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IN THE SUPREME COURT OF FLORIDA

RICKY THURMAN BRUMLEY,

Petitioner,

v. CASE NO. 71,247

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner files this reply to the brief of the respondent, which will be referred to as "RB", followed by the appropriate page number in parentheses.

ARGUMENT

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Respondent presents three options to this Court in disposing of this case: allow the appellate court to fashion its own reasons to justify the departure sentence, after the appellate court has struck the only reason, as is apparently allowed in Minnesota; allow the sentencing court to dream up new reasons for departure; or require a guidelines sentence (RB at 9). Respondent invites petitioner to take option number one. Petitioner declines the invitation.

Petitioner adheres to his rejection of option number two, allowing the trial judge to set forth new reasons for departure. It would frustrate the policy of finality for the reasons stated in the initial brief at 6-9. Option number three is the only one which makes sense.

As to option number one, this Court has already rejected it in Casteel v. State, 498 So.2d 1249 (Fla. 1987). There the First District had thrown out two reasons for departure but approved three. Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986). It affirmed the departure sentence because the crimes were heinous and repugnant, noted those facts in a footnote.

Id. at 74-75. This Court held that the appellate court has no power to go beyond the reasons stated by the sentencing judge and discover reasons in the record to support a departure:

> An appellate court must look only to the reasons for departure enumerated by the trial court and must not succumb to the temptation to formulate its own reasons to justify the departure sentence. Although a review of the record may reveal clear and convincing reasons for departure which were not expressly cited by the trial court, such reasons should not be considered.
>
> In the instant case the district court considered, along with enumerated reasons for departure, the "heinous, repugnant manner of commission." Although the state urged this reason for departure, the trial judge did not expressly rely on this factor as a reason for departure. Therefore, even if the heinous, repugnant manner of commission were a clear and convincing reason for departure, it should have not been factored into the district court's harmless error analysis in this case.

Casteel, supra, 498 So.2d at 1252. The same is true in the instant case, because the prosecutor forcefully asked the judge to find numerous reasons for departure (R 11; T 35-37).[1]

Nothing in Vanover v. State, 498 So.2d 899 (Fla. 1986), relied upon by respondent (RB at 7), authorizes the appellate court to invent its own reasons for departure. While it is true that Vanover allows the appellate court to "flesh out the factual support", id. at 902, for the already existing reasons

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[1]Petitioner advised the trial court that the sole reason upon which it relied was of questionable validity, by citing Wilson v. State, 490 So.2d 1360 (Fla. 5th DCA 1986) (T 43-44).

for departure, it does not allow the appellate court to "flesh out" the reasons themselves.[2] All of the purported reasons discovered by the state (RB at 7-8) cannot be adopted by the appellate court for the first time on appeal. Assuming these reasons are supported by the record, the judge would have had knowledge of them and would have cited them if they were of such importance.

The rule adopted by the lower tribunal is that the vacating of a sole reason for departure because it is struck by this Court while the appeal is pending allows the judge to state new and different reasons for departure. This rule is far too arbitrary and unworkable to be fairly applied. Every judge would need a computer to keep track of the reasons which have been invalidated by this Court, and the date of this Court's decision. Petitioner again states that the only fair way to solve the problem is to require the imposition of a guidelines sentence when all of the reasons are bad, without regard to when they were struck down or by which court.

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[2]This view is consistent with this Court's stated role as a court which reviews sentences, and does not impose them. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that in the initial brief, 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 17 day of November, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER