

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,209

JOSEPH D'ANGELO,
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY JURISDICTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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RULES:

Fla. R. Crim. P. 3.701(d)(11) 07

STATUTES:

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STATEMENT OF THE CASE

a. Course of Proceedings

Petitioner was the defendant in the trial court, and appellant in the appellate court, and respondent was the prosecution in the lower court, and appellee in the appellate court. The parties will be referred to as they appear in this court or interchangeably as "Mr. D'Angelo" and the "state." The symbol "R" will be used to refer to pages in the record on appeal. The symbol "SR" will be used to refer to pages in the supplemental record. The symbol "App" will be used to refer to the appendix.

The state charged petitioner by information with trafficking in cocaine in excess of 400 grams. (R.34). Petitioner entered a plea of not guilty and requested a jury trial. On February 24, 1987, a jury was sworn to try the case. On February 25, 1987, a mistrial was declared. (R.147). The case was tried to a second jury, which found Mr. D'Angelo guilty as charged. (R.218). The trial court adjudged Mr. D'Angelo guilty and deferred imposition of sentence pending the state's motion to aggravate sentence. (R.219). On January 13, 1988, the trial court sentenced petitioner to 30 years imprisonment, the maximum allowable under law. (R.225-226). Petitioner timely filed his notice of appeal to the Fourth District Court of Appeal on February 12, 1988. (R.227). The Fourth District Court of Appeal affirmed Mr. D'Angelo's conviction but reversed his sentence and remanded the cause back to the trial court for resentencing. (App.3).

Mr. D'Angelo filed a motion for rehearing and for rehearing en banc. The Fourth District Court of Appeal denied both motions.

Mr. D'Angelo then filed a petition to invoke this Court's discretionary jurisdiction. This Court accepted jurisdiction and this brief on the merits follows.

b. Statement of the Facts

Mr. D'Angelo was arrested on March 10, 1986, along with Guisepe Ardizzola, Terry Fillipelli and Ivan Betancur and charged with trafficking in cocaine in excess of 400 grams and conspiracy to traffic in cocaine.

On February 24, 1987, a jury was sworn to try the case of State of Florida vs. Joseph D'Angelo and Ivan Betancur.

On June 5, 1987, Mr. D'Angelo filed a motion for dismissal based on double jeopardy grounds. (R.155-165).

On June 16, 1987, the trial court held a hearing on Mr. D'Angelo's motion for dismissal. At the conclusion of the hearing, the trial court denied petitioner's motion. (R.216). A written order denying petitioner's motion for dismissal was filed on August 11, 1987. (R.216).

On November 13, 1987, Mr. D'Angelo was convicted by a jury of the two crimes charged against him by Information. (R.218). Judgment was entered against petitioner, and sentencing was deferred until January 13, 1988. (R.219). A presentence investigation report was ordered by the trial court.

Prior to the sentencing hearing, the state filed a motion to

aggravate Mr. D'Angelo's sentence beyond the minimum-mandatory penalty of fifteen years to the maximum allowable under law, thirty years. (R.220-221). The state's motion to aggravate was based on two reasons: 1) the quantity of drugs involved; and 2) the conclusion that the transaction was executed in a well-organized, professional manner. (R.220-221). The petitioner filed a response objecting to both grounds. (R.220-221). The presentence investigation report recommended that Mr. D'Angelo be sentenced to fifteen years. (SR.14).

At the sentencing hearing, no evidence was presented. (R.1-33). The trial court orally announced Mr. D'Angelo's sentence of thirty years and \$250,000.00 for each count, to run concurrent. (R.30).¹

With respect to the trial court's finding that the transaction was done in a well organized, professional manner, the court stated:

The Court herein departs from the sentencing guidelines and makes the following cogent reasons: One, it is not a simple, sloppy on-the-street transaction in a bar or on the street. Many have come before this Court in that regard involving one, two or three people, or one or two people. I have seen more sophisticated, greater plans of trafficking in cocaine. However, I would say this of these four peoples: In the manner in which it was involved it is sufficient within the departure from the sentencing guidelines that it was well-organized and done in a professional manner, and I so find that to be true and it's a reason for departure.

The execution was well done in a professional manner. It could have been done better I would think, but it was

¹At the sentencing hearing, the trial court concluded that the defendant's fine totalled \$500,000.00. (R.31). The written sentence indicates the trial court corrected the amount of the fine. (R.225-226).

still done in a professional manner. It was well-organized between the four of them: Who brought it, who drove, who watched, the middle man: how it was done. It appeared to be running smoothly. The only problem was they ran into a law enforcement officer, confidential informant, or undercover police officer. Other than that it would have went very smoothly and in a professional manner. So I find that as a reason for departure. (R.26-27).

Approximately five weeks after the sentencing hearing the trial court issued its "Order to Aggravate Sentence." (R.228). In this order, the trial court delineated the two reasons it announced at the sentencing hearing and added a third reason, stating:

"(3) The effects of distrubuting (sic) five thousand (5,000) grams of cocaine create's (sic) dangerous societal and communital results for numerous unknown and unseen victims." (R.228).

On appeal, the Fourth District Court of Appeal affirmed Mr. D'Angelo's conviction but reversed the sentence and remanded the cause back to the trial court. In so doing, the Fourth District stated:

"The departure sentence imposed was based upon three grounds, two of which were invalid, i.e., the quantity of drugs involved, Pastor v. State, 521 So.2d 1079 (Fla. 1988), and the effect of the distribution of large amounts of drugs on society, Platt v. State, 515 So.2d 1068 (Fla. 4th DCA 1987). The third ground, that the crime was committed in a well organized and professional manner, is a valid reason for departure, Young v. State, 502 So.2d 1347 (Fla. 2d DCA 1987)." (App.1-2)

Mr. D'Angelo then filed a motion for rehearing and for rehearing en banc, based on a conflict between the district court's opinion and Fletcher v. State, 508 So.2d 506 (Fla. 4th DCA 1987, and State v. Fletcher, 530 So.2d 296 (Fla. 1988). The district court denied the motions. (App.3).

ISSUE PRESENTED FOR REVIEW

- I. WHETHER THE EXECUTION OF A CRIME IN A WELL ORGANIZED AND PROFESSIONAL MANNER IS A VALID REASON FOR DEPARTURE WHERE THE CRIME COMMITTED WAS TRAFFICKING AND CONSPIRACY TO TRAFFIC IN COCAINE.

SUMMARY OF ARGUMENT

The appellate court's opinion holding that the commission of the crime in a well organized and professional manner is a valid basis for departure should be quashed because said reason is an inherent component of the crimes of trafficking and conspiracy to traffic in cocaine, State v. Fletcher, 530 So.2d 296 (Fla. 1988), Collins v. State, 535 So.2d 661 (Fla. 3d DCA 1988) and Rivera v. State, 14 F.L.W. 1268 (Fla. 3d DCA June 2, 1989), and because it is unsupported by the record. State v. Jones, 530 So.2d 53 (Fla. 1988); State v. Mischler, 488 So.2d 523 (Fla. 1986).

The trial court imposed a departure sentence because inter alia, the defendant and his co-defendants conducted a well organized, well planned scheme to consummate the crime. (R.228). The district court below upheld this reason and added that the crime was committed in a "professional manner." (App.2). Both the district court and the trial court commingled the "well-organized, well planned" and "professional manner" language into one reason. This, however, is an invalid reason pursuant to State v. Fletcher, 530 So.2d 296 (Fla. 1988).

ARGUMENT

- I. THE EXECUTION OF A CRIME IN A WELL ORGANIZED AND PROFESSIONAL MANNER IS NOT A VALID REASON FOR DEPARTURE WHERE THE CRIME COMMITTED WAS TRAFFICKING AND CONSPIRACY TO TRAFFIC IN COCAINE.

The district court held that the fact that the crime was committed in a well organized and professional manner is a valid reason for departure. (App.2). D'Angelo v. State, 541 So.2d 706 (Fla. 4th DCA 1989).

The second reason in the trial court's order aggravating sentence was that the defendant and his co-defendants conducted a well organized and well planned scheme to consummate the crimes of trafficking and conspiracy to traffic in cocaine. (R.228).

Before a trial court can depart from a sentence within the guideline range, it must find and enuciate a clear and convincing reason. Fla. R. Crim. P. 3.701(d)(11).

"'Clear and convincing reasons' require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted." State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The Supreme Court's definition of clear and convincing reasons was predicated on Judge Dell's definition of "clear and convincing evidence" in Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983):

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly

remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitancy, as to the truth of the allegation sought to be established.

A departure reason may be appropriate in the abstract, but the facts of a particular case must establish the reason beyond a reasonable doubt. State v. Jones, 530 So.2d 53 (Fla. 1988); see also State v. Mischler, 488 So.2d 523, 526-27 (Fla. 1986)(Ehrlich, J., specially concurring). There is nothing in the record that would enable the state to prove beyond a reasonable doubt that petitioner committed the crimes for which he was convicted in a well organized, professional manner. Moreover, the departure reason at issue here is not a valid basis in the abstract for departing from the sentencing guidelines.

A review of the sentencing transcript indicates that the trial court intended that the execution of the crime in a well organized and professional manner to be one departure reason. (R.26-27). The district court also commingled the "well organized" and "professional manner" language into one reason. (App.2). D'Angelo v. State, 541 So.2d 706 (Fla. 4th DCA 1989). The record in general and the sentencing transcript in particular compel the conclusion that the trial court was concerned with the organizational and planning aspect of the crime. (R.26-27). This is confirmed by the trial court in its written order to aggravate where it concluded that "[e]ach co-defendant had a role to play to ensure the success of the delivery." (R.228). The term

"professional manner" as used by the trial court at the sentencing hearing and as used by the district court in its opinion is part and parcel of the one departure reason at issue here (i.e. the word "and" placed between the "well organized" and "professional manner" language in both the trial court's recitation of its reason for departing from the guidelines at the sentencing hearing, R.26-27, and in the district court's opinion, is used in the conjunctive and not in the disjunctive).

The above analysis is consistent with the case law. The case of Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984), appears to be the progenitor of the professional manner language. In Dickey, the trial court stated the following as one of its written reasons for departure: "[The] manner in which crime was committed shows absolute premeditation. Was done in manner to indicate a 'pro.'" Id. at 1158. The First District Court of Appeal held, based on that reason, that "the trial court's consideration of Dickey's 'professional manner' in committing the crime is proper." Id. at 1159.

In Young v. State, 502 So.2d 1347 (Fla. 2d DCA 1987), one of the departure reasons listed by the trial court was that "the crime was part of a professional, well-organized scheme of criminal activity." Young, 502 So.2d at 1348. In affirming this aspect of Young's sentence, the Second District stated: "The trial court's second reason for departure appears to be valid. The professional manner in which a crime is committed has been found to be a valid reason for departure." The Young court cited

to Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984) as support for its holding. The Young court's reliance on Dickey is clear indication that "well organized, professional manner" is to be viewed as one reason for departure. Moreover, the Young court's reliance on Dickey is misplaced. The departure reason at issue in Dickey was that the crime "was done in a manner to indicate a pro." In other words, the crime proved that Dickey was a professional thief. That is no different than stating that Dickey's status as a professional thief was the reason given by the trial court for its departure sentence. However, the Young court itself held that a defendant's status as a professional drug dealer is not a valid basis for departure since it is an inherent component of the crime of trafficking in drugs. Young v. State, 502 So.2d 1347, 1348 (Fla. 2d DCA 1987); see Rivera v. State, 14 F.L.W. 1268 (Fla. 3d DCA June 2, 1989); Banks v. State, 509 So.2d 1320 (Fla. 5th DCA 1987); see also Pastor v. State, 498 So.2d 962 (Fla. 4th DCA 1986), reversed on other grounds, 521 So.2d 1079 (Fla. 1988)(defendant's status as a middleman drug dealer is an inherent component of the crime of drug trafficking and thus is not a valid basis for departure).

In Fletcher v. State, 508 So.2d 506 (Fla. 4th DCA 1987), one of the reasons used by the trial court for departing from the recommended guidelines sentence was the following: "The defendant planned and calculated the crime with sophistication and well organized premeditation including 'months of plotting and scheming'." Fletcher, 508 So.2d at 507. The Fourth District

held that this reason was not a valid reason for departure, but certified the issue to this Court.

In State v. Fletcher, 530 So.2d 296 (Fla. 1988), this Court answered the certified question and held that the fact that a person plans and calculates a drug trafficking offense is not a valid basis for departure as "all large drug trafficking cases, not to mention those involving a conspiracy, would 'inherently' involve calculated premeditation and planning."

Fletcher, then, implicitly overrules Dickey. More importantly, Fletcher is directly on point with the instant case and compels the conclusion that the one departure reason upheld by the district court is not a clear and convincing reason, i.e. in the abstract, it is not an appropriate reason for departure for the particular crime. The district court's opinion should be quashed and the trial court should be directed to resentence Mr. D'Angelo to a minimum-mandatory term of fifteen years.

Further, the analysis in Fletcher, vis-a-vis the holding in Dickey, should foreclose the possibility apparently left open by this Court in Downing v. State, 536 So.2d 189, 193 (Fla. 1988), that is, whether the execution of a crime in a professional manner could be a valid reason for departure. Downing, 536 So.2d at 193.

The Attorney General's office, at least in the Third District, State of Florida, agrees that executing the crime of drug trafficking in a professional manner is not a valid reason for a departure sentence. Collins v. State, 535 So.2d 661 (Fla.

3d DCA 1988); Rivera v. State, 14 F.L.W. 1268 (Fla. 3d DCA June 2, 1989).

In Collins, supra, the trial court imposed a twenty-one year sentence for two judgments of conviction for trafficking in cocaine and possession of cannabis. The second written reason given by the trial court for departing from the sentencing guidelines was:

"(2) Executing the crimes in a professional manner. See Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984). The packaging, use of small envelopes, locked trunk support a conclusion of professional execution."

Collins, 535 So.2d at 662.

In remanding the cause back to the trial court for resentencing within the guidelines, the Third District Court of Appeal held:

"The second reason, stated above, is not a clear and convincing reason for departing from the sentencing guidelines because the stated reason is an inherent component of the crime of trafficking in cocaine. Indeed, the state concedes that this was an invalid reason for the subject departure."

Collins, 535 So.2d at 663.

The holding in Collins is wholly consistent with State v. Fletcher, 530 So.2d 296 (Fla. 1988). In Fletcher, this Court rejected the state's argument that an "inherent component of the crime" should be defined as those facts which are essential to prove a statutory element of the crime. Fletcher, 530 So.2d at 297. This Court held that an "inherent component of the crime" includes factors or characteristics which necessarily precede or follow the criminal act itself, even though not included as a

statutory element of the offense. Id. at 297.

This Court has recognized that Florida's drug trafficking statute, Section 893.135, "was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-**organizer** down to the 'pusher' on the street." State v. Benitez, 395 So.2d 514, 517 (Fla. 1981)(emphasis added).

The packaging and use of small envelopes in Collins evinces the sophistication and well organized premeditation that this Court in Fletcher held to be an invalid reason for departure. Similarly, the well organized and professional manner in which the trial court in the instant case concluded that petitioner committed the crimes of trafficking and conspiracy to traffic in drugs fits squarely into the "inherent component of the crime" language of Fletcher and the ambit of activities embraced by the drug trafficking statute as defined by Benitez. The district court's holding that the crime was committed in a well organized and professional manner is a valid reason for departure should be quashed as the stated reason is an inherent component of the crimes of trafficking and conspiracy to traffic in cocaine.

CONCLUSION

Based on the foregoing, the petitioner, Joseph D'Angelo, respectfully requests this Court to quash the opinion of the Fourth District Court of Appeals in D'Angelo v. State, 541 So.2d 706 (Fla. 4th DCA 1989), with respect to the departure reason at issue here and remand the cause to the trial court to impose the minimum mandatory sentence of fifteen years.

Respectfully submitted,

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BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7 day of October, 1989, to Celia Terenzio, Esq., Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.


DANIEL S. CARUSI