

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

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CLERK, SUPREME COURT

By _____
Deputy Clerk

CHARLIE BROWN, JR.,
Petitioner,

vs.

CASE NO. 73,590

STATE OF FLORIDA,
Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Charlie Brown, Jr., the Defendant at trial in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, and also the Appellant in the District Court of Appeal, First District, will hereinafter be referred to hereafter as the "Petitioner". The State of Florida prosecuted the case at trial, was Appellee in the appellate court, and will be referred to hereinafter as the "Respondent".

The opinion of the District Court of Appeal may be found in the Appendix hereto, and is reported as: Brown v. State, 14 F.L.W. 161 (Fla. 1st DCA Jan. 13, 1989).

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted by a jury of two counts of Robbery with a Deadly Weapon (first-degree felonies punishable by life) and one count of Threatening to Discharge a Destructive Device (a second-degree felony). The sentencing guideline score sheet designated a range of four and one-half to five and one-half years; however, the trial court instead sentenced Petitioner to two fifty-year (50 year) terms of imprisonment for the robbery counts and fifteen years (15 years) for the count of threatening to discharge a dangerous device, with all sentences running concurrently. The trial court entered a written order citing for grounds for departure: (1) Petitioner's flagrant disregard for the safety of bystanders, (2) his recent release from prison, (3)

his lack of regard for the law and the judicial system as demonstrated by his failure to comply with the conditions of his release on bond, and (4) premeditation.

Petitioner appealed only the departure from the presumptive sentence. He attacked all four grounds as invalid, but the First District Court of Appeal held the justification given, "lack of regard for the judiciary and the law", to be a permissible ground. It found there to be an adequate factual basis for same when the trial court had held that the Petitioner's failure to abide by his condition of release on bond from other offenses, along with the short interval between his release and the instant offense, demonstrated a contempt for the judicial system. The appellate court did not comment upon the other three grounds, holding instead that a departure from guidelines may be upheld when at least one of the reasons given is valid, regardless of the validity, vel non, of others. In so doing, it cited 5921.001, Florida Statutes (1987), as amended by Chapter 87-110, Laws of Florida. Accordingly, the aforesaid sentences were upheld in its entirety.

Mandate issued on January 6, 1989.

On January 17, 1989, Petitioner moved to invoke the discretionary jurisdiction of this Court on ground that direct conflict with the decisions of other District Courts of Appeal.

SUMMARY OF THE ARGUMENT

This is a sentencing guideline departure case. The First District Court of Appeal used only one ground cited by the trial court "lack of regard for the judiciary and the law" to validate the departure. The use of this particular basis has been disapproved in at least the following cases: Hendsbee v. State, 497 So.2d 718 (Fla. 2nd DCA 1986); Lee v. State, 486 So.2d 709 (Fla. 5th DCA 1986); Medlock v. State, 489 So.2d 848 (Fla. 5th DCA 1986); Scott v. State, 488 So.2d 146 (Fla. 3rd E A 1986); and Weir v. State, 490 So.2d 234 (Fla. 4th E A 1986); and Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Therefore, the First District's opinion directly and expressly conflicts with the opinions of those other district courts and of this Supreme Court. Accordingly, this Court should assert its right to discretionary review and decide this case on its merits.

POINT ON APPEAL

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DIRECTLY AND EXPRESSLY CONFLICTS WITH THE OPINIONS OF OTHER DISTRICT COURTS OF APPEAL REGARDING THE USE OF THE GROUND OF DEFENDANT'S "LACK OF REGARD FOR THE LAW AND THE JUDICIAL SYSTEM" AS A VALID BASIS FOR DEPARTURE FROM GUIDELINE SENTENCING RULES, TO-WIT: HENDSBEE v. STATE, 497 So.2d 718 (Fla. 2nd DCA 1986); LEE v. STATE, 486 So.2d 709 (Fla. 5th DCA 1986); MEDLOCK v. STATE, 489 So.2d 848 (Fla. 5th DCA 1986); SCOTT v. STATE, 488 So.2d 146 (Fla. 3rd DCA 1986); and WEIR v. STATE, 490 So.2d 234 (Fla. 5th DCA 1986). MOREOVER, THE DECISION OF THE FIRST DISTRICT CONFLICTS WITH THIS COURT'S OPINION IN HENDRIX v. STATE, 475 So.2d 1218 (Fla. 1985).

Petitioner in this case appealed to the District Court only the issue of the trial court's departure from the presumptive sentencing guidelines in his case. Although the trial court had cited four grounds, the appellate court declined to discuss the other three when it found the third ground cited, "lack of regard for the judiciary and the law", to be a valid and permissible one. In so holding, the Court cited only to Frye v. State, 497 So.2d 964 (Fla. 1st DCA 1986), but also made reference to two cases from the Second District: Santana v. State, 507 So.2d 680 (Fla. 2nd DCA 1987) and Fuller v. State, 488 So.2d 594 (Fla. 2nd DCA 1986). It is highly significant, though, that following those citations the First District immediately went on to say:

But see, Lee v. State, 486 So.2d 709 (Fla. 5th DCA 1986) (under Hendrix v. State, 475 So.2d 1218 (Fla. 1985), disregard for the laws imposed by society and the criminal justice system is an invalid reason); Weathers v. State, 508 So.2d 1332 (Fla. 2nd DCA 1987) ("total disregard for the criminal justice system" invalid reason under facts given); Hendsbee v. State, 497 So.2d 718 (Fla. 2nd DCA 1986) (disregard for criminal justice system may not be used to depart from guidelines).

To be more precise, in Lee, supra, the Fifth District wrote:

. . . As noted by the State, the trial court's reasons appear to be best summarized as follows: .
. . (4) disregard for the laws imposed by society in the criminal justice system. Under Hendrix v. State 475 So.2d 1218 (Fla. 1985) it appears at a minimum that reasons (2) [not pertinent here] and (4) are invalid.

486 So.2d at 710.

The pertinent parts of Weathers, supra, are set out by the Court itself. As to Hendsbee, supra, the Court stated simply:

Disregard for the Criminal Justice System

An appellant's disregard for the criminal justice system may not be used to depart from the sentencing guidelines. Scott v. State, 488 So.2d 146 (Fla. 3rd DCA 1986). 497 So.2d at 719.

In addition to the four cases specifically cited by the First District in its tell-tale "but see" section, Petitioner submits three more cases could have been cited for the proposition that "disregard for law" or similarly-worded such bases are improper grounds for departure sentences. The Fifth District so held two

more times in Weir v. State, 490 So.2d 234, at 235 (Fla. 5th DCA 1986) and in Medlock v. State, 489 So.2d 848, at 849 (Fla. 5th DCA 1986), both of which cite back to Evie, supra, as their precedent. Thus, it can be seen that--at a very minimum--the Fifth D.C.A. has repeatedly (3 times) confronted this exact issue and ruled directly contrary to the First.

Petitioner's research could find only one time when the Third DCA was called upon to assess the validity of this particular ground. In Scott v. State, 488 So.2d 146 (Fla. 3rd DCA 1986) the trial court had listed as a basis for departure "defendant's total lack of respect for the criminal justice system, as evidenced by his testimony in and during the trial." at 147. But on appeal the State conceded the invalidity of "lack of respect" as a basis for departure. Instead, the State urged that departure was warranted by defendant's perjury at trial, which argument the Third District also rejected. Thus, on the basis of this one decision it appears the Third District concurs with the Fifth, and some decisions of the Second, disapproving this ground.

In contrast to the Fifth District's flat-out rejection of this ground, the Second District appears to have applied it inconsistently, using a case-by-case basis. It is difficult to infer a logical pattern. In the instant case, the First District cited to Santana, supra, which recites some facts, but also to Fuller, supra, which recites no facts.

Petitioner also suggests the appellate decision sought to be reviewed conflicts with Hendrix v. State, the Supreme Court cited supra. Hendrix, it will be recalled, was the case cited by the Fifth District in Lee, supra, for its support to invalidate a ground called "disregard for the laws imposed by society and the criminal justice system. "

In its opinion, the First District spoke of the existence of an "adequate factual basis" for the departure, namely that a condition of Petitioner's bond, upon his release from incarceration, was that he not leave his father's residence except while working. Insofar as this ground actually punishes Petitioner for violation of the conditions of his bond, such basis also conflicts, by inference, with other decisions of the Second and Fifth Districts, as well as the First itself. Petitioner believes such ground is no different from the cases dealing with a defendant's failure to appear in Court, which also is presumably a violation of the conditions of his bond and/or release. A discussion of this occurs in Monti v. State, 480 So.2d 223 (Fla. 5th DCA 1985). In that case, the Fifth District pointed out that the First and Second Districts had held that a failure to appear, standing alone is an insufficient basis for departure, citing Parker v. State, 465 So.2d 1361 (Fla. 1st DCA 1985) and Williams v. State 471 So.2d 201 (Fla. 2nd DCA 1985). The Fifth DCA chose to concur, explaining that a failure to appear amounts to a criminal content. It went on to point out, however, that in

Monti's case, no conviction had been obtained for criminal contempt, and Rule 3.701(d) (11) clearly rejects deviation from the guidelines based upon crimes for which defendant has not been convicted. Petitioner urges, therefore, that there is further conflict of the instant opinion with Monti: if Petitioner truly had violated the conditions of his bond, as held by the trial court, then such conduct would amount to a separate crime of criminal contempt, for which crime no conviction had been obtained. Likewise, Rule 3.701(d) (11) proscribes the use of that factor on which to base its departure.

It is also noted that, although the First District had before it the trial court's explicit ground of "recent release from prison" the Court declined to pass upon that ground, even though there is precedent in the area. It does seem, however, that the Court seemed influenced by the "recent release" argument since it made reference to "offenses committed shortly after his release", while not directly facing the issue.

Article V, §3(b) (3) of the Florida Constitution permits this Court to exercise its discretionary jurisdiction for the purpose of reviewing opinions of District Courts of Appeal which expressly and directly conflict with each other. The point of law involved here is relatively narrow and specific, yet there exists a plain, direct, and clearly articulable conflict among the decisions of the First, Second, Third, and Fifth District Courts of Appeal in this State on the issue of whether "lack of

regard for the criminal justice system (or similarly-worded bases) constitutes a valid ground for departure from the guideline sentencing implemented by the Florida Statutes and Rules of Criminal Procedure.

CONCLUSION

The opinion of the First District Court of Appeal in the instant case conflicts expressly directly with Hendsbee v. State, 497 So.2d 718 (Fla. 2nd E A 1986); Lee v. State, 486 So.2d 709 (Fla. 5th DCA 1986); Medlock v. State, 489 So.2d 848 (Fla. 5th DCA 1986); Scott v. State, 488 So.2d 146 (Fla. 3rd DCA 1986); and Weir v. State, 490 So.2d 234 (Fla. 4th E A 1986); and Hendrix v. State, 475 So.2d 1218 (Fla. 1985). This Court has the power under the Florida Constitution to examine these opinions and the rationales advanced so as to decide the better reasoning. This Court should assert such jurisdiction in order to impose some uniformity on this point of law which seems to have been so susceptible to varying interpretations by the District Courts of Appeal.

Respectfully submitted,

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