

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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Deputy Clerk

ARDEN M. MERCKLE,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Case No. 70,778

REVIEW OF THE DECISION OF THE DISTRICT COURT
OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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/sas

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STATEMENT OF THE CASE AND FACTS

Respondent adopts the May 15, 1987, opinion of the Second District Court of Appeals as an accurate representation of the procedural history and the facts of the case for the limited purpose of this sentencing review. In that opinion the District Court certified the following 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 ADMINIS-
TRATION OF JUSTICE CONSTITUTE CLEAR AND
CONVINCING REASONS FOR DEPARTURE FROM THE
RECOMMENDED GUIDELINES SENTENCE?

It is from this posture respondent briefs the merits of the certified question.

SUMMARY OF THE ARGUMENT

The elevated level of public trust and the resulting public injury that results from the crimes of bribery by a chief judge are beyond that which is inherent in a typical bribery of a public official. As such, departure on such grounds is not precluded as an inherent component of the crime of bribery. Likewise, the Respondent's motive is analogous to a heightened degree of premeditation, which is also a valid reason for departure.

ARGUMENT

ISSUE

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 DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE?

The trial court's written reasons for departure are as follows:

1. The appellant's status as chief judge and his abuse of that status makes the instant offense offensive beyond that of a typical public corruption/bribery case.
2. The heightened degree of negative impact upon societal values.
3. The motive of the appellant to commit the crime.
4. The impact on the public that resulted because of the public's trust.
5. The guidelines sentence is insufficient.

(R.204-211)

In State v. Mischler, 488 So.2d 525 (Fla. 1986), this Court held that if a reason for departure is (1) not prohibited by the rules, (2) not taken into account in calculating the guidelines scoresheet and (3) not an inherent component of the crime, the scope of review is an abuse of discretion standard. Respondent does not argue that the departure reasons which were certified are precluded by the Rules of Criminal Procedure; but rather, that the departure reasons are already calculated into the

scoresheet and are inherent in the crime convicted. Whereas the petitioner's argument merges inherent component with the concept of already calculated into the scoresheet,¹ respondent will limit his argument to the point of whether the departure reason which is certified is an inherent component of the crime convicted.

The petitioner argues at page 6 of his brief that his position as a public servant is inherent in the crime of bribery, and as such, an improper reason for departure. Notwithstanding the guise presented by petitioner, the reason for departure was not the petitioner's abuse of his status as a public servant; but rather, his abuse of the elevated status of a judge which was further aggravated by his position as chief judge. This is exactly the distinguishing point that the Fourth District was attempting to make in Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984), when it stated:

A judge who takes a bribe for a favorable ruling, or a public official who accepts illegal payoffs for his or her vote, are examples of white collar criminals who defile the very reason for their being. True, they enjoy elevated social status, which the guidelines decree should not be used against them, but much more than social status is involved when those whom we appoint or elect to chart the course of the Republic, desecrate their oaths of office or profession. Such repugnant and odious behavior is a

^{1/} The already taken into account in the scoresheet concept deals with generic prior record and scoreable victim injury. However, respondent merges the concept of inherent component and the concept of preexistent guidelines scoring by myoptically concluding that since it is inherent it has been scored. For the purpose of clarity, respondent notes the differences so that analysis can be systematically approached.

prostitution of that which they swore to protect and is clearly a convincing reason why a trial judge may depart the guidelines.

Mischler, supra, at 38-39.

The distinguishing point is that this is not a generic breach of trust that which could be found in all bribery cases. An analogy, respondent submits, is the facts and law that are discussed in State v. Rousseau, 12 F.L.W. 291 (Fla. June 11, 1987). In Rousseau, the court distinguished the type of trauma to any victim of a burglary (which it termed inherent) and trauma which was beyond that which was inherent. In doing so, the Florida Supreme Court discussed two sexual battery cases: (1) Lerma v. State, 497 So.2d 736 (Fla. 1986) - trauma inherent and (2) Casteel v. State, 498 So.2d 1249 (Fla. 1987) - trauma was not inherent. From the above, respondent submits, it is apparent that departure is appropriate when the crime results or occurs in a manner which distinguishes it from the typical crime of its respective category. Recognizing the traditional deference given to trial judges by appellate courts as to weight and credibility of evidence, respondent submits that since the evidence sub judice provides a factual scenario whereby a chief judge manipulated the docket of the circuit court in a manner to facilitate his practice of selling his heightened position of public trust at the open market there is a breach beyond that which is inherent in all bribery convictions of a public official. A judge's position with respect to his exercise of powers is given the most discretion and his position of trust is

manifestly above all others since it is the judge in our adversarial system who settles disputes. Fundamental in our system of justice is the belief that an aggrieved party may be heard by a judge free of undue influence. Whereas the respondent's acts strike at the very foundation of our government, the resulting impact cannot be equated with a generic public corruption crime. Whereas, the degree of the breach of the public's trust is beyond that which is inherent, the reason for departure is not invalid on grounds that it is inherent in the crime.

The opinion of the Second District Court of Appeals states at slip opinion page 8 that:

We do not regard defendant's alleged use of the bribery proceeds as being a clear and convincing reason for departure, and it is clear that the last two reasons for departure are invalid because they merely reflect the trial judge's disagreement with the penalties provided by the legislature and those prescribed by the sentencing guidelines. See Scurry v. State, 489 So.2d 25 (Fla. 1986).

From the above, the Second District seemingly rejects the petitioner's motive as a reason for departure. Respondent disagrees and submits that the petitioner's motive is a mind frame analogous to a criminal defendant's premeditation to commit a crime. A factor which can support a departure sentence when it is not an inherent component of a crime. Lerma, supra. Unquestionably, the petitioner's motive is not an inherent component of the crime of bribery since it is not an essential

element of a crime as defined in Blockburger v. United States, 484 U.S. 218 (1932)²

Finally, the last statement in the order should not be considered as the trial court's mere disagreement with the guidelines sentence since when it is accompanied by the above valid reason it should be considered as the trial court's conclusion that departure is necessary based upon the valid reasons. Scott v. State, 12 F.L.W. 290 (Fla. June 11, 1987).

2/ Steiner v. State, 469 So.2d 179, 181 at n.6 (Fla. 3d DCA 1985), contra, Lerma v. State, supra, trauma inherent in sexual battery; also Connel v. State, 502 So.2d 1272 (Fla. 2d DCA 1987) destruction of family unit inherent in sexual battery.

CONCLUSION

Based upon the above argument and authorities, the judgment of the circuit court and the District Court of Appeal should be affirmed.

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. mail to Frank Ragano, Esquire, 620 E. Twiggs Street, Tampa, Florida 33602, this *25th* day of August, 1987.



OF COUNSEL FOR RESPONDENT