

WOOL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
ROBERT A. LETTMAN,
Respondent.

CASE NO. 72,731

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent was the Defendant and Petitioner was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. In the brief the parties will be referred to as they appear before the Honorable Court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE

Respondent was charged by way of an indictment filed in the Seventeenth Judicial Circuit with third degree murder. This indictment provided that Respondent on March 19, 1986 " did commit Murder in the Third Degree, by unlawfully committing the felony offense of Child Abuse; in that ROBERT ARTHUR LETTMAN did knowingly or by culpable negligence permit physical injury to a child, TANESHIA SHANA LETTMAN, date of birth, May 2, 1983 and in so doing ROBERT ARTHUR LETTMAN caused great bodily harm, permanent disability, or permanent disfigurement to TANESHIA SHANA LETTMAN and as a consequence of and in the commission of the felony offense of Child Abuse he did kill and murder TANESHIA SHANA LETTMAN, by striking and/or causing her to be stricken by trauma about the body..." R 339. At the conclusion of Respondent's jury trial, he was convicted as charged. R 347.

Respondent was scored under the Fla.R.Crim.P. 3.701 sentencing guidelines to a presumptive guidelines sentence range of three (3) to seven (7) years in prison. R 353. Petitioner-State filed a motion to depart from the presumptive guidelines sentence. R 349. The trial judge in a written order departed from Respondent's presumptive guidelines sentence range and sentenced Respondent to fifteen (15) years in prison with credit for time served. R 354-355.

STATEMENT OF THE FACTS

Respondent cannot accept Petitioner's State of the Case and Facts as found in its Brief on the Merits.

The first witness called by Appellee was Martha Ann Lettman who resided at 1559 N.W. 10th Place in Fort Lauderdale, Florida on March 19, 1986. R 26-27. She married Respondent in 1981. They had two children. The Lettman's first child was Taneshia Shana Lettman born on May 2, 1983. R 28.

Martha Lettman testified that on March 19, 1986 she went to work at a day care center. R 27-29. Respondent remained at home that day to care for the children. R 30. Taneshia Lettman was physically fine when Martha Lettman left for work. R 33. She had seen Respondent discipline Taneshia in the past with a belt or his hand. R 33-34. These would cause welts on the child. R 34.

On cross-examination, Martha testified that Respondent had a good loving relationship with Taneshia. R 35-36. She did not think that Respondent was abusing their daughter. R 37.

Officer Gorman of the Fort Lauderdale Police Department testified that he responded to the Lettman residence at approximately 8:37 a.m. on the date in question. R 47. Respondent and two paramedics were at the residence. R 47. The paramedics were working on the young child. R 48. Officer Gorman observed numerous bruise about the child's body. R 49.

Respondent informed the officer that he had been chastising or beating the child for her actions. R 51. During the course of the beating, the child went limp and fell to the floor. R 52.

When he noticed that the child became motionless, he contacted medical assistance. R 52. Respondent also informed the officer that he attempted to perform cardiopulmonary resuscitation (CPR) upon the child in the bedroom. R 52.

Detective Moody of the Fort Lauderdale police department testified that he interviewed Respondent at the police station at 9:40 a.m. on March 19, 1986. R 73-80. Respondent was advised of his "Miranda" rights and gave the officer a statement about the incident. R 84. On the morning in question after Martha Lettman left for work, Taneshia began to cry. R 84, 87. Respondent chastised her for crying. R 84, 89-90. Respondent explained that he would chastise his child by whipping her with a belt. R 90-91. He would strike her on the legs, back and buttocks. R 91. He struck her nine (9) times that morning. R 92. Taneshia began to cry loudly. R 93. Taneshia told Respondent that she had to urinate. R 94. Respondent disbelieved her. He warned her about the consequences of lying. R 94. Apparently Taneshia did not need to urinate. R 94. Respondent believed that Taneshia was lying to him. R 94. He decided to discipline or chastise her for this fabrication. R 94. He started to beat her. R 94. When Taneshia started to cry, Respondent left the room. R 95-96. When Respondent returned, Taneshia was on the floor gasping for breath. R 97. Respondent began to press on her chest to give her CPR and then mouth-to-mouth resuscitation. R 97-98. Respondent also shook her in an attempt to revive her. R 98-99.

Respondent also informed Detective Moody that he has chastised Taneshia in the past with his belt. R 102-103. He may have acknowledged that he struck her too hard on this occasion. R 104.

Dr. Deleo, an expert in the field of pediatrics and child abuse, testified that in his opinion, Taneshia was a battered child. R 124. Taneshia suffered swelling of the brain and a bleeding abdomen. R 125. In Dr. Deleo's opinion, the injuries to Taneshia were not caused by the performance of CPR. R 126-127. The brain injury was caused by either a blunt instrument or shaking. R 126. In his opinion, the battery or force caused the death. R 149.

Dr. Ongley, an expert in forensic pathology and the CPR technique upon children testified that the cause of death was the result of inflicted injuries. R 193-195. In his opinion, CPR could not have caused this injury to her head. R 179.

Respondent took the stand in his own behalf at trial. R 207-208. Respondent noted that the Bible speaks of parental discipline and chastising children. R 210. Respondent testified that he had a very close relationship with his daughter, Taneshia. R 210. He had disciplined her in the past with a belt or open hand. R 211.

On March 19, 1986, Respondent chastised Taneshia after Martha Lettman left for work. R 214. She has cried in the past when her mother left for work. R 214. He told Taneshia that he was going to beat her for "crying unnecessarily or hollering unnecessarily." R 215. Respondent took a belt which he used to

beat her. R 215. He struck her in the back of the legs and on the buttocks four or five times with a belt. Thereafter, Respondent decided that Taneshia had lied to him, he spanked her with the belt four or five more times. R 218-219. Respondent then left the room. R 219.

Respondent testified that when he returned to the room Taneshia was experiencing breathing problems. R 220. He picked her up and shook her to revive her. R 220-221. He performed CPR upon her to help her breathe. R 222. He depressed upon her stomach area in an attempt to revive her. R 223-224. He then summoned medical assistance. R 224-226. Respondent testified that his intention that day was to merely discipline his child. R 224. He definitely did not intend to hurt her. R 224.

SUMMARY OF ARGUMENT

Respondent was convicted of third degree murder with the underlying felony of child abuse. The victim was his daughter. The Fourth District Court of Appeal in the instant case expressly relied upon and applied this Honorable Court's opinion directly on point, Hall v. State, 517 So.2d 692 (Fla. 1988) to reach the correct result that the trial court reversibly erred in departing from Respondent's guidelines sentence range on the basis of "abuse of familial trust." Abuse of family trust is a factor common to nearly all child abuse cases. In addition, based on the Florida Standard Jury Instruction in Criminal Cases (2d. Ed. 1981) for the underlying offense charged (child abuse) familial trust through parental responsibility and maintenance are elements of the crime. This Court has repeatedly held that an inherent component of the offense cannot be used to depart from the presumptive guidelines sentence range. For this same reason, the other ground for departure, "tender age of the victim" is an invalid basis to depart where child abuse by definition contains the age of the victim as an element of the crime. Hence, the decision of the lower court should be affirmed.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT THE GROUNDS FOR DEPARTURE FROM RESPONDENT'S GUIDELINES SENTENCE RANGE WERE INVALID

In adoption of the sentencing guidelines set forth in Fla.R.Crim.P. 3.701, this Court reiterated the same general concerns, expressed by the Legislature when it passed Section 921.001, F.S. (1983) establishing the sentencing guidelines:

Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offenses -- and offender -- related criteria and in defining their relative importance in the sentencing decisions.

The elimination of subjectivity variations in the sentencing process which has heretofore existed geographically -- and indeed from judge-to-judge -- throughout the state is the guidelines primary goal.

A departure from the presumptive guidelines sentence range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating a sentence. Rule 3.701(d)-(11). As stated by this Court in Scurry v. State, 489 So.2d 25 (Fla. 1986):

Florida Rules of Criminal Procedure, 3.701(d)-(11) seeks to discourage unwarranted departure from the sentencing guidelines. Albritton v. State, 476 So.2d 158 (Fla. 1985). Neither reasons prohibited by the guidelines themselves, nor factors already taken into account in calculating the guidelines scored, nor an inherent component of the crime in question can ever be used to justify departure from the guidelines. State v. Mischler, 488 So.2d 523 (Fla. 1986). The facts supporting the reasons for departure must be credible and proven

beyond a reasonable doubt. The "appellate court's function in a sentencing guidelines case is ... to review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons 'clear and convincing.'"

Id. at 28.

These stringent requirements place a heavy burden on the party advocating a departure both from a persuasive and evidentiary standpoint. Hence the judicial overlay coupled with the statutory requirements has evidenced an intent to ensure the vast majority of sentences stay within the presumptive bounds set by the sentencing guidelines ranges.

Respondent was charged and convicted of third degree murder with the underlying felony of child abuse. He was scored under the Fla.R.Crim.P. 3.701 sentencing guidelines to a presumptive guidelines range of three (3) to seven (7) years in prison. R 353. The trial judge departed from Respondent's presumptive guidelines range and sentenced him to fifteen (15) years in prison.

The Fourth District Court of Appeal in the instant case, Lettman v. State, 526 So.2d 207 (Fla. 4th DCA 1988) (See Appendix) expressly relied upon and applied this Honorable Court's opinion directly on point, Hall v. State, 517 So.2d 692 (Fla. 1988) to reach the correct result that the trial court reversibly erred in departing from Respondent's guidelines sentence range on the basis of "abuse of familial trust."

In Hall, the defendants, husband and wife, each pled nolo contendere to two (2) counts of aggravated child abuse of their children. The trial judge departed from their presumptive guidelines range and articulated three (3) separate reasons in support of the departure order. The third ground for departure was as follows: "Aggravated child abuse was committed against these young victims by their natural parents, persons in a special position of trust within the family unit."

This Court held that this ground for departure was improper:

There are, of course, some cases of child abuse which occur outside the family unit. However, since the use of familial authority exists in so many child abuse cases, its adverse effect may have been taken into consideration in the setting of the guideline ranges for that offense. In any event, to permit a built-in basis for departure in so many child abuse cases would be contrary to the purpose and spirit of the sentencing guidelines. Thus, we find that the trial judge's third reason for departure was invalid.

Id. at 695.

This Court in Davis v. State, 517 So.2d 670 (Fla. 1988) addressed a guidelines departure based on an "abuse of trust" of a family relationship wherein a wife was convicted of second degree murder for shooting her husband. This Court explained that while an "abuse of trust" of a family relationship may justify departure in some instances, it was insufficient to do so there, because "no particular trust bestowed on [the defendant] by the victim formed the foundation of the crime...." Id. at 674. This Court distinguished those cases where the offense committed was directly related to the trust conferred on the defendant and

the trust was the factor that made possible the commission of the crime. See Hankey v. State, 485 So.2d 827 (Fla. 1986) (burglary victim gave the defendant a job and entrusted him with key to fulfill duties); Gardener v. State, 462 So.2d 874 (Fla. 2d DCA 1985) (teacher abused position of trust by selling cocaine on school property). See also Steiner v. State, 469 So.2d 179 (Fla. 3d DCA), rev. denied, 479 So.2d 118 (Fla. 1985). This Court found, in contrast, "no particular trust bestowed on Davis by the victim formed the foundation of the crime; the crime was not directly related to a specific trust as in the above cases." Id. at 674 (Emphasis supplied).

Justice Ehrlich also indicated:

Further, were we to uphold a departure from the guidelines in this case based on abuse of trust of a family relationship, it would serve as authority to do the same in most cases involving the killing of a spouse or other family member. If the sentencing commission had intended to impose a harsher sentence on those convicted of second degree murder when the victim was the defendant's spouse, it would have created a separate category for spousal homicide for purposes of establishing a score under the sentencing guidelines.

Id. at 674 [Emphasis supplied].

In Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987), the defendant, a teacher's aide at a school for mentally and emotionally handicapped children was convicted of lewd and lascivious assault on a child under the age of sixteen in violation of Section 800.04, Florida Statutes (1985). The trial judge departed from the guidelines range on the basis, inter alia, that "the defendant violated a public and private trust resulting from

the defendant's custodial control over the child victim." The Fifth District held that violation of trust or vulnerability of the child were invalid grounds for departure in the case. Justice Cowart explained:

Everyone in society is vulnerable and must trust others to not harm or hurt or steal. Everyone who breaks a criminal law violates this trust. Being naturally innocent in sexual matters, all children are especially vulnerable to the physical, mental, emotional harm that can result from exposure to gross adult lewd acts. To protect children from that harm is the very purpose for section 800.04, Florida Statutes, which prohibits lewd acts on, or in the presence of, children. While, of course, some such acts are committed by strangers to the children, unhappily experience shows that such statutes are most commonly violated by persons who take advantage of a trust position involving the care, custody, teaching, and training of children, such as educational, religious, social, and child care workers, relatives, step-parents, and babysitters (a true one to one trust relationship). Because it is only a difference in degree that all children are vulnerable to being victimized by lewd acts and because all who violate this statute also violate some degree of trust, departure from the recommended guidelines sentence for the basic offense of lewd acts on or in the presence of a child (section 800.04, Florida Statutes), should not be based on these two particular factors.

Id. at 417.

* * *

All we hold here is that as emotional harm is a common factor to sexual battery, so "vulnerability" and "breach of trust" are factors common in child molestation cases. Abuse of trust and vulnerability are somewhat vague, subjective concepts. If they are held to authorize departure sentences, the "exceptional case" will become the rule, and departure sentences, rather than the recommended sen-

tences, will be authorized in a large percentage of all sentences based on violations of section 800.04, Florida Statutes.

Id. at 417-418.

Respondent also contends that "abuse of family trust" cannot be used to depart because it is an element of the offense as charged to the jury. Respondent concedes that the child abuse statute, section 827.04, Florida Statutes (1985) does not expressly refer to "familial" authority. However, the Florida Standard Jury Instructions in Criminal Cases (2d Ed. 1981) does so (p. 161)¹ under element three as follows:

(Defendant) [was a parent] [had assumed responsibility for the temporary or permanent care and maintenance] of (victim).

¹ Before you can find the defendant guilty of Child Abuse, the State must prove the following [three] [four] elements beyond a reasonable doubt:

1. (Defendant) [willfully] [by culpable negligence] [knowingly]:

[[deprived (victim) of] [allowed (victim) to be deprived of] necessary food, clothing shelter or medical treatment.]

[permitted [physical] [mental] injury to (victim).]
2. In so doing (defendant) caused (victim)

[great bodily harm.]
[permanent disability.]
[permanent disfigurement.]
3. (Defendant) [was a parent] [had assumed responsibility for the temporary or permanent care and maintenance] of (victim).
4. (Victim) was under the age of eighteen years.

This jury instruction was read to the jury without objection by the State. R 295, 297. These jury instructions approved by this Court are presumptively correct. See, State v. Bryan, 287 So.2d 73, 75 (Fla. 1974). Since the jury was instructed on this familial element and convicted Respondent of the offense as charged, this element must be considered a component of Respondent's offense. This Court has held that an inherent component of the offense can not be used to depart from the presumptive guidelines sentence range. See State v. Mischler, 488 So.2d 523 (Fla. 1986).

The trial court's second reason for departure was the vulnerability and tender age of the child victim. The Fourth District correctly held that this ground for departure was invalid. Chief Judge Hersey wrote for the Court: "Neither advanced age alone nor helplessness or vulnerability are sufficient as clear and convincing reasons for an upward departure from the guidelines." Lettman, supra at 208.

Respondent was charged and convicted of third degree murder. R 339, 347. The underlying felony was child abuse as proscribed by section 827.04, Florida Statutes, (1985). Under section 827.01(1), a "child" is defined "as any person under the age of 18 years." The age of the victim is an element of the crime and cannot therefore be used to depart. This Court has repeatedly held that an inherent component of the offense can not be used to depart from the presumptive guidelines sentence range. See State

v. Mischler; State v. Cote, 487 So.2d 1039 (Fla. 1986); Lerma v. State, 497 So.2d 736, 738 (Fla. 1986) (Departure cannot be based on inherent components of the crime.)

In Rozar v. State, 500 So.2d 659 (Fla. 5th DCA 1986), the defendant was convicted of three (3) counts of lewd and lascivious assault on a child under the age of sixteen in violation of section 800.04, F.S. (1985). One ground for departure cited by the trial judge was the tender age of the victim. The Fifth District found this ground for departure was invalid holding: "Because age is an inherent component of the crime, the tender years of the victims cannot be used to justify departure." Id. at 660. The identical situation is present here.

As to the vulnerability of the victim all children are vulnerable to adults. No citation is necessary to support this self-evident fact. Because of their innocence and vulnerability, children have been rightly singled out by our Legislature for special protection. To protect children from physical harm is the very purpose of section 827.04 Florida Statutes (1985), the child abuse statute. The "vulnerability" and "tender age of the victim" are factors common in all child abuse cases including third degree murder with child abuse as the underlying felony. If such grounds are held to authorize departure sentences from the recommended guideline range, it will become the rule not the special authorized exception. As Justice Adkins cogently articulated in McGouirk v. State, 493 So.2d 1016 (Fla. 1986):

In defining the crime and prescribing the punishment therefore, the legislature has taken into account its heinous nature and its potentially devastating consequences. To allow

departure based on these inherent components of the crime, therefore, would sanction an arbitrary and case-to-case sentencing based on identical acts and thus frustrate the guidelines purpose.

Id. at 1018.

Respondent finally notes that the Second District's supposition in Jakubowski v. State, 494 So.2d 277, 279 (Fla. 2d DCA 1986) that vulnerability coupled with an abuse of trust "might be valid if sufficiently articulated" is now erroneous in light of this Court's decision in Hall v. State, supra.

The final ground for departure was clearly invalid. See Lettman v. State, supra at 208. Therefore none of the grounds stated by the trial judge for departure were valid. The Fourth District vacated Respondent's fifteen (15) years sentence and remanded this cause for re-sentencing within Respondent's presumptive guidelines sentence range. This relief is mandated by this Honorable Court's decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987). Therefore the decision of the Fourth District Court of Appeal in the instant case should be affirmed.

REMAND FOR RECONSIDERATION

Assuming arguendo that this Honorable Court finds that a reason found by the trial court is a "clear and convincing" reason for departure, Respondent contends that this Honorable Court should remand this cause for resentencing for a redetermination without consideration of the improper reasons for a departure. The trial judge may decide not to depart from the

presumptive guidelines sentence range or reconsider the extent of his departure from Respondent's guidelines sentence. See Albritton v. State, 476 So.2d 158 (Fla. 1985).

EXTENT OF DEPARTURE

Assuming arguendo that the trial court was authorized to depart from Respondent's guidelines sentence, Respondent contends that the extent of the departure from Respondent's presumptive guidelines range sentence in this case was not justified. It should be noted that Respondent's offense occurred prior to July 9, 1986. Thus the extent of departure is still a viable basis for appeal herein. See Booker v. State, 514 So.2d 1079 (Fla. 1987); Johnson v. State, 14 F.L.W. 13, 14 n.5 (Fla. 3d DCA Dec. 20, 1988).

In Albritton v. State, supra this Court held:

In our view and we so hold, the proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and record to determine if the departure is reasonable. We disagree with and disapprove the holding below that the only lawful limitation on a departure sentence is the maximum statutory sentence for the offense.

Id. at 160; See also Booker v. State, supra.

Respondent's recommended presumptive guidelines sentence range was three (3) to seven (7) years in prison. The trial judge departed from this presumptive guidelines range and sentenced Respondent to fifteen (15) years in prison. This is the statutory maximum! The trial judge abused his discretion when he

departed from Respondent 's guidelines range and sentenced Respondent to the statutory maximum sentence. Even if one ground is permissible for departure from the presumptive guidelines sentence, it surely does not allow this extensive a departure. The extent of the departure from the recommended range was an abuse of discretion in light of the presumptive guideline sentence, record in this case, reasons for departure, and the maximum sentence actually imposed upon Respondent.

In Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), this Court adopted the following test for review of a judge's discretionary power:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

The record at bar supports Respondent's position that the departure was excessive. There were no valid reasons to allow this departure to the statutory maximum. Evidence was submitted in the lower tribunal that Respondent loved and cared for his child Taneshia. R 210-211. He had no criminal record. Respondent's beliefs in disciplining his child stem from his understanding of biblical teachings. R 210. This sad occurrence stemmed from those beliefs and not from ill will, malice or cruelty. Respondent was extremely remorseful for this tragic consequence. Hence the extent of departure from Respondent's

presumptive sentence was excessive and an abuse of discretion. Therefore alternatively Respondent's excessive departure sentence must be vacated on this basis.

CONCLUSION

Respondent respectfully requests this Honorable Court to AFFIRM the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RICHARD BARTMON, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 2nd day of January, 1989.



Of Counsel