IN THE SUPREME COURT OF FLORIDA

HENRY LEE SANDERS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 69,626

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, HENRY LEE SANDERS, was the defendant in the trial court and the appellee in the District Court of Appeal. He will be referred to herein as defendant. Respondent, the STATE OF FLORIDA, was the prosecution in the trial court and the appellant in the District Court of Appeal.

References to the original record in the District Court of Appeal will be designated by the use of the symbol "R" for the record and "T" for transcript. All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Defendant was charged, along with two co-defendants, by information with two counts of strong-armed robbery (R. 24-25. That information was subsequently amended to include a count charging a co-defendant with being an accessory after the fact (R. 38-39).

On August 29, 1985, the defendant appeared before the trial court for calendar call and offered a proposed plea to the court (R. 1-3). In the proceeding, which ultimately became a plea hearing, Defendant's counsel represented to the court that the case involved the purse-snatch robbery of two older women, one in her sixties and one in her eighties, at Delray Mall; both women were knocked to the ground in the course of the robberies by two assailants (R. 3). Counsel asserted the victims were unable to identify anyone, but several witnesses to the robberies gave descriptions (R. 3). These descriptions ultimately led to a car being stopped which contained the defendant and two others (R. 3). The other man (not the defendant) 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 defendant was wearing khaki-colored clothes and was driving the car (R. 4).

Defense counsel asserted that there were identification problems in the case because while the physical descrip-

tions matched the co-defendant, one of the witnesses picked the defendant's photo out of a photo line-up (R. 4). Additionally the co-defendant was found to have money in his pocket which was exactly the amount and denominations the victim described as being stolen; the defendant had less than two dollars in his pocket (R. 4). Defense counsel asserted the co-defendant gave inconsistent statements: first, that he had not been to the mall that day; second, that he was at the car; and third, that he was the driver of the car (R. 5). Further, the co-defendant wrote a letter to the Public Defender's office asserting that the defendant "didn't do anything" and that he, (the co-defendant), had done it (R. 5).

Defense counsel told the court that the co-defendant was offered a plea to two years probation and adjudication withheld, which plea the co-defendant entered before the trial court (R. 6). Defense counsel asserted the defendant had not been offered the same plea; defense counsel assumed there was an identification of the defendant (R. 6). Counsel represented to the court that the defendant had no prior record or arrests and requested the court offer the same plea, two years probation, adjudication withheld, to the defendant (R. 6).

Defense counsel told the court that he believed the co-defendant 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). Counsel questioned what the co-defendant would testify to in light of his many inconsistent statement, but asserted he had been placed on probation and failed to report to the probation office, thus there was a warrant pending for his arrest (R. 7).

In response to the court's inquiry defense counsel stated the victims were unable to identify anyone, but other witnesses did give descriptions, all agreeing the may wore a red shirt and was 5 foot 10, which was taller than defendant (R. 7-8). She stated the description did fit the co-defendant, however the defendant had been selected by one of the witnesses from a photo line-up (R. 8).

The Assistant State Attorney at the hearing told the court that this was not his case, but was the case of another Assistant State Attorney, thus he could not add to or rebut anything the defense counsel had stated because he knew nothing about the case; he further requested the court to delay its decision until the following week when the Assistant State Attorney assigned to the case would be back (R. 8).

Defense counsel stated that the defendant came out to 12 to 30 months on the guidelines, and that the court had departed below the guidelines on the co-defendant (R. 8). She stated there were reasons to depart below the guidelines on this case because the defendant had no prior criminal history and, as the purpose of the guidelines

was to do away with disparity in sentencing, accepting this plea would make the defendant's treatment the same as the co-defendant's (R. 8-9).

The trial court agreed to accept the plea at that time, and requested a stipulation to the factual basis for the plea (R. 9). Defense counsel responded that she would stipulate to the facts that she had previously set out or would stipulate to the probable cause affidavit; since the money was all recovered, she did not believe any restitution issue was involved (R. 9).

Defense counsel told the court that she would have to prepare a guidelines scoresheet and that the defendant scored sixty points which placed him in the twelve to thirty month category. (R. 10).

The trial court inquired whether the plea would be nolo contendere; defense counsel replied affirmatively, and the prosecutor stated that if the court was going to enter the plea over his objection, he would ask for a guilty plea (R. 10).

The trial court stated it would treat the plea as a guilty plea, withhold adjudication and place the defendant on two years probation. (R. 10).

The court stated its reason for the departure below the guidelines was because the court gave the co-defendant the same sentence; he agreed with defense counsel that the defendant's age, thirty-two, coupled with his lack of prior

criminal history, was also a reason for departure (R. 11).

The clerk noted there were other conditions on the co-defendant's probation, i.e., five months in county jail and no contact with the victims (R. 11). Defense counsel asserted the defendant served more time than his co-defendant (R. 11). The defendant stated he was arrested on December 15th and not bonded out until May 4 (R. 12). As the defendant had already served five months, and the court wanted to make his sentence the same as the co-defendant's, the court agreed that the time had already been served (R. 12).

The court warned the defendant that if he violated probation, the court would send him to prison; the defendant stated he understood (R. 13).

Defense counsel, on behalf of the defendant, withdrew his not guilty pleas to Counts One and Two, and entered a no contest plea (R. 13). The court found the plea was made freely and voluntarily accepted the plea and sentenced the defendant as was discussed (R. 13).

The state objected to the departure below the guidelines (R. 13-14).

The trial court entered an order withholding adjudication on the defendant's guilty plea to the two counts of robbery (R. 45), and wrote its reasons for departure below the guidelines on the scoresheet (R. 46).

The state timely filed its notice of appeal and this appeal follows (R. 47).

SUMMARY OF THE ARGUMENT

A.

The lack of any prior arrests or convictions record for a person age 32 is not a clear and convincing reason for a downward guidelines departure. The guidelines have already factored in prior criminal records or lack thereof Fla.R.Crim.P. 3.701 b.4; 3.701 d.15; 3.701 d.5.b). Defendant's age of 32 without convictions constitutes the same invalid argument. Further age is solely properly considered if defendant is too young as to be too mentally and/or emotionally immature to understand the nature and consequences of his acts, or too old.

As to the possible use of lack of prior arrests for a downward departure, Rule 2.701 d.11 covers the occasion where there are to be any guideline departures. It provides that "Reasons for deviating shall not include factors relating to prior arrests without convictions."

B.

A trial judge may not depart downward and offer a plea bargain on the sole ground that the state has agreed to the same downward departure for a co-defendant. The fact that a co-defendant has received a negotiated plea is "totally irrelevant". There exists a different set of circumstances with every defendant. In the instant

case co-defendant received the benefit of a negotiated plea and reduced sentence as there was a dearth of evidence proving co-defendant's guilt and co-defendant was to cooperate with the state in defendant's case. To the contrary, with defendant there was concrete evidence - a picture I.D. and no need for cooperation.

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 CONVICTED OF THE SAME CRIME WHO HAS BEEN THE RECIPIENT OF A PLEA BARGAIN?

ARGUMENT

A.

THE LACK OF ANY PRIOR ARREST OR CONVICTION RECORD FOR A PERSON AGE 32 IS NOT A CLEAR AND CONVINCING REASON TO DEPART DOWNWARD.

The goal behind the establishment of the guideline was uniformity, Fla.R.Crim.P. 3.701 b. As such the guidelines have already factored in prior criminal record or lack thereof, Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985). The guidelines provide that:

> b.4. The severity of the sanction should increase with the length and nature of the offenders criminal history.

Clearly it was intended that if defendant had no criminal history he would receive the minimum sanction provided by the guidelines.[1] Whereas if defendant had prior convictions they would be factored into the scoresheet to increase defendant's guideline score and concomitantly defendant's sentence, Hendrix at 1220.

Further for robbery, burglary and theft, forgery and fraud convictions for which it was believed, when the guidelines were written, that a more severe sentence was required for repeat offenders, prior convictions for similar

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[1] Assuming no other aggravating factors exist.

offenses are additionally factored into the guideline sentence Rule 3.701 d.15. Clearly all permutations as to a prior offense or lack thereof have already been written into the guidelines.

The fact that conviction free defendant's are already incorporated into the guidelines is additionally supported by the fact that they provide that an adult defendant's prior record shall not be scored if defendant has maintained a conviction free record for a period of ten consecutive years immediately preceeding the primary offense, Rule d.5.b). From this it is apparent that the guidelines directly address the issue. If a defendant has remained conviction free for 10 years he is considered to have no prior criminal record. In this event no downward departure is authorized. The sole benefit which inures to defendant is that the guidelines then apply without enhancement.

Clearly as the Rule itself is very specific as to the inclusion of prior offenses or lack thereof there is a

> lack of logic in considering a factor to be an aggravation (in this case a mitigation) allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity.
>
> Hendrix at 1220.

Downward departure from the guidelines on the basis of a lack of criminal record has routinely been held

to constitute an invalid reason for departure, State v. Mihocik, 480 So.2d 711 (Fla. 5th DCA 1986); State v. Holcomb, 481 So.2d 1263 (Fla. 3d DCA 1986); State v. Taylor, 482 So.2d 578 (Fla. 5th DCA 1986); State v. Caride, 473 So.2d 1362 (Fla. 3d DCA 1985); see also State v. Mischler, 488 So.2d 523 (Fla. 1986); Hendrix, supra.

As to the possibility of the lack of prior arrests being utilized to depart from the guidelines, the guidelines specifically reject this. Fla.R.Crim.P. 3.701 d.11 covers the occasion when there are to be any "Departures from the guideline sentence". Said rule does not speak in terms of upward departures alone but speaks in terms of any departure and consequently includes downward departures as well. This Rule provides that "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without convictions".

The second reason for departure, that at the defendant's age of 32 he had no prior convictions is, in reality, the same argument that has been made. The fact that defendant is 32 without any prior convictions is not different a reason than defendant being without prior convictions at all. Neither reason is a valid reason for departure based upon the reasons and citations of authority already cited herein. And, as they constitute the same reason both certainly cannot be valid reasons for departure.

Defendant cites to State v. Bentley, 475 So.2d 255 (Fla. 5th DCA 1985); State v. Rice, 464 So.2d 684 (Fla. 5th DCA 1985); State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1986) in support of his contention.[2] However Rice, supra and Bentley, supra, were decided pre-Hendrix, supra, at 475 So.2d 1218 (Fla. 1985), and consequently are of little or no value. Collins, supra, was decided subsequent to Hendrix, however the reasoning in said case was faulty.[3] The Collins court, based on its previous reasoning in Bentley, supra, conducted an analysis of the average age of a robber, the crime charged therein. It then found that "Most robbers seem to range from fourteen to twenty-five or thirty" and that defendant fell within the average age range so that downward departure was not warranted. Clearly this is not what is intended when the age of defendant is to be considered as a mitigating factor. If this were the case there would be the need to arrive at a median age for every crime to enable each court to determine if defendant's age would be a ground for downward departure in all crimes--in every case.

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[2] It must be noted that all these cases arose out of the same district.

[3] Further, on rehearing, after Hendrix, was rendered, the court altered its opinion and held that departure was warranted however cited the reason as being that the state agreed to the downward departure.

To the contrary, the sole circumstances under which age becomes relevant is when defendant is so young as to be emotionally and/or mentally immature and unable to understand the consequences of his actions, see Eutzy v. State, 458 So.2d 755 (Fla. 1984), or at an advanced age, see Agan v. State, 445 So.2d 326 (Fla. 1983). This is what was argued in Mihocik, supra, where defendant was "only eighteen years old", and the court found the age of defendant to be a clear and convincing reason for departure.[4]

Clearly the Fourth District Court of Appeal was correct in finding an improper downward departure from the guidelines.

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[4] The court, however vacated defendant's sentence as improper reasons were also utilized.

B.

A TRIAL JUDGE MAY NOT DEPART DOWNWARD AND OFFER A PLEA BARGAIN TO A DEFENDANT ON THE SOLE GROUND THAT THE STATE HAS AGREED TO THE SAME DOWNWARD DEPARTURE FOR A CO-DEFENDANT.

First, defendant argues that the trial court's 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..." (Brief, p.13). However, this is not true. The trial courts order of departure stated, in entirety:

> Defendant, age 32, has no prior arrests or record. Co-defendant Bateman was given the same sentence as part of a plea agreement with state. Court believes both defendants should be treated similarly in this case.
>
> (R. 46)

Clearly, the court did not base departure in the instance case on co-defendant's alleged criminal record as only written reasons for departure may be considered,[5] State v. Jackson, 478 So.2d 1054 (Fla. 1985).

The fact that a co-defendant received a negotiated plea has been held to be "totally irrelevant to a deter-

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[5] Defense counsel's allegation as to co-defendant's prior criminal record was that it did not consist of anything serious (T. 6-7). Both co-defendant and defendant, in fact, received the same guidelines score (T. 8).

mination of whether the court should depart from the guidelines", Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985); Brinson v. State, 483 So.2d 13, 16 n.3 (Fla. 1st DCA 1985); Thomas v. State, 461 So.2d 274 (Fla. 1st DCA 1985). Clearly a prosecutor or the court is free to negotiate a plea, for whatever reasons, with a co-defendant without the plea applying similarly the defendant. With every defendant there exists a different set of circumstances to consider in determining whether a plea and concommitent reduced sentenced is appropriate including but not limited to, amount of state evidence proving guilt, active or passive involvement in the crime, prior criminal record, etc. In the case at bar co-defendant was offered a plea by the State while defendant was not, as explained by defense counsel, since there was more evidence proving defendant's guilt--"they have a picture I.D." (T. 6). The fact that the State had little evidence against co-defendant and therefore offered him a plea certainly should not inure to the benefit of defendant for whom there was more evidence implicating his involvement in the crime. Further, defense counsel indicated that co-defendant was to testify on behalf of the state in defendant's trial (T. 6-7). This would constitute a second, independent reason for co-defendant to receive a reduced sentence.

Clearly the instant case is a perfect example of why a negotiated plea must not be utilized as a reason

for departure. Equally situated co-defendant's where the exact set of circumstances exist for all, will always be eligible to receive the same sentence. This will, however, occur without departure being based on a co-defendant's plea, but instead upon similarly applicable valid reasons for departure.

Lastly the fact that the court can not utilize the sentence of a co-defendant as a ground for departure may inure to defendant's benefit. In Thomas v. Sate, 461 So.2d 274 (Fla. 5th DCA 1985), the trial court departed upwards based upon the fact that it had departed upwards for a co-defendant. The court recognized the well known axiom of law that equally culpable defendant's should receive equal sentences[6] however the District Court found the argument inapplicable to sentences calculated under the guidelines. It was reasoned that as the guidelines take into account the nature of the defendant's criminal history similar sentences are not always warranted.[7] See also Scott v. State, 469 So.2d 865 (Fla. 1st DCA 1985) where the fact that defendant had an accomplice who acted in an unpalatable manner and pled guilty was found not to be a legitimate reason for departure.

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[6] Demps v. State, 395 So.2d 501 (Fla. 1981); Slater v. State, 316 So.2d 539 (Fla. 1975).

[7] The guidelines also factor in numerous other criteria, which make a co-defendant's sentence inapplicable, i.e., legal status at the time of the offense, additional offenses at conviction. Further many reasons for departure might apply to a co-defendant and not apply to defendant, i.e., possession of a firearm, on a crime wave or defendant was the mastermind of the crime, see Benitez v. State, 470 So.2d 734 (Fla. 2d DCA 1985); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984) approved 476 So.2d 163 (Fla. 1985); Gitman v. State, 482 So.2d 367, 372 (Fla. 4th DCA 1985).

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the district courts decision be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished this 5th day of December, 1986 to: MARGARET GOOD, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401.

Diane Leeds

Of Counsel