IN THE SUPREME COURT OF FLORIDA

HENRY LEE SANDERS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. _____ 4th DCA No. 85-2149

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITIES

Florida Rule of Criminal Procedure

PRELIMINARY STATEMENT

Petitioner, HENRY L. SANDERS, was the defendant in the trial court and the appellee in the District Court of Appeal. He will be referred to herein as petitioner, defendant or Mr. Sanders.

References to the original record in the District Court of Appeal will be designated by use of the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Mr. Sanders was charged, along with two co-defendants with two counts of strong armed robbery (R-24-25).

On August 29, 1985, petitioner appeared before the trial court for calendar call and offered a proposed plea to the court (R-1-3). In proposing a unilateral plea bargain to the trial court, petitioner's counsel explained the circumstances of the offenses to the court (R-3) and asserted that the victims were unable to identify anyone but that several witnesses to the robberies gave descriptions (R-3). These descriptions ultimately led to a car being stopped which contained petitioner and two others (R-3). The other man (not the defendant/petitioner) was wearing a red shirt (R-3). Defense counsel told the court that the witnesses said one of the robbers was wearing a red shirt and one of the robbers was a female (R-3-4). The witnesses had observed the purse snatch robbery of two elderly women by these two individuals; one was a male with a red shirt and the other was the female. The petitioner was wearing khaki colored clothes and was driving the car (R-4).

Defense counsel informed the trial court that there were identification problems in the case because while the physical descriptions matched the co-defendant, one of the witnesses picked the petitioner's photo out of a photographic lineup (R-4). Also, the co-defendant was found with money in his pocket, which was exactly the amount and denominations the victim described as being stolen; Mr. Sanders had less than two dollars in his pocket

(R-4). Defense counsel then informed the court that the co-defendant had given inconsistent statements: first, he said he had not been to the mall that day; next, that he was at the mall but only as a passenger in the car and never left the car; and third, that he had been the driver of the car (R-5). Further, petitioner's counsel informed the judge that the co-defendant wrote a letter to the Public Defender's Office asserting that Mr. Sanders "didn't do anything" and that he, the co-defendant Bateman, had done it (R-5).

Petitioner's counsel then informed the trial judge that the co-defendant had been offered a plea bargain by the state to two years probation with adjudication withheld, which plea had already been entered (R-6). Mr. Sanders had not been offered the same plea; defense counsel assumed there was an identification of the defendant (R-6). Petitioner's counsel told the court that petitioner had no prior arrests nor record and requested the court to offer the same plea bargain, two years probation, adjudication withheld to Mr. Sanders (R-6).

Petitioner's counsel told the court that it was believed that Bateman had a prior record, although not a serious one, and that the co-defendant was supposed to cooperate with the state in this defendant's case (R-6-7). Petitioner's counsel questioned what the co-defendant might testify to in light of his many inconsistent statements, but asserted that Bateman had been placed on probation and had failed to report to the probation office. There was a warrant pending for Bateman's arrest, petitioner's counsel told the court (R-7).

In response to the court's inquiry, petitioner's counsel represented that the victims were unable to identify anyone, but other witnesses did give descriptions, all of which agreed that the man who was the robber wore a red shirt and was five feet, ten inches, which was taller than Mr. Sanders (R-7-8). That description fits the co-defendant; however, petitioner had been selected by one of the witnesses from a photographic lineup (R-8).

The Assistant State Attorney at this hearing told the court this was not his case but was the case of another Assistant State Attorney and therefore the state could not add nor rebut anything represented by defense counsel. (R-8).

Defense counsel informed the trial court that Mr. Sanders scored in the grid of community control/12 to 30 months incarceration on the guidelines and that the trial court had departed below the guidelines on the co-defendant (R-8). Defense counsel represented there were valid reasons to depart below the guidelines in this case, that Mr. Sanders had no prior criminal history, and that the purpose of the guidelines was to do away with disparity in sentence. Therefore, counsel argued, accepting the plea would make this defendant's treatment the same as the co-defendant's (R-8-9).

The trial court agreed to accept the plea as offered and requested a stipulation to a factual basis for the plea (R-9-10). Defense counsel stipulated to the facts as set out in the probable cause affidavit (R-9).

Defense counsel prepared a sentencing guidelines scoresheet for the court (R-10,46).

The trial court stated it accepted the plea as a guilty plea, withheld adjudication and placed the defendant on two years probation with a special reason that the defendant serve five months in the county jail, with credit for five months jail time already served (R-12,45). The trial court orally stated its reasons for departure below the sentencing guidelines (R-11). The trial court placed on the sentencing guidelines form these written reasons to justify departure:

> Defendant, age 32, has no prior arrest or record. Co-defendant Bateman was given same sentence as part of plea agreement with state. Court believes both defendants should be treated similarly in this case.

(R-46).

The state objected to the departure below the guidelines (R-13-14) and timely took an appeal.

On August 13, 1986, the district court entered its decision on the state's appeal, reversing. Although the district court was of the opinion that the lack of any prior criminal convictions and the lack of any prior arrests should be valid reasons for the trial judge to exercise its discretion to be merciful to a first offender who had never even been arrested, the court felt that it was bound to affirm due to the decisions in State v. Mischler, 488 So.2d 523 (Fla. 1986) and Williams v. State, 11 F.L.W. 289 (Fla. June 26, 1986). The district court then

reversed the sentence imposed and remanded for resentencing (A-4). However, the district court did certify the following as a question of great public importance:

> CAN THE TRIAL JUDGE DEPART DOWNWARD FROM THE GUIDELINES IF THE DEFENDANT HAS NO PRIOR CONVICTIONS OR ARRESTS AND IF THE JUDGE BELIEVES THE DEFENDANT SHOULD NOT RECEIVE A SENTENCE MORE SEVERE THAN A CO-PERPETRATOR OF THE SAME CRIME WHO HAS BEEN THE RECIPIENT OF A PLEA BARGAIN?

State v. Sanders, 11 F.L.W. 1783 (Fla. 4th DCA August 13, 1986).

Petitioner timely filed for rehearing and to stay the mandate on August 20, 1986 (A-5-7).

On October 8, 1986, the motion to stay mandate was granted and the rehearing motion denied (A-8).

SUMMARY OF ARGUMENT

The trial court's departure of seven months from the recommended guideline range was supported by clear and convincing reasons of Mr. Sander's age of 32, coupled with a lack of any prior convictions or arrests. This first written reason alone is sufficient to support the extent of the departure in this case and should have been affirmed by the district court.

The trial had the authority under the facts of this case to offer the defendant a plea bargain with sentence concessions when the state had already agreed to lenient plea for the co-defendant, who had a record. The trial court's sound exercise of its discretion to offer a plea bargain with sentencing concessions for good and valid reasons may be utilized as a clear and convincing reason for departure.

The district court erred in reversing only for resentencing. If the mitigated sentence may not be sustained on appeal, then the sole remedy is for the case to be reversed and remanded for the defendant to have the opportunity to withdraw his plea, since it was entered on the specific condition that Mr. Sanders receive two years probation with a special condition of five months incarceration.

ARGUMENT

POINT ON APPEAL

CAN THE TRIAL JUDGE DEPART DOWNWARD FROM THE GUIDELINES IF THE DEFENDANT HAS NO PRIOR CONVICTIONS OR ARRESTS AND IF THE JUDGE BELIEVES THE DEFENDANT SHOULD NOT RECEIVE A SENTENCE MORE SEVERE THAN A CO-PERPETRATOR OF THE SAME CRIME WHO HAS BEEN THE RECIPIENT OF A PLEA BARGAIN?

A

THE LACK OF ANY PRIOR ARREST OR CONVICTION RECORD FOR A PERSON AGE 32 IS A CLEAR AND CONVINCING REASON TO SUPPORT A MINOR DOWNWARD DEPARTURE.

The trial court's sentence represents a downward departure by only seven months incarceration from the recommended sentence. Petitioner's score under the guidelines fell into the range of community control or 12 to 30 months incarceration. The trial court imposed a sentence of two years probation with a special condition that the defendant serve five months in the county jail (R-45). The written reasons for departure appear at the bottom of the guideline scoresheet as follows:

> Defendant, age 32, has no prior arrest or record. Co-defendant Bateman was given same sentence as part of plea agreement with state. Court believes both defendants should be treated similarly in this case.

(R-46).

Recently in State v. Schoff, 490 So.2d 1040 (Fla. 2d DCA 1986), the court affirmed a downward departure to two-and-a-half years community control from the recommended range of two-and-a-half to three-and-a-half years imprisonment upon a finding that

one departure reason was clear, convincing and valid, a consideration of the defendant's "lack of a prior record." The Second District found this reason was not foreclosed by the opinions of this Court in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), and State v. Mischler, 488 So.2d 523 (Fla. 1986). In petitioner's case, the written reason for departure includes not only the fact that petitioner had no prior arrest record but also included his age of 32. The age of the defendant under these circumstances may be a valid reason for departure. Relevant cases have previously held the age of a defendant may be a basis for departure. See State v. Rice, 464 So.2d 684 (Fla. 5th DCA 1985), where the defendant's age of 56 coupled with no prior criminal record were found to be valid reasons to depart from the guidelines minimum recommended sentence of seven years for second degree murder to a sentence of five-and-a-half years imprisonment followed by one-and-a-half years probation. However, it should be noted that this case was based on the Fifth District's decision in Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984), rev. 475 So.2d 1218 (Fla. 1985). See also, State v. Bentley, 475 So.2d 255 (Fla. 5th DCA 1985), State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1986), and State v. Mihocik, 480 So.2d 711 (Fla. 5th DCA 1986).

In State v. Mihocik, the court found the youthful age of 18 to be a valid basis for departure for an unspecified crime but remanded for resentencing under Albritton v. State, 476 So.2d 158 (Fla. 1985), because the second reason, the defendant's prior criminal acts had resulted only in county court probation, had

already been scored. In that case, the court does not mention what was the recommended guideline range nor what was the extent of departure. In State v. Bentley, supra, the court recognized that age could be a basis for departure but found that the age of 22 was not young for a robber. In Bentley, the court said that "most robbers seem to range from 14 to 25 or 30." Accord Collins, where 23 was not considered to be a mitigating age for robbery. Under the authority of these cases, petitioner's age of 32, is a valid mitigating factor for departure for it reflects just how long Mr. Sanders has been a law abiding citizen and the age of 32 is within the range that the Fifth District would consider mitigating for a robber.

Middle-age as well as a youthful age may be considered a valid basis to grant a mitigation of sentence. In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court discussed how age could be considered a mitigating factor under the capital sentencing statute. The Court said that the age of a defendant in conjunction with the length of time that the defendant had obeyed the law could be considered a mitigating circumstance. The reasoning in State v. Dixon, demonstrates that the trial court's first reason for departure is sufficient because it is clear and convincing. Under the standard of Mischler v. State, supra, since the reason given by the trial court of the defendant's age coupled with a lack of prior convictions is clear and convincing, such reason is sufficient to support departure, State v. Mischler, supra, at 525.

Although a lack of prior convictions has already been factored into the defendant's guidelines score, the guidelines do not score how long the defendant has lived a law-abiding life nor does his score contemplate his complete lack of any prior arrest. Since the timing of the commission of new offenses, within a very short time after the defendant's release from incarceration, may be a valid basis for departure, Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984), then likewise the long period of time that a defendant has gone without any arrests or convictions may also be a valid basis for departure. See also, Rodrigue v. State, 481 So.2d 24 (Fla. 5th DCA 1985), where the court held a departure based on considerations of time was proper. There the trial court had departed further then one cell on the basis that the defendant had violated his probation within six hours of being placed on probation.

Since the court may validly depart for criminal convictions that are not scored, Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1984), the trial court should likewise be able to depart in mitigation for the reason of a complete absence of any prior arrests since neither prior arrests nor the lack thereof are scored. Although another arrest for which the defendant has not been convicted cannot be a basis for departure, Florida Rule Of Criminal Procedure 3.701(d)(11), Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), Weaver v. State, 475 So.2d 1365 (Fla. 2d DCA 1985), there is no similar prohibition that the absence of any prior arrests in the life of a 32 year old man may not be a basis for departure.

The combined mitigating effect of no record and the defendant's age of 32, which reflects the length of time he has gone without any prior arrests or convictions, is certainly a strong enough reason to justify the extent of the trial court's departure in this case, which is only seven months under the recommended amount of incarceration, particularly where the trial court also placed the defendant on probation for two years. Even without the consideration of the other written reason for departure, it is clear beyond a reasonable doubt that the trial court would have and could have validly departed to the extent he did upon consideration of defendant's age and complete lack of prior arrests or convictions. Accordingly, reversal by the district court was not required, even if the second reason is infirm. Albritton v. State, supra Cf. State v. Mihocik.

B

A TRIAL JUDGE MAY DEPART DOWNWARD AND OFFER A UNILATERAL PLEA BARGAIN OF EQUAL LENIENCY TO A DEFENDANT WITH NO PRIOR RECORD WHERE THE STATE HAS AGREED TO THE SAME DOWNWARD DEPARTURE FOR THE MORE CULPABLE CO-DEFENDANT, WHO HAS A RECORD.

The trial court's other reason for departure is not just that the co-defendant got the same sentence but that the co-defendant, who had a criminal record, was given a downward departure sentence of two years probation as part of a plea agreement with the state. The state's agreement to lenient treatment for the co-defendant with the criminal record, who was probably the man who actually snatched the purse while petitioner at best drove the get-a-way car (R-3-5,7-8), prompted the court to offer petitioner a unilateral plea bargain - a sentence of probation and five months incarceration in exchange for a guilty plea. The state and a defendant's agreement to a plea bargain is an unimpeachable reason to depart from the sentencing guidelines. Scott v. State, 465 So.2d 1359 (Fla. 5th DCA 1985), Bell v. State, 453 So.2d 478 (Fla. 2d DCA 1984). Yet, Florida Rule of Criminal Procedures 3.701 (b)(4) states that the severity of the sanction should increase with the length and nature of the offender's history. The state's plea agreement with the co-defendant has unfairly compromised the purpose of the guidelines, which purpose cannot be carried out in petitioner's case, unless the trial court departs in mitigation from the guidelines, since the state has already agreed to a departure for the defendant who had a prior criminal record.

The cases which disapprove a guidelines departure for the reason that the same sentence was received by a co-defendant, Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985), Thomas v. State, 461 So.2d 274 (Fla. 1st DCA 1985), and Brinson v. State, 483 So.2d 13 (Fla. 1st DCA 1985), do not relate to a trial court's agreement to a unilateral plea bargain that effects sentence where it is appropriate and fair for the court to offer the less culpable defendant with no criminal record a downward departure sentence because the state has already agreed to the same mitigated sentence for another co-defendant, who has a criminal record.

The trial court had the authority to offer a unilateral plea bargain effecting sentence to the defendant based on the factors of record which reasonably called for the court to offer such a plea to the defendant. In Florida trial judges have wide discretion in plea bargain practices that effect sentencing; the prosecutor's concurrence is unnecessary where no charge concession is involved. Barker v. State, 259 So.2d 200, 204 (Fla. 2d DCA 1974). Determination of the defendant's sentence has always been in the discretion of the trial court and it is not the purpose of the guidelines to supersede or usurp that judicial discretion. Jean v. State 455 So.2d 1083 (Fla. 2d DCA 1984), Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), affirmed 469 So.2d 128 (Fla. 1985). Plea bargains are still encouraged by Florida Rule of Criminal Procedure 3.171 and subsection (a) of that rule specifically states, "Ultimate responsibility for sentence determination rests with the trial judge." Accordingly,

those factors which prompt the court to offer sentencing concessions to the defendant if he pleads to the court may be utilized as clear and convincing reasons for departure. Here it is the state's agreement to the plea bargain with the co-defendant Bateman, as much as the fact that Bateman received this same sentence, which is the basis for departure. This reason for departure is clear and convincing because it reflects why the court exercised its inherent authority to allow the petitioner to plead straight up to the court in exchange for a specified sentence below the recommended guideline range.

C

IF THE DOWNWARD DEPARTURE SENTENCE MAY NOT STAND, THE PETITIONER MUST BE GIVEN AN OPPORTUNITY TO WITHDRAW HIS PLEA AND PLEAD ANEW.

In reversing petitioner's downward departure sentence, the district court ordered that petitioner be resentenced. In his motion for rehearing, petitioner pointed out that resentencing was an inappropriate remedy, that petitioner must be afforded an opportunity to plead anew if the trial court had no authority to offer the unilateral plea bargain with sentencing concessions. In other cases, where a district court finds that it may not affirm a downward departure sentence agreed to by the trial court as part of a unilateral plea bargain, the defendant is given an opportunity to withdraw his plea if he so chooses on remand. State v. Walden, 476 So.2d 771 (Fla. 3d DCA 1985), State v. Davis, 464 So.2d 195 (Fla. 3d DCA 1985). Where the trial court's promise of leniency is the only inducement the defendant has in pleading guilty, the defendant is entitled to withdraw his plea of guilty if the plea bargain is not carried out. Davis v. State, 303 So.2d 27 (Fla. 1975). If the trial court has no authority to fulfill his end of the plea bargaining contract by imposing a sentence of two years probation with a special condition of five months imprisonment, then the case must be returned to the position it was in prior to the plea negotiations, thereby imposing no unfair advantage on the defendant. Davis v. State, supra. See also, Enos v. State, 272 So.2d 847 (Fla. 4th DCA 1973).

Accordingly, even if the certified question is to be answered in the negative, then the wrong remedy which was ordered by the district court must be reversed and petitioner must be given an opportunity to withdraw his plea before the trial court proceeds to resentencing.

CONCLUSION

Wherefore, based on the foregoing, petitioner respectfully requests this Court to answer the certified question in the affirmative, to quash the decision of the District Court of Appeal or to order that petitioner be given an opportunity to withdraw his plea if the trial court had no authority to impose the agreed upon sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARAH B. MAYER, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 17th day of November, 1986.

Margaret Good

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