IN THE SUPREME COURT OF FLORIDA

CHARLES LEE ANTHONY, JR.,

Petitioner,

v. CASE NO. 70,864

STATE OF FLORIDA,

Respondent.

_____/

# RESPONDENT'S BRIEF ON THE MERITS

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# RESPONDENT'S BRIEF ON THE MERITS

## PRELIMINARY STATEMENT

Charles Lee Anthony, Jr., the defendant and appellant below, will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below, will be referred to herein as Respondent.

The record on appeal consists of one bound record volume and two transcript volumes. Citations to the record volume will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the transcript volumes will be indicated parenthetically as "T" with the appropriate page number(s). Citations to the Petitioner's Brief on the Merits will be indicated parenthetically as "P" with the appropriate page number(s).

For the Court's convenience, a copy of the First District's decision herein, along with other pertinent documentation, has been attached hereto as an appendix. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s).

The decision below is currently reported as Anthony v. State, 508 So.2d 452 (Fla. 1st DCA 1987).

## STATEMENT OF THE CASE AND FACTS

For the purpose of resolving the issue raised herein Respondent accepts as accurate Petitioner's statement of the case and facts (P. 2-6), with the following additional information.

The Petitioner's wife, Marlow Anthony, testified that there were other children coming into the school at the time of the incident. (T. 43). A passenger in the car, Katrina Nesbitt, testified that she saw children near the school and other pedestrians on the street in the adjoining business area. (T. 84-85).

In jury argument, the Petitioner, through counsel, stated, "There were pedestrians, both adult and children". (T. 152). He also stated, "All of this is happening at rush hour. It's 9 o'clock in the morning in a busy area. (T. 152).

While the trial judge, in his sentence and order did utilize the "boiler plate" language, complained of (A. 6), he also set forth, in commentary form, a statement (set forth fully in the argument portion hereof at page 6) which further explains the basis for the trial judge's departure decision (A. 6).

## SUMMARY OF ARGUMENT

Respondent contends that the two reasons for departure were clear and convincing and valid. There is sufficient evidence in the record to support the two reasons.

The district court of appeal did not rely upon the boiler plate language when it held that resentencing is not required. The court correctly held that the record establishes beyond a reasonable doubt that the absence of the invalid reason would not have affected the sentence. The appellate court reviewed the extent of the departure in conformity with the Albritton standard.

## ARGUMENT

### ISSUE

THE LOWER COURT CORRECTLY APPROVED THE DEPARTURE SENTENCE BASED UPON A VALID REASON FOR DEPARTURE. (Restated by Appellee)

The lower court held that only one of the two reasons for departure given by the trial court is valid but that the record establishes beyond a reasonable doubt that the absence of the invalid reason would not have affected the sentence. In support of its decision the lower court cited Griffis v. State, 497 So.2d 296 (Fla. 1st DCA 1986) and Leopard v. State, 491 So.2d 1284 (Fla. 1st DCA 1986). Respondent submits that the lower court's decision is correct and thus due to be affirmed

Petitioner argues that both reasons given for departure are invalid. Respondent contends this argument is without merit.

While the lower court did not indicate which of the trial judge's two reasons it found invalid, Respondent assumes that reason "A" (A. 5) being based largely on speculation, was the offending reason. Respondent submits, however, that reason "A" is valid and should be upheld. Reason "A" is as follows, "The age of the defendant's children in this case is relevant as they may have permanent psychological damage as a result of having their father shoot at them. Children of tender age have an expectation of protection from their father." This reason is

essentially the family relationship and not the age of the children. The Petitioner's children, ages four and two, were in the back seat of the car when the Petitioner shot and hit the car. In Davis v. State, 489 So.2d 754 (Fla. 1st DCA 1986), the court held that the possible long-lasting traumatic effect on a child of the victim is a valid ground for departure from the guidelines. See also Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986) wherein the court held that trauma to family members is a valid reason to depart from the guidelines.

Although the mother was the intended target, the children were also victims. A crime against a mother with the children present, perpetrated by their father, strikes directly at the sense of care and protection that children naturally expect from their parents. Respondent submits therefore, that the first reason for departure, reason "A", is valid on the law and the facts.

The second reason for departure, reason "B", is the danger the Petitioner's crime presented to others in the vicinity. Petitioner fired shots at a vehicle occupied by four people near a school in a business area. There is no doubt from the record that more than a few people were endangered. The crime occurred at about 9:00 a.m. on a school day. There were other children coming into the school. (T. 23-29, 43, 68-80, 85).

Danger to others is a valid reason for departure. In Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984), the court found that the danger to others represented by the "reckless firing of a gun" during a car chase was a valid reason for departure. Similarly, in Johnson v. State, 462 So.2d 49 (Fla. 1st DCA 1984), departure was upheld in a robbery with a firearm in which three victims were endangered and the trial court found that the defendant had shown an utter disregard for the property rights and welfare and safety of others.

In support of his reasons the trial judge in the instant case, made the following comment a part of his sentencing order:

> The conduct of this defendant, Charles Lee Anthony, Jr., in firing a handgun at an automobile occupied by two women, one of whom was his wife, and two small children, now ages 2 and 4, in the proximity and vicinity of a public elementary school at a time when said school was in session, is the act of a depraved, vicious and savage human being.

(A. 6).

Respondent contends that the trial judge's comment, which is little more than a stronger restatement of reason "B" (A. 6), demonstrates exactly what his concerns were in imposing the departure sentence.

Departure in this case due to the Petitioner placing others in danger was clearly valid both in law and fact.

In order to sustain a departure sentence, the reasons must be clear and convincing. As this Court noted in State v. Mischler, 488 So.2d 523, 525 (Fla. 1986):

> ...'clear and convincing reasons' require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy that departure is warranted.

There is sufficient evidence in the record to support the two reasons given by the trial court in support of the imposition of the departure sentence. The reasons were clear and convincing and thus valid.

Secondly, Petitioner argues the validity of the boiler plate language. This particular argument has not been presented to the courts below but has been raised by Petitioner for the first time in this Court.

The district court of appeal did not rely upon the boiler plate language when it held that resentencing is not required. The court noted, "We find that only one of the two reasons for departure given by the trial court is valid, but that the record establishes beyond a reasonable doubt that the absence of the invalid reason would not have affected the sentence." (A. 1).

Consequently, the question of the validity of the boiler plate language used by the trial court has little bearing on the outcome of this case.

It is true the trial judge, in his sentencing order, utilized the following boiler plate language:

> In the event one or more of these reasons of departures [sic] are found to be invalid, the sentence imposed by this Court would have been the same despite the invalid reason(s).

(A. 6).

The record before the lower tribunal indicated that in addition to the boiler plate language complained of the trial judge also made the following comment a part of his sentencing order:

> The conduct of this defendant, Charles Lee Anthony, Jr., in firing a handgun at an automobile occupied by two women, one of whom was his wife and two small children, now ages 2 and 4, in the proximity and vicinity of a public elementary school at a time when said school was in session, is the act of a deprated, vicious and savage human being.
>
> To sentence this defendant to not more than twelve (12) months in the Duval County Jail would be an unacceptable and inappropriate disposition in this case.

(A. 6).

Respondent submits that the boiler plate statement, not standing alone, but viewed in conjunction with the trial judge's

comments in his sentencing order and valid reasons for departure, unquestionably demonstrates that the lower tribunal disposed of the Albritton issue in conformity with this Court's decision in Griffis v. State, 509 So.2d 1104 (Fla. 1987). In Griffis, supra, this Court reiterated the principle of Albritton v. State, 476 So.2d 158 (Fla. 1985) holding that such a departure sentence can be affirmed only where the appellate court is satisifed by the entire record that the state has met its burden of proving beyond a reasonable doubt that the sentence would have been the same without the impermissible reasons. A statement by the trial court that it would depart for any of the reasons given, standing alone, is not enough to satisfy that burden. Griffis at 1104.

The opinion of this Court in Griffis does not conflict with the holding in the instant case. The lower tribunal sub judice clearly stated that "...the record establishes beyond a reasonable doubt that the absence of the invalid reason would not have affected the sentence." It is clear that the district court was able to determine beyond a reasonable doubt that the impermissible reason did not affect the departure sentence. The record indicates that the trial judge conscientiously weighed the relevant factors in imposing sentence and that he would have departed for any valid reason.

This Court in Booker v. State, 12 F.L.W. 491 (Fla. September 24, 1987) reaffirmed the standard set forth in Albritton, finding

that the reasons for departure were clear and convincing and supported by the facts in the case, and further found no abuse of discretion by the trial court in the sentence imposed.

Judge Barfield's reasoning in the recent opinion of Felts v. State, case no. BJ-413, (Fla. 1st DCA, January 14, 1988), sheds light on his opinion in the instant case. The court in Felts, holding one of four departure reasons valid, affirmed the departure sentence. He reasoned in Felts, supra, that the court would be inclined to find that the record, including the trial court's statement, (that it would depart for any of the reasons given) demonstrates that same sentence would have been imposed in the absence of the impermissible reasons, and that the sentence may therefore be affirmed.

The record sub judice establishes beyond a reasonable doubt that the absence of the invalid reason would not have affected the sentence; therefore, the sentence should be affirmed.

Finally, the departure sentence is not excessive. It is true that the extent of the departure was based upon two reasons for departure. The trial court did, however, state in the sentencing order that, "In the event one or more of these reasons of departures [sic] are found to be invalid, the sentence imposed by this Court would have been the same despite the invalid reason(s)." (A. 6).

The appellate court found that only one of the two reasons for departure given by the trial court was valid but concluded that, "the record establishes beyond a reasonable doubt that the absence of the invalid reason would not have affected the sentence." (A. 1).

Therefore, it is clear that the appellate court reviewed the extent of the departure in conformity with the standard enunciated in Albritton v. State, 476 So.2d 158 (Fla. 1985). Petitioner's argument that his sentence should be reduced by one-half is clearly without merit.

## CONCLUSION

Based upon the foregoing argument and the authority cited herein, the decision of the First District Court of Appeal in this cause 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 forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 this 25th day of January, 1988.

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