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IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,209

JOSEPH D'ANGELO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

FILED
DEC 21 1982
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ON DISCRETIONARY JURISDICTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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REBUTTAL ARGUMENT

The respondent argues: 1) that petitioner is precluded from arguing that the record on appeal does not support the trial court's finding that the crime of trafficking and conspiracy to traffic in cocaine was committed in a well organized, professional manner because petitioner did not include the trial transcript in the record, and; 2) that the departure reason upheld by the district court is a valid reason, despite this Court's holding in State v. Fletcher, 530 So.2d 296 (Fla. 1988).

With respect to respondent's first argument, petitioner states that what is crucial to a trial court's determination of a departure reason is the court's analysis at the time of the sentencing hearing. The transcript of the sentencing hearing is part of the record on appeal in the instant case. At the sentencing hearing, the trial court failed to follow the mandate of State v. Mischler, 488 So.2d 523, 525 (Fla. 1986) that the evidence supporting a departure reason "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."

The respondent recites in full in its answer brief the trial court's support for the departure reason at issue here. (Answer brief 7-8) (R. 26-27). The lack of conviction in the trial court's recitation of facts is evident and does not meet the

standard of Mischler.¹

The respondent's second argument addresses the validity of the instant departure reason in light of State v. Fletcher, 530 So.2d 296 (Fla. 1988). The respondent argues that Fletcher is not controlling because the trial court's departure reason, "professional manner", is distinguishable from the "premeditation and planning" language of Fletcher. The respondent's argument necessarily assumes the conclusion that the trial court departed because the crime was committed in a "professional manner" but **not** because it was "well organized." This, as the record makes abundantly clear, is simply not so. In furtherance of the respondent's untenable position, the state argues incorrectly that this Court, in Downing v. State, 536 So.2d 189 (Fla. 1989), left unsettled whether professional manner **and** well organization could be a valid reason for departure. Although this Court in Downing did mention "professional manner" in dicta, the issue of its validity was neither before the Court nor answered by it. See Downing at 193. The respondent desperately seeks to distinguish the subject departure reason from Fletcher. The respondent evades the fact that progenitor of the "professional manner" language, Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984), was predicated on the following factual finding: "[The] manner in which crime was committed shows absolute premeditation." Id. at 1158. The Fletcher case controls the use

¹The trial court stated: "I have seen more sophisticated, greater plans of trafficking" and "[the execution] could have been done better I would think". (R. 26-27).

of the "professional manner" language as it has evolved through Florida case law.

More importantly, the trial court in the instant case departed because of its conclusion that: "2. The Defendant and his co-defendants conducted a well organized, well planned scheme to consummate the delivery of five kilograms of cocaine in this case. Each co-defendant had a role to play to ensure the success of the delivery." (R. 228). The trial court, in its written order of departure, did not mention "professional manner."

The respondent further argues that the subject departure reason should be upheld because "the premeditation and planning in Fletcher involved months of plotting and scheming whereas, in the case at bar, the record demonstrates that the trial judge was primarily concerned with the sophisticated manner in which the drug transaction was executed..." The words the trial court used cannot be changed. The trial court imposed a thirty-year departure sentence because it concluded that the suspects conducted a "well organized, well planned scheme." (R. 228). Thus, the respondent's attempted distinction has no relevance to the issue before this Court. Indeed, the facts of Fletcher are even more egregious than those of the instant case. There is no claim here that the planning involved "months of plotting and scheming" as it did in Fletcher.

Despite the apparent controlling holding of State v. Fletcher, 530 So.2d 296 (Fla. 1988), the respondent concludes that the departure reason at issue here is valid because it is

not essential to prove a statutory element of the crime of drug trafficking, and because although all large drug trafficking cases inherently involve premeditation and planning, they do not all inherently entail execution in a professional and sophisticated manner. (Answer brief 8). Again, this Court's holding in Fletcher compels the opposite conclusion. This Court rejected the same argument in Fletcher wherein the 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 247. Moreover, the departure reason under review in Fletcher was the sophisticated\and well organized manner in which the crime of trafficking and conspiracy to traffick in drugs was committed. Fletcher v. State, 508 So.2d 506, 507 (Fla. 4th DCA 1987). Thus, this Court has already rejected the arguments made by respondent in the case herein.

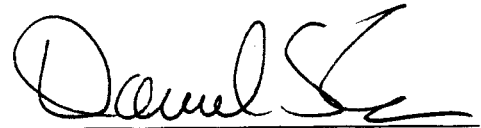
Respectfully submitted,

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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 18 day of December, 1989, to John M. Koenig, Jr., Esq., Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

A handwritten signature in cursive script, appearing to read "Daniel S. Carusi", written over a horizontal line.

DANIEL S. CARUSI