

1-13

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 70,670

STATE OF FLORIDA,

Petitioner,

vs.

HOWARD MARK SACHS,

Respondent.

DEC 30 1987
Deputy Clerk

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

BRIEF OF RESPONDENT ON THE MERITS

BRUCE ROGOW
2097 S.W. 27th Terrace
Ft. Lauderdale, FL 33312
(305) 524-2465

and

LLOYD C. MOSLEY
MOSLEY AND EVANS, P.A.
Suite B
2123 N.E. Coachman Road
Clearwater, FL 33575
(813) 446-4059

Counsel for Respondent

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii,iii
STATEMENT OF THE CASE AND FACTS	1
A. <u>The Facts</u>	1
B. <u>The Charge And The Plea</u>	2
C. <u>The Sentence</u>	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
I.	
WHERE SEVERAL CLEAR AND CONVINCING REASONS SUPPORT THE TRIAL COURT'S DOWNWARD DEPARTURE FROM SENTENCING GUIDELINES, THE TRIAL COURT'S USE OF A SINGLE IMPROPER REASON DOES NOT REQUIRE REVERSAL OF THE TRIAL COURT'S DECISION.	
.	5
A. <u>This Case Requires Consideration Of All The Trial Court's Reasons For Departure</u>	5
B. <u>Several Clear And Convincing Reasons Supported The Trial Court's Decision To Depart From The Sentencing Guidelines</u>	6
1. <u>The Trial Court's Belief In The Defendant</u>	8
2. <u>The Trial Court's Consideration Of The Factual Circumstances Of The Case</u>	12
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX	17-26

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Albritton v. State</u> 476 So.2d 158 (Fla.1985)	7,15
<u>Armenia v. State</u> 497 So.2d 638 (Fla.1986)	13
<u>Baker v. State</u> 377 So.2d 17 (Fla.1979)	12,13,14
<u>Canakaris v. Canakaris</u> 382 So.2d 1197 (Fla.1980)	15
<u>Castlewood International Corp. v. LaFleur</u> 322 So.2d 520 (Fla.1976)	11
<u>Choctawatchee Electric Cooperative, Inc. v. Green</u> 132 So.2d 556 (Fla.1961)	6
<u>Escarra v. Winn Dixie Stores, Inc.</u> 131 So.2d 483 (Fla.1961)	6
<u>Fuller v. State</u> 488 So.2d 863 (Fla.1987)	9
<u>Knowlton v. State</u> 466 So.2d 278 (Fla. 4th DCA 1985)	7
<u>Sanders v. State</u> 510 So.2d 296 (Fla.1987)	5
<u>State v. Mischler</u> 488 So.2d 523 (Fla.1986)	8, 9,14
<u>State v. Rousseau</u> 509 So.2d 281 (Fla.1987)	15
<u>State v. Sachs</u> 507 So.2d 708 (Fla. 2d DCA 1987)	3, 5, 6
<u>Whitehead v. State</u> 498 So.2d 863 (Fla.1987)	9

OTHER

	<u>PAGE</u>
§316.1931(2), Fla.Stat. (1985)	2,12
§782.07, Fla. Stat. (1985)	2
Article V, §3(b)(3), Fla.Const.	3
Rule 3.701, Florida Rules of Civil Procedure	14

STATEMENT OF
THE CASE AND FACTS

The facts of this case are undisputed. They were sworn to by the Defendant, Howard Sachs, in his Rule 3.190(c)(4) Motion to Dismiss. (R 10-12). The Motion was not traversed, nor were the factual matters specifically denied. Therefore, under Rule 3.190(d), Florida Rules of Criminal Procedure, they are deemed admitted.

A. The Facts

On April 13, 1985, Howard Sachs, while operating a motor vehicle, collided with another vehicle on the Courtney Campbell Causeway in Pinellas County, Florida. (R 1,10). Mr. Sachs was heading west and the driver of the second automobile was heading east. The two cars collided approximately corner to corner. (R 10).

Immediately after the accident, the driver of the second auto, Willie Williams, exited his vehicle. As he did so, he heard his passenger, Kenneth Hill, mumbling and groaning. (R 10).

A few minutes later, Todd Rosenbaum, a pedestrian, came upon the scene and attempted to extricate Mr. Hill. During this time several automobiles were able to negotiate safely around the accident scene. (R 10). After a few more minutes passed, a third vehicle driven by Douglas Swan plowed into the passenger side of Williams' vehicle. (R 10-11).

As a result of this second collision, Rosenbaum was

killed. (R-10). Rosenbaum died instantly after the impact and Hill was dead when the paramedics arrived minutes later. (R 10). The medical examiner was unable to determine whether Hill expired as a result of injuries sustained in the original collision or whether his death like Rosenbaum's, occurred from the collision between the Swan vehicle and the Williams vehicle. (R 11).

The drivers of the three automobiles had blood samples taken from them at the scene. (R 10-11). Each showed the presence of alcohol in varying degrees. (R 10,11,21). Mr. Sachs, whose blood alcohol level was the highest, was the only driver charged with any offense. (R-21).

B. The Charge and the Plea

Mr. Sachs was charged by information with two counts of DUI/Manslaughter in violation of §§316.1931(2) and 782.07 Fla.Stat. (1985). (R 3). He entered a plea of nolo contendere to both counts and was adjudicated guilty by the trial court on May 27, 1986. (R 18; Appendix p.2).

C. The Sentence

The trial judge departed downward from the recommended sentencing guidelines of 3-7 years. He sentenced Mr. Sachs to two years of community control on each count, to run consecutively, for a total of four years. (R 18; App 2,3). The court emphasized that community control is equivalent to being under house arrest and except for business activities

the defendant's freedom would be very restricted. (R 58).

Other special conditions were imposed as part of the sentence. Mr. Sachs must give five hundred hours of service to the community; must make himself available to the Mothers Against Drunk Driving (MADD) to assist them in furthering public awareness of the consequences of operating a vehicle while under the influence of alcohol (R 59); must pay \$2,000 to the Crimes Compensation Fund and pay for any medical or funeral expenses of the victims which are currently unpaid; and is required to refrain from consuming any alcoholic beverages during his four-year sentence (R 59,61,63).

The written reasons the trial judge gave for his departure from the sentencing guidelines were that Sachs had an exemplary prior record; that Sachs had and would continue to suffer a great deal of remorse and shame for his involvement in the accidents that occurred; that Sachs' use of alcohol was an isolated and not a customary event; that Sachs posed no threat or danger to society; and that the facts of the case cast a doubt on Sachs' actual responsibility for the death of the two victims (R 21; App 5,6,7).

The State appealed the sentence to the Second District Court of Appeal, contending the trial court erred in its downward departure from the recommended guidelines. On May 15, 1987, the Second District affirmed Sachs' sentence in State v. Sachs, 507 So.2d 708 (Fla. 2d DCA 1987). (App 8,9).

Following the Second District's affirmance, the State sought review in this Court. Pursuant to Article V, §3(b)(3), Fla. Const., this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal was wrong when it held that a sentencing court could depart downward from the Sentencing Guidelines because a defendant had no prior record. However, the Court was correct in affirming the trial court's downward departure because other valid reasons existed to justify the downward departure.

Where a District Court of Appeal's decision is right, albeit for the wrong reasons, and the record supports the affirmed trial judge's actions, the District Court of Appeal's affirmance of the trial court must be sustained.

ARGUMENT

I.

WHERE SEVERAL CLEAR AND
CONVINCING REASONS SUPPORT
THE TRIAL COURT'S DOWNWARD
DEPARTURE FROM SENTENCING
GUIDELINES, THE TRIAL COURT'S
USE OF A SINGLE IMPROPER
REASON DOES NOT REQUIRE
REVERSAL OF THE TRIAL COURT'S
DECISION.

A. This Case Requires Consideration
Of All The Trial Court's Reasons
For Departure

One reason for the trial court's downward departure was the defendant's lack of any prior criminal record. The Second District Court of Appeal approved that reason as a valid basis for departing from the sentencing guidelines. State v. Sachs, 507 So.2d 708 (Fla. 2nd DCA 1987). That court did not have the benefit of this Court's decision in Sanders v. State, 510 So.2d 296,297 (Fla. 1987) holding that "the lack of prior convictions cannot be a basis for a downward departure." Therefore the State correctly submits that the District Court of Appeal erred in affirming a trial judge who utilized the lack of a prior record to downward depart.

However, this case does not end there. If the District Court of Appeal's affirmance was right for the wrong reasons, the trial court's decision must still be upheld.

It is the settled practice of
this court to affirm a decree
of the lower court even
though it is based on an

erroneous ground if the result is justified on any other ground appearing in the record.

Escarra v. Winn Dixie Stores, Inc., 131 So.2d 483,485 (Fla. 1961).

The Second District Court of Appeal believed the no prior record reason was the only valid reason advanced by the trial court. Despite its view that the other reasons were invalid, the District Court of Appeal was "convinced, however, that the trial court would have imposed the same penalty absent consideration of the invalid reasons." State v. Sachs, 507 F.2d at 709.

As we demonstrate below, the trial court properly utilized other reasons which justified its sentencing conclusion. Therefore the District Court of Appeal's result was correct, even if based upon an erroneous ground.

[It is] the well settled rule that the judgment of an inferior tribunal will not be reversed on appeal because of erroneous reasons applied in reaching a correct decision.

Choctawatchee Electric Cooperative, Inc. v. Green, 132 So.2d 556,559 (Fla.1961).

B. Several Clear And Convincing Reasons Supported The Trial Court's Decision To Depart From The Sentencing Guidelines

In addition to the defendant's lack of any prior offenses, the trial court gave many other reasons in support of its downward departure. (R 20-21; App 5,6,7).

Capsulized, they were: (1) that Mr. Sachs had and would continue to suffer remorse and shame for the rest of his life because of his involvement in the accidents that occurred; (2) that he was not a threat or danger to society; (3) that Sachs' use of alcohol was an isolated and not a customary event; and (4) that the facts of the case cast a doubt on Sachs' actual responsibility for the deaths of the two victims. Id.

There is no question that a trial judge may consider various factors in making his or her sentencing decision.

[T]he guidelines specifically state that they are "not intended to usurp judicial discretion...." If the trial judge could not deviate from a specified list of factors, discretion would be virtually eliminated.

Knowlton v. State,
466 So.2d 278,281
(Fla. 4th DCA 1985).

This Court has said:

Sentencing is still an individualized process. For that reason, the guidelines themselves provide for sentences which depart from the norm. To place a cap on the degree of departure from the guidelines sentence would severely restrict the trial judge's discretion to impose sentences, within statutory limits, based on the particular factors present in an individual sentencing. In our view, and we so hold, the proper standard of review is whether the judge abused his judicial discretion.

Albritton v. State,
476 So.2d 158,160
(Fla. 1985).

The trial judge's reasons for departure, and the facts supporting them show that he did not abuse his discretion in this case. The reasons fall into two conceptual categories--a belief in Mr. Sachs and consideration of the specific factual circumstances of the case. We treat them seriatim.

1. The Trial Court's Belief In The Defendant

Remorse, shame, guilt, non-dangerousness, and isolated nature of the proscribed conduct are all factors which may be considered by a sentencing judge. They are not reasons "prohibited by the guidelines," nor are they "[f]actors already taken into account in calculating the guidelines score," nor are they "component[s] of the crime in question." State v. Mischler, 488 So.2d 523,525 (Fla. 1986). If the reasons given by a trial court do not fall into the three categories mentioned by Mischler, they can be utilized:

Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge.

Rule 3.701, Florida Rules of Criminal Procedure, Committee Note.

Mischler held, inter alia, that the trial court "abused its discretion in finding that lack of remorse is a clear and convincing reason to [upward] depart from the guidelines because the facts do not support a finding of

lack of remorse." 488 So.2d at 526 (emphasis supplied). In Mischler the aggravating "lack of remorse" was the defendant's denial of guilt. The clear implication of Mischler is that a factually demonstrable lack of remorse may permit departure. Therefore, the necessary corollary is that the clear and convincing factually demonstrable presence of remorse, shame and guilt should allow a judge to depart downward.

The same rationale supports the trial court's consideration of Mr. Sachs' usual abstinence from alcohol and his belief that the defendant was not a danger or threat to society. This Court has held that evidence "which establishes beyond a reasonable doubt that the defendant poses a danger to society in the future can clearly be considered justification for a departure from the recommended sentence." Whitehead v. State, 498 So.2d 863,865 (Fla. 1987). See also, Fuller v. State, 488 So.2d 594 (Fla. 2nd DCA 1986). Here the trial court found clear and convincing evidence that the defendant's background and the isolated nature of his misconduct (R 20) left no doubt he posed no danger to society (R 21). Nothing precluded his favorable consideration of that evidence.

This record contains the trial court's careful and cautious consideration of the facts relevant to discharging his sentencing responsibility:

THE COURT: Now as I have indicated before and I will again that I have given a

great deal of time to both sides in this matter knowing how important it is to the people involved.

(R 49-50)

* * *

I had a three day holiday and I want you to know that while I had a holiday my thoughts and my concerns were kind of impaired me [sic] of fully enjoying Memorial Day Holiday knowing that I would have this matter to consider this morning. I'm speaking when I took the oath to be a Circuit Judge I certainly said I would follow the law and I intend to do that.

(R 50-51)

* * *

Now, I'm taking more time in this explanation of what I'm doing than usual because I want everybody, not that you have to agree with me because I know whatever I do is not going to make everybody happy, but I want you to understand the thoughts and thinking that I'm going through and what is a just and fair sentence in this case.

On the other hand, if one of my children had been in the Defendant's posture this morning with the background that this young man has with the letters that I have seen attached to this PSI from people of all walks of life, from people that have known him from the time he was a small child all attesting to his fine character and the fact that he's gone out of his way to help people, letters from Congressmen on down in this case, it makes it very difficult. I am certainly appalled at the tragic deaths we have on the highways because of drinking,

driving while under the influence of alcohol.

Every case is unique. This case is unique in only this instance and my observations now I am gleaning from a pretty complete comprehensive presentence investigation that was made.
(R 52-53)

Based upon all that he knew about the defendant, Judge Albritton rendered his sentence of 4 years of Community Control. It was not a light sentence: "...community control being house arrest, except for business activities you are very restricted...." (R 58)^{1/}. The trial court's sentencing conclusions must be viewed with respect.

[T]he trial judge is given the discretionary power because he is on the scene and can actually see, hear, and observe all the participants in the trial and therefore has a superior vantage point as compared to those of us on the appellate court who must look at a bare record.

Castlewood International Corp. v. LaFleur, 322 So.2d 520,523 (Fla. 1976). See also, Russo, The Scope of Judicial Discretion in the Sentencing Process under the Guidelines, Fla.B.J., Jan. 1987, p.57,59.

The trial court acted within its discretion here in departing downward because of Mr. Sachs' remorse, shame, guilt and lack of future dangerousness.

^{1/} The sentence also required a \$2,000 payment to the Crimes Compensation Fund, 500 hours of Community Service, and numerous other restrictions and requirements. (R 18-19; App 3).

2. The Trial Court's Consideration of
The Factual Circumstances Of The Case

In its departure order, the trial court wrote:

[T]he facts as set forth in the pre-sentence investigation made it impossible for the court to determine if victim Hill (passenger in one of the first impact vehicles) was killed by the Defendant at the initial impact or by the third driver, who arrived on the accident scene some minutes later and struck one of the disabled vehicles.

(R 21).

There is no dispute that the second death was caused by the third driver who arrived at the scene and struck one of the disabled vehicles. In other words, it is clear that the defendant did not directly cause the second fatality, and it is possible that he did not directly cause the first fatality.

The trial court acknowledged the strict liability consequences flowing from DUI/manslaughter under §316.1931(2), Fla. Stat. (R 21; App 6). In Baker v. State, 377 So.2d 17 (Fla. 1979), this Court approved the strict liability countenanced by the statute:

Although, as noted, legal scholars have questioned the efficacy of the deterrent effect of strict liability statutes, an argument can be made that the presence of strict liability sanctions for a particular activity has the effect not only of inducing persons to engage in that activity with greater caution, but may also have

the effect of keeping a relatively large class of persons from engaging in the conduct at all. This thesis cannot be proved empirically, but neither can the position of the opponents of strict criminal liability. Consequently, it cannot be asserted that the legislature has acted irrationally in enacting section 860.01(2) where it is just as plausible as not that it does have the desired deterrent effect.

Id., 377 So.2d at 20.
See also, Armenia v. State,
497 So.2d 638 (Fla. 1986).

The question presented here is whether the trial court acted rationally when it determined that the unique factual circumstances of this case justified a departure from the strict terms of the sentencing guidelines. Certainly there is a difference between a driver who is actually operating his or her car and directly causes a fatality (like Baker and Armenia) and a driver who has already had an accident, is no longer operating or controlling the vehicle, and fatalities are caused by a third driver who later arrives at the scene.^{2/} Is it an abuse of discretion for a trial court to consider that difference when imposing its sentence? The answer should be "No."

^{2/} That driver had also been drinking (R 11), although neither he, nor the drinking driver of the second car were ever charged. See Statement of Facts, p.2. The trial court considered all of these facts. (R 53).

Consideration of the factual circumstances of a case is not one of the precluded reasons for departure. State v. Mischler, 448 So.2d at 525. Indeed, the guidelines require that the "penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." Rule 3.701(b)(3), Florida Rules of Criminal Procedure. And the guidelines, recognizing the finite prison resources of the State, mandate that "sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence." Rule 3.701(b)(7).

That is exactly what the trial judge did. No useful purpose would have been served by incarcerating Mr. Sachs. The four years of Community Control, the trial court said, acknowledging parole and good time standards, "is going to be a lot more than a year and a half in the Department of Corrections and I think it will be a deterrent for Mr. Sachs publicly...and...do some deterrent to other people who may not know the full consequences of what happens when you are under the influence of alcohol operating a car where there's a death." (R 58-59).

In Baker this Court found that the deterrent effect of a strict liability DUI/manslaughter statute was rational. In this case, the Court should find that the trial judge was rational, and within his discretion, when he considered the unique factual circumstances of the accident in determining that his downward departure from the

guidelines would serve the deterrent and punitive effect sought by the guidelines and the substantive statute.

The abuse of discretion standard of review allows the trial judge wide latitude in the decision-making process. In Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) this Court stated the "reasonableness" test should apply to determine an abuse of discretion.

If reasonable men could differ as to the propriety of the action taken by the trial court, the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Id., 382 So.2d at 1203.

Judge Albritton's Departure Order was not an abuse of discretion. It was supported by clear and convincing valid reasons. There is no doubt that Judge Albritton would have departed from the guidelines based upon these valid reasons. Therefore, the affirmance of the trial court's order was proper. Albritton v. State, 476 So.2d 158,160 (Fla.1985); State v. Rousseau, 509 So.2d 281,282 (Fla.1987).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

BRUCE ROGOW
2097 S.W. 27th Terrace
Ft. Lauderdale, FL 33312
(305) 524-2465

and

LLOYD C. MOSLEY
MOSLEY AND EVANS, P.A.
Suite B
2123 N.E. Coachman Road
Clearwater, Florida 33575
(813) 446-4059

Counsel for Respondent

BY: 
BRUCE ROGOW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Respondent on the Merits" has been furnished by U.S.Mail to JOSEPH R. BRYANT, Assistant Attorney General, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 19 day of December, 1987.


BRUCE ROGOW