IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 23 1989
CLERK, SUPREME COURT
By Deputy Clerk

CHARLIE BROWN, JR.,

Petitioner,

vs.

CASE NO. 73,590

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

THIS COURT SHOULD DISALLOW THE USE OF "DISREGARD FOR LAW", "CONTEMPT FOR THE JUDICIAL SYSTEM", AND SIMILAR CONCEPTS AS GROUNDS FOR DEPARTURE FROM THE SENTENCING GUIDELINES OF RULE 3.701, FLORIDA RULES OF CRIMINAL PROCEDURE.

The State's Answer Brief takes issue with very few of the points raised by Petitioner. The State makes a highly significant admission that ". . . every criminal defendant has a lack of regard and contempt for the judiciary, . . ." (State's Brief, p. 7). In short, should this Court approve the disregard-contempt ground, appellate courts can probably expect to review numerous "boiler-plate" trial court orders advancing it. Yet in its response the State really goes on to concede further what Petitioner has been arguing all along: the disregard-contempt ground is too vague and overbroad to have an independent existence. It must, in each and every case, be bolstered by separate and tangible factors like evidence of continuous and persistent patterns of criminal activity (especially after recent release from incarceration or supervision), failure to abide by conditions of a bond, or some of the other specific elements this Court has painstakenly scrutinized since the enactment of sentencing guidelines.

By its manner of argument, the State stops just short of admitting that the disregard-contempt ground is at best,

superfluous. But what the State dares not to confess is that the continued life of the disregard-contempt ground will perpetuate confusion among both the DCA's and trial courts. Many more hours of judicial labor will be expended as appellate courts, including this one, continue to examine, on a case-by-case basis, trial court orders using that nebulous label.

The State asserted that Petitioner claimed "better-reasoned" decisions supported his position. (SB **4)** Petitioner himself never used that phrase; on the contrary, he forthrightly stated in his Initial Brief (IB) at page 7, that his research had discovered no dedicated analysis of the validity per = of the disregard-contempt ground. Petitioner does contend the cases supporting his position reached a better result, and he wrote 15½ pages explaining why. About one-half of that space was devoted to an analysis of the evolution of the case law. Nowhere does the State contend that Petitioner mischaracterized either the particulars of the cases nor the general trend of the law, The other half of the expository portion set out both legal reasons and public policy considerations disfavoring the continuation of the disregard-contempt ground.

The State cites to only one case (besides the instant DCA opinion here on review), Williams v. State, **484** So.2d 71 (Fla. 1st DCA **1986)** approved **504 So.2d** 392 (Fla. **1988),** by way of argument on the actual point on review before this Court. Even there

the attack is only in the form of an analogy. Moreover, even that comparison lends credence to Petitioner's contention that trial courts are far better suited at citing, and appellate courts are better at reviewing, objective factors like frequent contacts with the criminal justice system or timing between releases, as opposed to a defendant's attitude or state of mind.

What the State really seems to be saying in its Answer Brief is that the District Court did the right thing (upholding Brown's sentences) for the wrong reason (as it cited to contempt-disregard). It implies the courts could have and should have used recent release from prison, timing of the offense, and violations of conditions of bond to justify these sentences. Although that argument supports the object of the State (keeping Brown under a sentence ten times longer than that presumed by the guidelines), it just as surely has the other deleterious effect of perpetuating imprecision and confusion in the jurisprudence of this state regarding sentencing guidelines.

Surely this Court--especially in cases of inter-district conflict--must have as its mission and goal the bringing of order out of chaos. The State offers no general rule designed to impose discipline on this divisive area of the law. It urges only that this Court go behind each disregard-contempt finding to determine if it is supported by factors like recent release from prison, etc.

The Petitioner's purposed solution is simple: this Court should strike down the disregard-contempt ground as overly broad and subjective. But in appropriate cases, where conventional factors like continuing and persistent criminal behavior are present, the State can still ask for, and trial courts can still impose, an upward departure. Likewise, appellate courts can still measure those departures against the body of case law which has already defined those objective factors. By this means, appellate courts will no longer be tasked with preventing forays by trial courts into etherial evaluations of defendants' psyches.

Petitioner once more reminds this Court it is being asked to validate a departure ground the State itself did not bother to defend before the District Court. (See Appendix to Initial Brief, containing the State's DCA Answer Brief.) In further desperation, the State now urges this Court, in the interest of "judicial economy" (SB 7) to go back into the trial court order so as to rescue this case on the basis of other grounds advanced by the trial court.

The State first advances, as did the trial court, a ground summarized as "disregard for the safety of bystander. (R 60) Specifically, the Defendant purportedly threatened "the safety of innocent bystanders by pointing a firearm at patrons of the bank which was being robbed and by threatening them with great bodily

harm." (R 60) The State glibly asserts that this finding is "factually supported by the record" (SB 7) at pages 30 through 37 of the transcript. This is false. The conscientious reader will search the record in vain for any testimony that there were any customers in the bank at the time of the robbery. And even if there were, there is absolutely no testimony that Brown pointed a firearm at them, nor that he threatened them with great bodily harm. In his Initial Brief before the First District, Brown made this exact attack on this same ground; the State did not try to refute it in its Answer Brief. The State cites Scurry v. State, 489 So.2d 25 (Fla. 1986) in support. Ironically, this Court recognized the validity of that purported ground but found it unsupported by the record in that case.

Finally, the State urges this Court again to retreat back into the trial court's second ground, summarized as recent release from prison. Again, this basis could have been validated by the appellate decision, but was purposely bypassed. This was true even though the recent-release ground was the only one briefed by the State before the DCA. In his Initial Brief on the merits before this Court, Petitioner explained (pages 29-30) why this particular ground is problematical.

In sentencing guideline cases this Court has sometimes looked to the statutory and case law of the State of Minnesota. (See e.g., Hendrix v. State, 475 So.2d 1218 [Fla. 1985] which cited

three Minnesota cases touching on the point there.) Inasmuch as Minnesota's sentencing guidelines pre-date our own, their view of a common issue can be instructive. Minnesota uses a somewhat different approach on the topic of departures from presumptive guideline sentences. Their rule, at §II. D. 103, Minnesota Sentencing Guidelines and Commentary, Minnesota Rules of Court (West Publishing Co., 1989), provides a non-exclusive list of four mitigating and nineteen aggravating factors. Trial courts are free to make and appellate courts to review, other factors. But the commontary on this section explains:

> The factors are intended to describe specific situations involving a small number of cases. The Commission rejected factors which were general in nature, and which could apply to a large number of cases, such as intoxication at the time of the offense.

Petitioner's admittedly superficial review of Minnesota case law discovered no instances where disregard-contempt or similar grounds came in for scrutiny. Likewise, the 23 specifically enumerated factors embraced nothing along those lines. But the Committee's articulated rejection of factors which are "general in nature" and "which could apply to large numbers of cases" would seem to preclude a factor like lack of regard for the law, or contempt for the judiciary. The State itself admitted that such a trait can be detected in every defendant.

Charlie Brown, Jr. received a sentence ten times that called for under the guidelines. (R 63) This lengthy sentence was

justified by the trial court's stated perceptions that he evinced "a lack of regard and a contempt for the law and the judicial system". (R 60) The trial court's inference was, by definition, a subjective process. And yet this Court has recognized, in its adoption of Rule 3.701 on September 8, 1983, that reducing the subjectivity in the sentencing process will tend to eliminate unwarranted variations in the sentences themselves. In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983) If this Court puts its stamp of approval on this First District opinion, it will be encouraging the revival of the very subjectivity it purportedly seeks to eliminate.

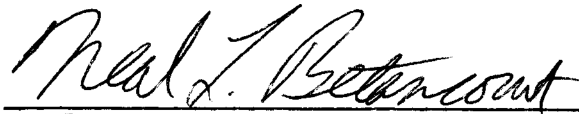
Some time ago this Court successfully quashed the "lack of remorse" ground some trial court judges were fond of finding. State v. Mischler, 488 So.2d 523 (Fla. 1986) Petitioner urges there is no material destinction between "lack of remorse" and "disregard-contempt" in terms of the type of factor each embodies: both focus in on an operation of the mind. Neither enjoys any place in Florida sentencing law.

CONCLUSION

This Court should forthrightly disallow, as a valid ground for departure from guideline sentencing, that basis known variously as "disregard for the law of society", "contempt for the criminal justice system" and all such similarly-worded grounds. Acccordingly, this Court should quash the decision of the First District Court of Appeal, Brown v. State, 535 So.2d **671** (Fla. 1st DCA **1988)**

Respectfully submitted,

ROTCHFORD & BETANCOURT, P.A.



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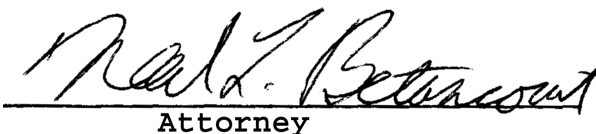
CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U. S. Mail to John M. Koenig, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, this 22nd day of June, 1989.



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