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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,]
Petitioner,]
v.]
HOWARD MARK SACHS,]
Respondent.]

CASE NO. 70,670

FILED
SID J. WHITE

NOV 9 1987

CLERK, SUPREME COURT

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DISCRETIONARY REVIEW OF THE DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

HOWARD MARK SACHS will be referred to as the "respondent" in this brief. The STATE OF FLORIDA will be referred to as the "petitioner". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE CASE AND FACTS

On April 13, 1985, Respondent, while operating a motor vehicle, collided with another motor vehicle on the Courtney Campbell Causeway in Pinellas County, Florida. The evidence indicated that the passenger in the second car either died immediately, or was killed shortly thereafter. A few minutes later, a pedestrian went to the second car and attempted to render aid and assistance to the occupants therein. Meanwhile, a third car, while trying to negotiate the accident scene, collided with the second car -- instantly killing the pedestrian.

A subsequent test of Respondent's sobriety resulted in a .173 and a .160 on the breathalyzer machine. Respondent was then charged by information with two (2) counts of DUI/Manslaughter, and with two (2) counts of Manslaughter/Culpable Negligence, as against §§316.1931(2) and 782.07, Fla. Stat. (1985). (R. 3-4)

On March 10, 1986, Respondent pled nolo to the two counts of DUI/Manslaughter. (R. 13) On May 27, 1986, the Honorable Owen S. Albritton adjudicated Respondent guilty of the aforementioned charges, and sentenced him to four (4) years of community control. (R. 18)

Petitioner thereafter took an appeal to the Second District Court of Appeal contending that the trial court

erred in departing downwards from the recommended range of the sentencing guidelines. On May 15, 1987, the Second District affirmed Respondent's sentence in State v. Sachs, 507 So.2d 708 (Fla. 2d DCA 1987).

Following the Second District's affirmance, this appeal ensues.

SUMMARY OF THE ARGUMENT

Petitioner contends that since Respondent's lack of prior criminal record has already been factored in the scoresheet, then it was error for the Second District to affirm the instant downward departure based upon this invalid reason.

ARGUMENT

ISSUE

WHETHER A DEFENDANT'S LACK OF PRIOR
CRIMINAL RECORD IS A VALID REASON TO
JUSTIFY A DOWNWARD DEPARTURE FROM THE
RECOMMENDED RANGE OF THE SENTENCING
GUIDELINES?

Respondent plead nolo to and was adjudicated guilty on two (2) counts of DUI/Manslaughter. His score under category I for the primary offense at conviction and victim injury totaled 135. (R. 16) This total gave Respondent a presumptive range of three to seven years of incarceration. (R. 17) Respondent, however, was sentenced to four (4) years in community control. (R. 18)

The trial court based its departure sentence on four written reasons. (R. 20-22)

On appeal, the Second District found three of the reasons invalid, but affirmed Respondent's sentence on his lack of prior criminal record. 507 So.2d at 709. In so holding, the Second District recognized that its decision was in conflict with decisions of the Third, Fourth, and Fifth District Courts of Appeal. See State v. Holcomb, 481 So.2d 1263 (Fla. 3d DCA 1986); State v. Sanders, 11 F.L.W.1783 (Fla. 4th DCA 1986); State v. Taylor, 482 So.2d 578 (Fla. 5th DCA 1986).

Petitioner contends that this conflict has been resolved in the case of Sanders v. State, 510 So.2d 296 (Fla. 1987), wherein this Court stated:

[1] We agree with the district court that the lack of prior convictions cannot be a basis for a downward departure. The sentencing guidelines are designed to reflect prior convictions by adding additional points and thereby increasing the length of the recommended sentence. A sentence which is recommended for a defendant without prior convictions is just that; it presupposes that he has never before been convicted of a crime. Hence, the absence of prior convictions cannot be a basis for departing under the recommended sentence.

510 So.2d at 297.

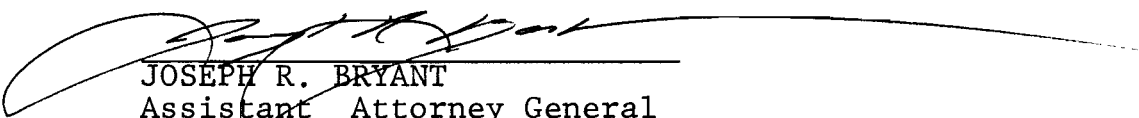
Since this Court has found that lack of prior record is an invalid reason, and since the Second District has already found invalid the trial court's other three reasons for departure, then this cause must be remanded to the trial court for resentencing within the guidelines.

CONCLUSION

Based on the above stated facts, argument and authorities, petitioner would ask that this Honorable Court reverse the order of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to H. MICHAEL EVANS, ESQUIRE, Mosely & Evans, P.A., 2123 N.E. Coachman Road, Suite B, Clearwater, Florida 33575, on this the 6th day of November, 1987.



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