

0. a. 1-9-90

IN THE SUPREME COURT OF FLORIDA

DEC 23 1989

AIDA HERNANDEZ,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 74,210

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE BASED ON THE "PROFESSIONAL" MANNER IN WHICH THE CRIME WAS COMMITTED.

Respondent argues initially that Ms. Hernandez acted "professionally" when she committed the instant crime. But the circumstances Respondent relies on to demonstrate Ms. Hernandez' "professionalism" establish no more than that she was capable of taking orders. There is nothing in the State's recitation of facts surrounding the instant offense which suggests that Ms. Hernandez took any active part in planning the instant crime, or indeed that she did anything other than act as the transport for the drugs at the direction of others, notably Jimmy Killings. She did not initiate the use of the name "Connie": it was Killings who first so addressed her (R177). Nor was there any proof that this was not a legitimate street name or nickname for Ms. Hernandez. The fact that Ms. Hernandez did not directly refer to drugs on the telephone may have been evidence of prudence--which again could well have been at the direction of Jimmy Killings himself, who was careful enough to change his telephone number often--but did not in and of itself support a finding that Ms. Hernandez acted professionally. Certainly, the entire procedure of going inside the garage to make a drug transfer was evidently a standard practice for Jimmy Killings, regardless of who the particular source was on any specific occasion (R344). Ms. Hernandez' compliance with this practice not original or peculiar to her again suggests no more than that she, along with others, did what she was told. This is

not the behavior of a professional, but of a flunky.

If there is any distinction between the "professional" commission of a crime such as drug trafficking and premeditating and planning it, but see, Argument, infra, then it must apply only to those who are the source of the professionalism, and not to those who merely go along with what they are told. Otherwise, a trial judge's finding that a drug transaction was professionally accomplished would become a blank check to impose departure sentences against anyone involved in the deal. From the lowliest mule to the kingpin of the operation, all would be equally subject to a guidelines departure sentence. Such blanket treatment of individuals whose personal circumstances and involvement are quite different is just what the sentencing guidelines were designed to eliminate, and cannot be countenanced.

In arguing that the professional manner in which an offense of drug trafficking is committed is a valid reason for departure, Respondent relies largely on history, that is, that district courts of appeal have upheld this reason in the past. But, in the evolving area of law inspired by the sentencing guidelines, history is not always the best predictor of the correct result. Moreover, of the recent cases cited by Respondent, Rodrique v. State, 533 So.2d 931 (Fla. 1st DCA 1988) is not apposite, since the decision in that case does not mention what crimes the defendant was convicted for. Nor is it clear that the precise argument herein raised was before the district court of appeal in Krebs v. State, 534 So.2d 1236 (Fla. 5th DCA 1988). And both D'Angelo v. State, 541 So.2d 706 (Fla. 4th DCA 1989) (S.Ct. Case No. 74,209) and

Hernandez v. State, 540 So.2d 881 (Fla. 4th DCA 1989) (this case) are presently pending before this Court. Respondent's citation of previous cases which have held that committing a crime in a professional manner is a valid reason for departing from a guidelines sentence thus presents an unconvincing basis for its argument that professionalism should continue to be upheld as a valid reason for departure, despite the intervening decision of this Court in State v. Fletcher, 530 So.2d 296 (Fla. 1988).

On the other hand, examination of the rationale underlying those cases which have upheld professionalism as a reason for departing from the guidelines strongly suggests that Fletcher-type premeditation and committing a crime in a professional manner have been viewed as one and the same. Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984) is the seminal decision on this issue, and is the one cited by this Court in Downing v. State, 536 So.2d 189, 193 (Fla. 1988) as support for the arguable propriety of this reason for departure. In Dickey, the district court of appeal upheld the trial judge's basis for departure that the "manner in which the crime was committed shows absolute premeditation. Was done in manner to indicate a 'pro.'" Id. at 1159. Thus, in Dickey, it was the very fact that the crime was well-planned and thought out beforehand which demonstrated that it was executed in a professional manner and not on the spur of the moment or haphazardly.

Those other cases which state the facts on which the finding of professionalism was based¹ similarly demonstrate that it is the fact of prior planning which makes the crime "professional." For instance, in Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986), the defendant was found to be a professional drug dealer who committed his crime, possession of cocaine with intent to sell or deliver, in a professional manner because he hid the drugs in a secret compartment inside his car. Obviously, the forethought necessary to manufacture such a hiding place and so commit a crime "professionally" constituted premeditation and planning, the very factor which this Court rejected as a valid departure reason in Fletcher.²

Again, in Gray v. State, 522 So.2d 91 (Fla. 1st DCA 1988), the district court of appeal found the defendant's use of a disguise to commit an armed robbery to demonstrate his professionalism, even though the court conceded that he "proved not to be a very skilled criminal" since he was caught soon after the crime in possession of both the weapon he used to commit and the

¹The vast majority of prior decisions which uphold a finding of professionalism as a basis for a guidelines departure do so with no more than a citation to Dickey v. State, *supra*, or one of its progeny to support the validity of the reason. E.g., Krebs v. State, 534 So.2d 1236 (Fla. 5th DCA 1988); Rodrique v. State, 533 So.2d 931 (Fla. 1st DCA 1988); Martin v. State, 523 So.2d 1226 (Fla. 1st DCA 1988); Young v. State, 502 So.2d 1347 (Fla. 2nd DCA 1987); Brown v. State, 480 So.2d 225 (Fla. 5th DCA 1985).

²Mullen also demonstrates the fallacy of the State's historical argument, since it upholds as valid grounds for the departure sentence the defendant's status as a professional drug dealer drug dealer, rejected in Young v. State, 502 So.2d 1347, 1348 (Fla. 2nd DCA 1987); *see also*, Banks v. State, 509 So.2d 1320, 1322 (Fla. 5th DCA 1987), and the amount of drugs involved, rejected by this Court in Atwaters v. State, 519 So.2d 611 (Fla. 1988).

disguise which was supposed to hide his identity. Gray clearly demonstrates that "professionalism" in the sentencing guidelines context does not imply any special skill or expertise, but merely the fact that a crime has been thought about beforehand and its commission planned. See also, Young v. State, 502 So.2d 1347 (Fla. 1987), where, as Judge Schoonover pointed out in dissent, the defendant was a Jamaican woman with a third grade education and two children who was found to have committed a "professional" crime because she or someone else did a sophisticated job in packaging the drugs she brought to Florida.

Hoyte v. State, 518 So.2d 975 (Fla. 2nd DCA 1988) demonstrates a second fallacy of the attempt to separate professionalism from other, invalid reasons for departing from the guidelines sentence. In Hoyte, twenty-one pounds of marijuana were wrapped in brown paper, covered in carbon paper and sealed in a solid fiberglass container, together with some fragrance, which was presumably intended to mask the aroma of the drugs. This was "sophisticated" packaging, which to the trial court demonstrated that "this is not some personal use or penny ante situation. It's a professional job." Id. at 976. The district court of appeal agreed, finding that the special packaging and the amount of drugs involved "definitely indicates that the marijuana was brought into the United States for more than personal consumption," id., and upheld the validity of the departure reason that the crime was committed in a professional manner.

Hoyte thus exemplifies the close relationship between "professionalism" in a drug trafficking case and the fact that, "Nearly

every person convicted of trafficking in [drugs] in the amount present in this case could be considered a professional drug dealer." Young v. State, supra. It is in the very nature of drug trafficking that the crime is committed for profit, not to facilitate personal consumption of the drugs. As every drug trafficker is a professional, so every drug trafficking case is, in some way or another, committed in a professional manner. See, Young v. State, supra, Judge Schoonover dissenting.

A reason for departing from the guidelines sentence in a given case which is inherent in the crime for which sentence is being imposed cannot be valid, for it would allow departure, in the trial court's discretion, in every case where that crime is committed, contrary to the spirit and the letter of the guidelines. State v. Mischler, 488 So.2d 523 (Fla. 1986). In State v. Fletcher, 530 So.2d 296, 297 (Fla. 1989), this Court explained that an inherent component of a crime is not limited to its statutory elements, since this would render it redundant with the prohibition against departing on the basis of factors already taken into consideration (i.e., the statutory elements of the crime) in calculating the guidelines score. Rather, an inherent component of a crime is a factor or circumstances which "necessarily precedes or follows the criminal act itself, even though not included as a statutory element of the offense." Id.

Because Fletcher recognized that "all large drug trafficking cases, not to mention those involving a conspiracy, would 'inherently' involve calculated premeditation and planning," these factors cannot be valid reasons to depart from the guidelines sentence in

such a case. Since drug trafficking is also necessarily a crime committed by "professional" drug dealers who plan and premeditate their offense, the necessary result of that planning, that the crime is committed in a professional manner, is likewise an inherent component of the crime which cannot be considered a valid reason for a guidelines departure.

This natural interpretation of Fletcher has, contrary to Respondent's argument, been expressly accepted by the Third District Court of Appeal in Collins v. State, 535 So.2d 661 (Fla. 3rd DCA 1988). The pertinent reason given for the departure³ in Collins was:

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 professionalism.

Id. at 662. In order to avoid confusion, Ms. Hernandez sets forth the entire holding of the district court of appeal in relation to this issue:

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. [Citations omitted.]

Id. at 663. There can be no doubt as to what Collins says, and it is not, as the State wishes, that its decision was predicated on the particular facts before it.

³A second reason, that the defendant's flight created a great risk of harm to pursuing police officers and other individuals in the area, was rejected as unsupported by the evidence. Id.

In Downing v. State, 536 So.2d 189, 193 (Fla. 1988), this Court did not rule out the possibility that committing a crime in professional manner, a la Dickey, supra, could be a valid reason for departure. It did not have to, since in that case it found that the reason was not adequately supported by the evidence. Although Ms. Hernandez strongly argues that her case is in the same posture, she also urges this Court to take the opportunity presented by this case and make express what Fletcher and Downing leave open: that committing the crime of drug trafficking in a professional manner is not a valid reason for departing from the recommended guidelines sentence, as it is an inherent component of that offense.

POINT II

THE TRIAL COURT ERRED IN DENYING MS. HERNANDEZ'S MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL WIRETAP ORDER.


Respondent appears to be operating under a misconception of what is required in order to incorporate one document by reference into another. Merely stating, as the instant application for a wiretap order does, that an "original order for wire intercept was obtained" previously and requesting that "an amended order" be entered does not suffice. Rather, incorporation by reference of a prior pleading or exhibit is accomplished where the prior document is attached to the more recent pleading and is made a part of it by specific reference. McClurkin v. Parrish Volvo, Inc., 317 So.2d 85 (Fla. 1st DCA 1975) [exhibit attached to complaint which contained allegation that plaintiff had experienced " the problems listed in plaintiff's attorney's notice of breach of warranties letter... a copy of which is attached hereto and marked Plaintiff's Exhibit B"]. The reference must be so plain and explicit as to leave no reasonable doubt as to its meaning. A. Morellaro & Co. v. Atlantic Coast Line R. Co., 91 Fla. 230, 107 So. 528 (1926). The purpose of allowing incorporation by reference is to give sufficient notice to the opposing party without unduly burdening the moving party. See generally, Fla. Jur.2d, Pleadings ss. 47-49.

The so-called incorporation of the prior application upon which the State now relies in the present case is patently and woefully inadequate to effect the State's purpose. Consequently, the doctrine of incorporation by reference cannot serve to avoid

the reversal of the Fourth District Court of Appeal's decision upholding the trial court's denial of Ms. Hernandez's motion to suppress the evidence against her in the instant case.

Respectfully Submitted,

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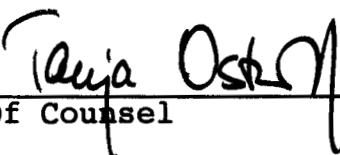


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JAMES CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 21st day of December, 1989.



Of Counsel