

4-17

IN THE SUPREME COURT OF FLORIDA

CARVEL HOLLOMAN

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MAR 25 1983  
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CASE NO. 71,296

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH  
Attorney General

CELIA A. TERENCE  
Assistant Attorney General  
111 Georgia Avenue, Suite 204  
West Palm Beach, FL 33401  
(305) 837-5062

COUNSEL FOR RESPONDENT

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STATUTES

§ 921.001(5), Fla. Stat.

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RULES

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the trial court. Respondent was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The symbol "R" will denote all references.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additions and clarification:

The trial court articulated several other valid reasons in its order for departure other than the habitual offender status (R 389-391).

SUMMARY OF ARGUMENT

Since the trial court correctly relied on a current valid reason for departure it should be allowed on remand to again depart for reasons that were initially given at the original sentencing.

The trial court gave several valid reasons for departure other than the habitual offender status. Consequently, those reasons are not new and should be deemed a basis for departure.

Furthermore, it is clear that beyond a reasonable doubt that the trial court would still have departed based on the valid reasons irrespective of the invalid reason.

ARGUMENT

POINT

WHERE ONE OF THE REASONS INITIALLY  
GIVEN FOR DEPARTURE WAS HELD TO BE  
VALID BY APPELLATE COURTS AT THE TIME  
OF SENTENCING BUT WAS SUBSEQUENTLY HELD  
INVALID BY THIS COURT, THE TRIAL COURT  
SHOULD BE ALLOWED ON REMAND, TO AGAIN  
DEPART FROM THE GUIDELINES, IF THE  
OTHER REASONS INITIALLY GIVEN AT THE  
TIME OF THE ORIGINAL SENTENCING WERE  
VALID REASONS FOR DEPARTURE

As was stated in the Respondent's brief on jurisdiction, it is requested that the case sub judice be held in abeyance by this Court until Morganti v. State, No. 87-0312 (Fla. 4th DCA August 12, 1987 (12 F.L.W. 1960) is decided.

Petitioner argues that the main reason for departure was that petitioner was a habitual felony offender. The trial court's order was dated September 29, 1986, a full month prior to this Court's holding in Whitehead v. State, 498 So.2d 863 (Fla. 1986) dated October 30, 1986. The Fourth District Court of Appeals initially reversed and remanded to sentence within the guidelines, however on rehearing allowed the trial court the opportunity to enter valid reasons for departure relying on Morganti, supra.

Petitioner relying on Shull v. Dugger, 515 So.2d 748 (Fla. 1987) claims that departure on resentencing is invalid.



Respondent disagrees with the Shull holding and believes this Court should recede for the following reasons:

Although, in Shull, this Court reasoned that the better policy requires the trial court to articulate all of the reasons for departure in the original order and that to do otherwise may needlessly subject a defendant to numerous resentencings, Respondent submits that this suggested modus operandi will almost certainly lead to at least two sentencings per case. Because Albritton v. State, 476 So.2d 158 (Fla. 1985), requires reversal unless the State can show beyond a reasonable doubt that the sentence would have been the same without invalid reasons being included, trial courts have recently found that in the interest of finality, a listing of one or two obviously valid reasons was superior to a "kitchen sink" listing of all possible reasons for departure. Now, under Shull, trial courts are told that they must articulate all the possible reasons for departure in original orders because they will not get a second chance should their initial reasons be held invalid. Respondent suggests that the case law embodied in Shull and Albritton will almost certainly force trial courts to first list all possible reasons for departure and then, should any of those reasons be found invalid, the trial courts will have to resentence defendants using the approved reasons only. This, of course, leaves the appellate courts of this State in the position of having to trim the list of reasons for departure from the greater list provided

by the trial courts. This situation is not in the interest of judicial economy and will only over-tax the already overburdened appellate courts.

In the case at bar, there were other reasons existing at the time of the original sentence which justified departure. The trial court had a firm basis at the time of the initial sentencing to believe that the habitual offender status was a valid reason for departure. Respondent submits that escalating pattern of criminality, habitual offender status, the violent crime committed happened just two months subsequent to release from jail are reasons for departure which often exist simultaneously and therefore provide overlapping reasons for departure.

In the instant case, it is illogical to conclude that the trial court made "unwarranted efforts to justify the original sentence" by merely articulating additional reasons for departure on resentencing. Even if the better policy is for the trial court to articulate all of its reasons for departure in its initial order, under Fla.R.Crim.P. 3.701(d)(11), sentencing courts are not required to list more than one clear and convincing ground for departure. The trial court's sentence, in the instant case, should be upheld because there was no abuse of discretion in finding the reasons for departure articulated during resentencing. See, State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). In any event, Respondent urges this Court to follow

the rule of law adopted in the Minnesota case of Williams v. State, 361 N.W. 2d 840, 844 (Minn. 1985), where that court held:

...[I]f the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.

The July, 1987, amendments to the guideline show that it is the Florida legislature's intent to adopt a procedure similar to that in Minnesota. Florida Statutes, § 921.001(5) reads, in pertinent part:

...When multiple reasons exist to support a departure from the guideline sentence, the departure shall be upheld when at least one circumstance or factor justifies departure regardless of the presence of other circumstances or factors found not to justify departure.

Respondent therefore submits that this Court's decision in Shull is at odds with the legislature's intent. One of the basic principles of the sentencing guidelines is that the severity of the sanction should increase with the length and nature of an offender's criminal history. Fla.R.Crim.P., Rule 3.700(b)(4). To conclude that a trial court cannot depart from the guidelines because it initially expressed its reasons either inartfully or without prescience is to elevate form over substance. Morganti v. State, 510 So.2d at 1184.

Last, Respondent submits that the July, 1987, amendments to the guidelines make it clear that a departure will be upheld if there is a basis for so doing in the record. The July, 1987

amendments, should be retroactively applied because they were not substantive changes but merely procedural. Dobbert v. Florida, 53 L.Ed.2d 344, 356 (1977). Unlike the situation in Miller v. Florida, 96 L.Ed.2d 351 (1987), this change in the guidelines did not increase the punishment, and therefore the amendments did not alter any substantial rights. See, Miller v. Florida, supra, at 362.

Therefore, since the reasons supporting departure existed at the initial sentencing, this Court should allow the trial court the ability to articulate those reasons upon resentencing.

Furthermore, the trial court articulated several other reasons in its order for departure. Consequently, the trial court would not be finding new reasons to justify departure, therefore there would be no violation of Shull supra. The reasons were already stated (R 389-391). Just because the reasons stated in the order justify a habitual offender classification, they are still valid reasons for departure irrespective of whatever label attached to them and departure is still warranted. See dictum in Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1986) affirmed State v. Vicknair, 498 So.2d 416 (Fla. 1986).

The Supreme Court in Vicknair, supra found departure impermissible based on a habitual offender status where the sole factual basis for the habitual offender determination was the defendant's criminal record and current conviction which had

be a valid basis to enhance a guideline sentence."

Another reason stated by the trial court was that Petitioner was out of prison only four months when he committed this crime (R 388). This is also a valid reason for departure. Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986). The trial court also described the nature of the beating Petitioner inflicted upon the victim as "an outrageous, anti-social act against a defenseless person" (R 391), another valid reason for departure. Webster v. State, 461 So.2d 965 (Fla. 2nd DCA 1984).

In sum it is clear from the trial court's order that valid reasons for departure were stated (R 387-391). Because these reasons also happened to satisfy the requirements of the habitual offender statute does not in any way violate their validity for departure. Respondent would argue that the only error in the trial courts' sentencing order is the lable of habitual felony offender. Absent that label the reasons are valid. Consequently, Respondent would submit that it has shown beyond a reasonable doubt that absent the invalid reason the trial court would have still departed based on the several valid reasons articulated. Albritton v. State, 476 So.2d 158 (Fla. 1985).