

IN THE SUPREME COURT OF FLORIDA

ARDEN M. MERCKLE, :
Petitioner, :
vs. :
STATE OF FLORIDA, :
Respondent. :

CASE NO: 70,778

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PETITIONER'S BRIFF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On July 17, 1985, the Grand Jury for the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, returned a six-count indictment against the Petitioner and Co-Defendants, Howard L. Garrett and Richard P. Hope (R. 23-27). The first four (4) counts charged the Petitioner with bribery (Fla.Stat., § 838.015(1)), unlawful compensation (Fla.Stat. § 838.016(2)), extortion by State officer (Fla.Stat., § 839.11), and misbehavior in office (Fla.Stat., § 775.01) (R. 23-27).

The Petitioner and his two (2) co-defendants went to trial on August 25, 1985 (R. 479).

On September 8, 1985, the jury returned verdicts of guilty on the six (6) counts that Petitioner and his co-defendants were tried for.

The presumptive, recommended and correct sentence for Petitioner under the Sentencing Guidelines was "any non-state prison sanction".

On October 11, 1985, the trial judge departed from the Sentencing Guidelines and entered judgments against the Petitioner and sentenced him to serve a five (5) year prison term and assessed a fine of Twelve Thousand (\$12,000.00) Dollars against the Petitioner (R. 240, 241).

Thereafter, Petitioner and his two (2) co-defendants timely filed Notices of Appeal to the Second District Court of Appeal (R. 226).

Two of the issues raised on appeal by the Petitioner were the legal sufficiency of the circumstantial evidence (the State's case was predicated entirely on circumstantial evidence) and the trial judge's departure from the Sentencing Guidelines.

On May 15, 1987, the District Court rendered its opinion affirming the judgments and sentences of the lower court as to Petitioner, but reversed the judgment and sentence of co-defendant, Garrett, because of the insufficiency of the circumstantial evidence. State v. Garrett, No. 85-2398, (2nd DCA, May 14, 1987).

However, the District Court certified a question pertaining to one of the reasons given by the trial judge for departing from the sentencing guidelines to this Honorable Court due to the fact that the District Court deemed the said question to be of great public importance.

SUMMARY OF ARGUMENT

We submit that the question certified to this Honorable Court by the District Court should be answered in the negative because the factors contained therein do not, and should not, constitute clear and convincing reasons for departing from the Sentencing Guidelines since those factors are an "inherent component" of the offense of bribery and are already built into the Guideline range.

The lower court erroneously applied an incorrect rule regarding the court's obligation when reviewing the sufficiency of circumstantial evidence. The lower court held that it could review the evidence only to determine if there was legally sufficient evidence to support the jury's verdict, when, in fact, the court should have applied the well established rule that was stated by this Honorable Court in McArthur v. State, 351 So.2d 972 and the Third District Court of Appeal in Fowler v. State, (1986), 492 So.2d 1344.

Issue I

(CERTIFIED QUESTION)

WHETHER A CIRCUIT JUDGE'S CONDUCT IN ACCEPTING A BRIBE AND THE ATTENDANT IMPACT OF SUCH CONDUCT ON SOCIETAL VALUES AND THE DESTRUCTION OF CONFIDENCE OF THE PUBLIC IN THE ADMINISTRATION OF JUSTICE CONSTITUTE CLEAR AND CONVINCING REASONS FOR DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE?

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The Petitioner was convicted of the offense of bribery under Section 838.015 of the Florida Statutes. Bribery, as defined in Section 838.015, by its very definition, deals with a public servant who is involved in the performance of a public duty.

In State v. Mischler, (Fla. 1986), 488 So.2d 523-525, this Honorable Court held that factors already taken into account in calculating the Guidelines' sentence can never support a departure. Citing Hendrix v. State, (Fla. 1985), 475 So.2d 1218. This Court also held that a lower court cannot use an "inherent component" of a crime in question to justify departure. Citing with approval, Steiner v. State, (3rd DCA 1985), 469 So.2d 179; Baker v. State, (3rd DCA 1985), 466 So.2d 1144.

In the Mischler case the Petitioner was charged and convicted of grand theft under the omnibus theft statute, which incorporates into its terms the former separate offense of embezzlement. Embezzlement is broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted. This Honorable Court held that the trial court improperly deviated from the presumptively correct sentence on the basis that the crime involved was a white collar crime. That the trial court was not

justified in its departure from the Guidelines because the special relationship between the Petitioner and her employer was an inherent component of the crime for which she was convicted and therefore the trial court could not use this factor to justify a departure.

This Court went on to hold that if the sentencing commission had intended to impose a harsher sentence on those convicted of embezzlement, as opposed to theft, it would have placed embezzlement in a different category than theft for purposes of establishing a score under the Sentencing Guidelines.

So it is, we submit, that if the sentencing commission had intended to impose a harsher sentence on judges convicted of bribery it would have placed bribery involving a judge in a different category than other public servants convicted of bribery for purposes of establishing a score under the Sentencing Guidelines.

In the Hendrix case supra, this Honorable Court established the reasons that the guidelines were adopted and that shall govern the lower courts in applying the Sentencing Guidelines. This Court held that the Guidelines were in response to the widespread problem of disparity in sentencing practices around the State. The Guidelines were adopted to establish "a uniform set of standards to guide the sentencing judge" and "to eliminate unwarranted variations in the sentencing process by reducing the subjectivity in interpreting specific offenses in defining their relative importance in the sentencing decision". That while the Sentencing Guidelines do not eliminate judicial discretion in sentencing they do seek to discourage departures from the guidelines. Finally, this Court found a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the

same factor is included in the guidelines for purposes of furthering the goal of uniformity.

In the case sub judice, the presumptive, recommended and correct sentence for Petitioner, under the Sentencing Guidelines, was any non-state prison sanction. The trial judge made it abundantly clear that he felt that the presumptive sentence under the Sentencing Guidelines for Petitioner was insufficient and expressed the opinion that bribery should be a second degree felony and not a third degree felony (R. 240,241). The lower court gave five (5) reasons for departing from the Sentencing Guidelines. However, the District Court held that all of the reason given by the lower court were invalid except the reasons set forth in the certified question.

The District Court certified the question that is now before this Honorable Court. The reasons set forth in the question are relative to the impact of the Petitioner's conduct on societal values and the destruction of confidence of the public in the administration of justice.

Section 838.014, defines the term "public servant" as used in the bribery statute, as meaning, inter alia, an elected judicial officer. The Petitioner was an elected judicial officer and his conduct, according to the jury's verdict, constituted a violation of a public duty. That is to say, that while serving as a public servant he accepted a bribe in connection with the performance of a public duty.

Rule 3.701(c), which deals with the offense categories, lists eight (8) categories of crimes. Bribery is not included in those eight (8) categories. The ninth category includes all other felony

offenses. Therefore, since the bribery statute and Section 838.014, defining the terms of the bribery statute, involve a public servant, which includes a judicial officer, then by its very definition those statutes include those factors in the Sentencing Guidelines. We submit that since the Petitioner was a public servant that factor was an "inherent component" of the offense of bribery and, therefore, the lower court was not justified in departing from the Guidelines because the component was already built into the Guidelines. Wiggins v. State, (4th DCA 1985), 476 So.2d 257; Baker v. State, (3rd DCA 1985), 466 So.2d 1144; Knowlton v. State, (4th DCA 1985), 466 So. 2d 278; Allen v. State, (2nd DCA 1985), 476 So.2d 309.

It is crystal clear that the offense of bribery involves a public servant who violates a public duty. The Petitioner was a Public servant and the jury by its verdict found that he violated a public duty. This being so, there can be no question that those factors were already taken into account in calculating the Guidelines score for a Judge who had been found guilty of bribery in violation of Section 838.015, Florida Statutes.

Section 838.014 lists a variety of persons who are elected, appointed or employed by the State, including Judges, that are "public servants". We submit that to single out a Judge from the wide range of persons described in Section 838.014 would result in a different standard of punishment being applied to a Judge who is convicted of bribery. The net result would be that a Judge would be given a harsher sentence than any other person described in Section 838.014; simply because he is a Judge. This would also have the effect of "double-

dipping" and counting convictions twice, which is contrary to the spirit and intent of the Guidelines. Hendrix v. State, supra; Whitehead v. State, (Fla. 1987), 498 So.2d 863.

As an example of the above, if an elected Clerk of a Circuit Court accepted a bribe in connection with the assignment of a case to a particular Judge, contrary to the blind rotation system, and was charged and convicted of bribery, he would be given a non-state prison sanction. Yet, the Petitioner under like circumstances received a five (5) year prison sentence simply because he was a Judge.

We submit that an affirmative answer to the certified question would clearly result in a violation of the Petitioner's rights to due process of law and equal protection of the laws as guaranteed to him under the Fifth and Fourteenth Amendments to the United States Constitution.

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It was the State's theory of the case that co-defendant Hope gave the money to co-defendant Garrett to give to Petitioner as a bribe in connection with the favorable disposition of a case that was then pending against David Wynn Hope, III, who was a relative of Hope. That Garrett was the "middle man" or "bag man". We submit that if the circumstantial evidence was legally insufficient to sustain the jury's guilty verdict in Garrett's case, it would necessarily follow that the circumstantial evidence would likewise be legally insufficient to sustain the guilty verdict in Petitioner's case since the State contended that Garrett was the "middle man" who bribed the Petitioner. In other words, if the circumstantial evidence was legally insufficient to sustain the guilty verdict against Garrett who allegedly bribed the Petitioner, then, how can the identical circumstantial evidence presented against the Petitioner be legally sufficient to sustain the guilty verdict returned against the Petitioner when it was the State's theory of the case that the Petitioner received the cash bribe from Garrett?

The District Court recognized the circumstantial nature of all the evidence against the Petitioner, but held that such evidence must be viewed in a light favorable to the State. That it could review the evidence only to determine if it was legally sufficient to support the verdict (Opinion p. 3). The District Court's ruling conflicts with a myriad of holdings of this and all other District

Courts of this State.

It has been held by the Second District that it is the duty of the Court to pass upon the sufficiency of the evidence to sustain a verdict, and if the evidence is found to be legally insufficient to support the verdict, then it becomes the duty of the Court to grant a new trial. Pacetti v. State, (2nd DCA, 1963), 157 So.2d 445.

Probably the most direct and demonstratable conflict can be found in this Court's opinion in McArthur v. State, 351 So.2d 972.

In McArthur this Court readily recognized a state of facts upon which the jury could and did reasonably conclude that guilt was more likely than not.

However, notwithstanding this fact, this Court went on to re-approve the well established rule that:

".... even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypotheses of innocence."

The First District Court of Appeal in its opinion in Fowler v. State, (1986) 492 So.2d 1344, dutifully and correctly followed McArthur, supra, when it held that:

"When the state presents circumstantial evidence of a particular fact which is arguably consistent with the defendant's story, then that fact is not simply probative of the defendant's guilt."

Moreover, that Court in the Fowler case was confronted with the State's position before the Second District Court in the case sub judice when on rehearing it specifically refuted the position of the Second District Court that it must view such evidence favorably to the State and review it only to see if the evidence is legally sufficient

to support the jury's verdict and this upon the apparent conclusion of the jury that such evidence excluded every reasonable hypotheses of innocence.

Based upon McArthur and Fowler, supra, it is respectfully urged that the sufficiency of circumstantial evidence is a question of law for the Courts and not one of fact for the jury when such evidence is consistent with innocence.

Thus, it becomes clear that the opinion of the Second District in the case at Bar is in direct conflict iwth the cites cases as well as "... the law in this state for the last sixty years".
Fowler, supra, p. 1346.

Section 838.015(1), Florida Statutes, as it applies in the case sub judice, provides as follows:

" 'Bribery' means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty." (Emphasis supplied)

Section 838.016(2), Florida Statutes, as it applies in the case sub judice, provides:

"It is unlawful for any person corruptly to give, offer or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept or agree to accept, any pecuniary or other benefit not authorized by law for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission which the person believes to have been or which is represented to him as having been, either within the official discretion of the other public servant, in violation of a public duty, or in the performance of a public duty." (Emphasis supplied).

Counts One and Two of the Indictment under the two (2) foregoing Statutes have heretofore been challenged. However, it is fervently urged that neither Count states a crime under the intended sections as they are drawn.

Count One purports to charge that the Petitioner believed his sentencing of David Wynn Hope, III, to be within his mandated duty or within his discretion. The Statute obviously requires such belief to be held by the "person" giving the bribe and not the "public servant".

Count Two alleges that the Petitioner exerted influence upon himself. It is clear from the most cursory reading of the Statute that it applies to a "public servant" who exerts influence upon a second, or "any other public servant" on behalf of a third "person". Averill v. State, (2nd DCA 1984), 463 So.2d 272.

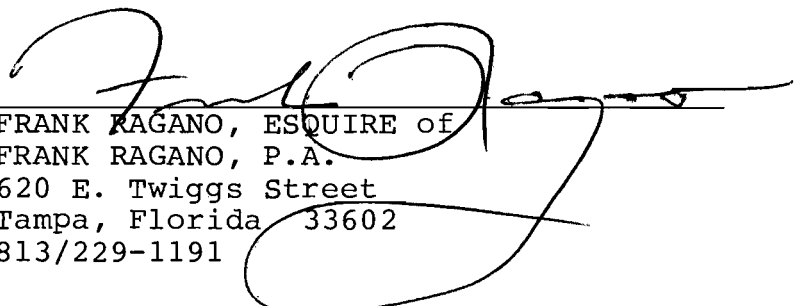
Neither Count alleges such a representation by the Petitioner and neither Count is supported by one shred of evidence of belief on the part of either co-defendant "person" or of any act involving a second "public servant".

It is most respectfully submitted that the District Court erroneously applied the rule of law regarding the review of circumstantial evidence, and therefore this Court should reverse the ruling of the District Court and remand this cause with directions to dismiss the Indictment that was returned against the Petitioner.

CONCLUSION

Based upon the foregoing facts, decisions and authorities this Honorable Court should reverse the convictions of the Petitioner with directions that the Indictment brought against him be dismissed, or, at the very very least, answer the certified question in the negative.

Respectfully submitted,

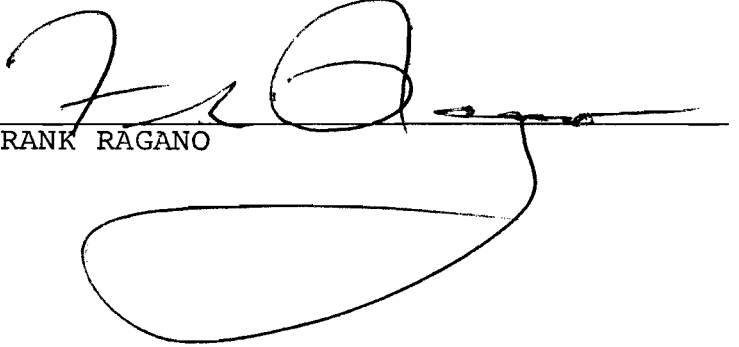


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished, by mail, this 30th day of July, 1987 to Gary O. Welch, Esquire, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.


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