IN THE SUPREME COURT OF FLORIDA

RICKY THURMAN BRUMLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,247

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. A one volume record on appeal will be referred to as "R", followed by the appropriate page numbers in parentheses. Attached hereto as an appendix are the opinion of the lower tribunal, the motion for rehearing, and the opinion on rehearing which spawned the certified question.

STATEMENT OF THE CASE AND FACTS

By information filed April 22, 1986, petitioner was charged with aggravated battery, kidnapping with intent to commit sexual battery, and two counts of sexual battery (R-6-7). On August 11, 1986, petitioner entered a plea of guilty to the charges (R-10). At a sentencing hearing on September 26, 1986, the victim testified that she would never forget the incident (T-3-9). Detective G. D. Gilbreath testified that he photographed the victim at the hospital (T-9-11). Psychiatrist David Leonard Sall testified that the victim suffered emotional trauma from the crimes (T-12-25).

Petitioner's father George Thurman Brumley testified that petitioner had helped build a church (T-26-28). Petitioner's sister Sonya Vycital testified that appellant was a good baby sitter for her children (T-28-29). Petitioner testified that he was very sorry about the crimes. He had been divorced and began drinking and living out of his car (T-30-32).

The prosecutor reviewed the facts and asked that the court depart from the recommended guidelines sentence (T-32-37). Petitioner's counsel argued to the contrary (T-39-47). The court read a prepared sentencing order (R-19-26) into the record (T-48-53).

The recommended guidelines sentence was 17-22 years (R-27). The court adjudicated petitioner guilty and imposed the following prison terms: For aggravated battery, 15 years;

for kidnapping, life, to run consecutively; and for each count of sexual battery, 30 years, to run concurrently (R-12-18).

On October 2, 1986, a timely notice of appeal was filed (R-31). On December 5, 1986, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that the sole reason for departure was invalid.[1] The lower tribunal agreed, but did not direct the imposition of a guidelines sentence (appendix A). Petitioner moved for rehearing, arguing that when all reasons for departure are declared to be invalid, the proper remedy is to remand for imposition of a guidelines sentence (appendix B). The lower tribunal disagreed, by opinion filed September 9, 1987, but certified the same question currently pending before this Court in Morganti v. State, 510 So.2d 1172 (Fla. 4th DCA 1987) (appendix C).

On October 7, 1987, a timely notice of discretionary review was filed.

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[1] "The recommended guideline sentence is insufficient to properly rehabilitate defendant, protect society and provide retribution." (R 25).

SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the proper remedy when all reasons for departure are invalidated by the appellate court is for the case to be remanded with directions that a guidelines sentence be entered. To hold otherwise would be to encourage piece-meal appeals, which the law does not favor, to encourage trial judges to save up reasons for departure, which is fundamentally unfair, and to decide cases haphazardly, which obviously the law should not favor either. In any event, this Court has already decided the certified question in a prior guidelines case. This Court must reverse the lower tribunal and direct the imposition of a guidelines sentence.

ARGUMENT

WHEN THE SOLE REASON INITIALLY GIVEN FOR DEPARTURE FROM THE GUIDELINES WAS HELD TO BE VALID BY THE APPELLATE COURTS AT THE TIME OF SENTENCING BUT IS SUBSEQUENTLY HELD INVALID BY THE SUPREME COURT, THE TRIAL COURT ON REMAND MAY NOT AGAIN DEPART FROM THE GUIDELINES, EVEN IF THE NEW REASONS EXISTED AT THE TIME OF THE ORIGINAL SENTENCING AND ARE VALID REASONS FOR DEPARTURE.

The lower tribunal's opinion indicates its belief that a defendant whose reasons for departure are invalid at the time they are entered will gain a guidelines sentence after his successful appeal, but a defendant whose reasons are thought to be valid at the time but are declared to be invalid by this Court while his appeal is pending sustains the substantial risk that the judge will be able to make up new reasons when the case is remanded for resentencing. This disparity in relief granted by the appellate court makes no sense, for it is wholly dependent upon the random movement of cases through this Court.

Petitioner submits that the lower court erred. In Williams v. State, 471 So.2d 630 (Fla. 1st DCA 1985), the trial court departed from the guidelines on several grounds related to the facts and circumstances in the record, which grounds for departure were supported by decisional law of the First District Court of Appeal. On appeal, the First District affirmed those grounds for departure, relying on its prior decisions, but struck another ground for departure as being improper. The case went up to this Court, which found all the grounds for departure improper and ordered that Williams be sentenced

within the recommended range provided by the guidelines. Williams v. State, 492 So.2d 1308 (Fla. 1986). Thus, notwithstanding that it was overruling prior decisional law supporting the grounds for departure, this Court ordered that where all the grounds for departure were improper the defendant should be sentenced within the recommended guidelines range. The situation in the case at bar is not significantly different from that in Williams, so that the lower court erred by ruling that the trial court could come up with new grounds for departure on resentencing.

Petitioner submits that policy reasons support his position in this cause. The law favors finality. See, e.g., Witt v. State, 387 So.2d 922 (Fla. 1980). To allow the trial court to come out with new reasons for departure on resentencing tends to turn cases into "yo-yo's" which can bounce up and down between the trial courts and appellate courts. See, e.g., Spivey v. State, 12 FLW 2248 (Fla. 3d DCA Sept. 15, 1987) (case remanded for third sentencing).

Even the First District once acknowledged that allowing the trial court to save up reasons for departure is unfair, because it makes the appellate process less predictable, and encourages piece-meal appeals. Brooks v. State, 487 So.2d 1142 (Fla. 1st DCA 1986). In that case, the First District remanded for resentencing because the trial court used a "preprinted

laundry list" of reasons for departure.[2] At resentencing, the judge stated:

> [t]he First District is one of those Districts that if you give more than one reason for departure and they then find one of those reasons is not sufficient, they remand for resentencing anyhow. So in the First District, I don't think it's prudent to give but one reason at a time. I have other reasons but at this time I don't see any reason to go into them because if they find any of those reasons are not sufficient, then it will come back for resentencing. So I will give one reason at a time. That's simply to avoid the necessity of doing the job over and over again. So I think any judge in the First District is well advised to only give one reason for departure. Once you make up your mind to depart from the sentencing guidelines, then you should arrive, I think, at a sentence you think the offense calls for and impose it and that's what I have done in this case. Id. at 1143-44.

The lower tribunal expressed its displeasure with such action:

> It would be fundamentally unfair for a trial court that has several potential reasons for departing from a recommended sentence to withhold some of those reasons when stating its decision to depart and then utilize one or more of those reasons to depart again, should the case be remanded for resentencing. Depending upon the number of reasons a trial court may have, it could be many years before a defendant would have full and complete appellate review of his sentence. Moreover, it is conceivable that this court, upon a finding that the one stated reason was inadequate, would remand the case for resentencing within the guidelines and thereby deprive the trial court of a further opportunity to set out additional reasons for deviation. For these reasons, we strongly urge the

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[2] Brooks v. State, 466 So.2d 1182 (Fla. 1st DCA 1985).

> trial courts of this district to state all the reasons upon which a departure is based at the initial sentencing. Id. at 1144; emphasis added.

Even the First District has acknowledged that when all reasons for departure are declared to be invalid because the First District finds them to be invalid, and not because of an intervening decision from this Court, the defendant should receive a guidelines sentence. Foister v. State, 510 So.2d 371 (Fla. 1st DCA 1987). Why should the fate of a particular defendant be placed upon the random movement of cases through this Court? It should not!

There are apparently three types of invalid reasons for departure. First, where they are all bad at the time they are pronounced, the defendant receives a guidelines sentence. Second, where they are thought to be valid at the time they are pronounced, but the First District says they are not, the defendant receives a guidelines sentence. Third, where they are thought to be valid at the time they are pronounced, but this Court in another case says they are not, the First District will apply the intervening decision and reverse, but will allow the trial court to come up with other reasons to depart.

The decision of the First District makes absolutely no sense. This Court should clearly hold, as some thought it already had in Williams, supra, that a defendant who successfully attacks his departure sentence should be given a guidelines sentence, without regard to reasons which may have been saved up by the judge, and without regard to from which court

the favorable law emanated. This solution is the only way to satisfy this Court's stated concern that criminal cases become final at some point in time:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. ... Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole. Witt v. State, supra, 387 So.2d at 922.

Public policy and fundamental fairness require that the certified question be answered in the negative.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that the lower tribunal be quashed, and that he receive a sentence within the guidelines range of 17-22 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Ricky Brumley, #104392, Post Office Box 221, Raiford, Florida, 32083, this 22 day of October, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER