OA
9/7/90

IN THE SUPREME COURT OF FLORIDA

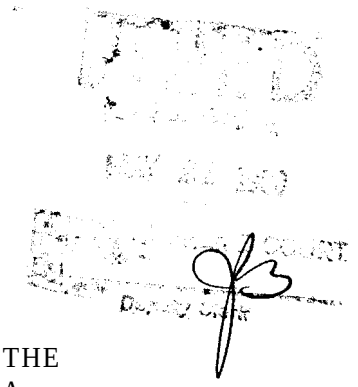
MICHAEL L. HERRIN, :

Petitioner, :

vs. : Case No. 75,523

STATE OF FLORIDA, :

Respondent. :



DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE AND FACTS

On November 18, 1989, the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, filed an information charging the Petitioner, MICHAEL LYNN HERRIN, with the purchase of cocaine within 1,000 feet of a school contrary to section 893.13, Florida Statutes (1987), which occurred on October 29, 1988 (R1). Mr. Herrin entered a guilty plea and a sentencing hearing was held on May 3, 1989 (R3-14, 18). At the hearing, Mr. Herrin testified that he had been addicted to cocaine since late 1986 (R6). At that time he was using rock cocaine every single day (R6). He sought treatment and spent three months in a rehabilitation center in Fort Lauderdale (R6-7). After his release, he managed to avoid using cocaine until October 29, 1988 (R7). On that date, Herrin testified he had been having social problems with friends which got him in a "depressed mood" (R7). He went down the road from where he lived and bought $10 worth of cocaine which he intended to use for himself before he was arrested (R7).

Subsequent to the arrest, Herrin attended N.A. meetings and enrolled in a 16-week Tri-County program (R8). The trial court found that there was evidence that Mr. Herrin had an addiction problem (R12). Although not until his arrest did Herrin attempt to use cocaine following his release from the rehabilitation program, the trial court stated this was "not uncharacteristic from what I'm seeing with crack" (R12). The court adjudicated Mr. Herrin guilty, and placed him under two years community control followed by one year probation, drug evaluation, treatment, warrantless urinalysis,

100 hours of community work, and $150 in court costs (R12-13, 15-16). Under the sentencing guidelines, Mr. Herrin scored out to 3 1/2 - 4 1/2 years incarceration (R17). In the Justification of Mitigation of Sentence, the trial court stated "the defendant suffered from substance abuse. Barbara v. State, 505 So.2d 413 (Fla. 1987). The defendant is amenable to rehabilitation, as is evidenced by his voluntary entry into drug treatment. The defendant will also complete the drug treatment program at Tri-County" (R22).

The State filed a Notice of Appeal on May 16, 1989 (R23). The Second District Court of Appeal reversed the sentence. State v. Herrin, 555 So.2d 1288 (Fla. 2d DCA 1990). The court held that for intoxication or substance abuse to justify a downward departure from the recommended guidelines sentence, the evidence must show the defendant was impaired at the time he committed the crime. The court also held that amenability to rehabilitation was not a valid departure reason. Mr. Herrin filed a motion to stay issuance of mandate pending disposition of his petition for review. This court granted the motion on February 16, 1990. Mr. Herrin filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court on January 19, 1990. This court accepted jurisdiction on April 23, 1990.

SUMMARY OF THE ARGUMENT

Mr. Herrin argues that his case conflicts with prior Florida Supreme Court and other District Court decisions as to whether drug addiction is a valid reason for downward departure from the sentencing guidelines. According to those prior decisions, evidence that a defendant suffered from drug addiction at the time of the offense is a valid reason to depart downwards. The Second District Court's opinion in Mr. Herrin's case that alcohol or drugs must have actually clouded the defendant's mind at the time of the offense in order to justify departure, constitutes a conflict with existing law. Based on prior decisions trial courts are permitted to depart downwards where a defendant would not have carried out illegal acts but for a substance abuse problem. To hold that a defendant must be under the influence of drugs at the time of the offense is illogical and arbitrary.

The evidence presented at the trial was sufficient for the trial court to determine that the Petitioner had a substance abuse problem. Findings of fact should not be disturbed by the appellate court.

Other district courts have held that amenability to rehabilitation is a valid reason for downward departure. Flexibility is necessary in an overcrowded prison system, especially for those who show a reasonable chance for rehabilitation.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN STATE V. HERRIN, 555 SO.2D 1288 (FLA. 2D DCA 1990), IS IN CONFLICT WITH FLORIDA SUPREME COURT AND DISTRICT COURT OF APPEAL OPINIONS HOLDING THAT SUBSTANCE ABUSE AND AMENABILITY TO REHABILITATION ARE VALID REASONS TO DEPART DOWNWARD FROM THE SENTENCING GUIDELINES?

Mr. Herrin was convicted and sentenced for possession of cocaine within a thousand feet of a school. In sentencing Mr. Herrin, the trial judge departed downward from the sentencing guidelines because he found that Mr. Herrin suffered from substance abuse. The trial court cited Barbera, supra, for support. Barbera simply states that intoxication or substance abuse is a clear and convincing reason for a downward departure. Id. Following Barbera, other district courts have held on numerous occasions that substance abuse or drug dependency is a valid reason to depart downward. See, e.g., State v. Fink, 557 So.2d 129 (Fla. 3d DCA 1990); State v. Winter, 549 So.2d 1170 (Fla. 4th DCA 1989); State v. Joseph, 543 So.2d 405 (Fla. 4th DCA 1989); State v. Bledsoe, 538 So.2d 94 (Fla. 3d DCA 1989); State v. Salony, 528 So.2d 404 (Fla. 3d DCA 1988), review denied, 531 So.2d 1355 (Fla. 1988); State v. Whitteg, 524 So.2d 1114 (Fla. 4th DCA 1988); State v. Francis, 524 So.2d 1172, 1173 (Fla. 4th DCA 1988); State v. Wilson, 523 So.2d 179 (Fla. 3d DCA 1988); State v. Mesa, 520 So.2d 328 (Fla. 3d DCA

1988); State V. Daughtry, 505 So.2d 537, 539 (Fla. 4th DCA 1987), review dismissed, 511 So.2d 999 (Fla. 1987).

The Second District Court of Appeal reversed Mr. Herrin's sentence holding that a defendant must demonstrate more than drug or alcohol dependency or intoxication at the time of the offense. The court held that "where competent and substantial evidence reflects that alcohol or drugs, or a combination thereof, so clouded the defendant's mind at the time that he committed the crime as to impair his judgment, but without rising to the level of incompetence or insanity, that factor may support a mitigation of the sentence." State v. Herrin, 555 So.2d at 1289. The court admitted that the "other district courts have not construed the Barbera holding as limited as we believe it should be construed." Id. Therefore, it is clear that express and direct conflict exists between this case and the line of cases following Barbera. This court should reverse the Second District's holding because it goes against a clear, established pattern of decisions.

The Second District limited Barbera's holding because it feared the sentencing guidelines would be rendered meaningless where "defendants attempt to attribute their actions to an alcohol or drug abuse problem." Id. However, this court's decision in Barbera was a recognition of the enormity of the existing drug problem facing the State of Florida. A recent U.S. Senate report estimated there are nearly 2.2 million regular cocaine users in America, with Florida ranking fifth in the nation in the number of hard-core users. Tampa Tribune, May 11, 1990, at 1A, col. 1.

Clearly, the existing prison system is not equipped to deal with the sheer numbers of those who commit crimes due to substance abuse. Therefore, the Barbera decision granting trial courts the flexibility to depart downward from the guidelines is a necessary recognition of reality.

The sentencing guidelines have not become meaningless now that trial courts may depart downward based on a defendant's drug problem. The courts still have the option to sentence defendants within the guidelines, which they regularly do and no doubt will continue to do. However, they are free to depart downwards if they determine that these defendants would not have broken the law without the craving for alcohol or drugs pushing them on. In Salony, 528 So.2d at 405, the trial court departed downwards based on the defendant's substance abuse and the Third District affirmed. Doctors determined that the defendant had an obvious and chronic substance abuse problem and but for the desire to satisfy his need, would not have committed illegal acts. Drug dependency is a treatable medical and psychological condition. Vance v. State, 475 So.2d **1362, 1363** (Fla. 5th DCA 1985) Defendants who would not have committed crimes but for their drug problem do not deserve to be treated as harshly as those who freely chose to break the law. After Barbera, the courts can now legally recognize this distinction and act on it.

In support of its holding, the Second District noted that the Barbera court presented in detail the facts of that case in its opinion. In Barbera, the Florida Supreme Court related how the

defendant "had drunk a case of beer before stabbing his victim, and his drunken state was the central factor in a defense-filed psychological report." Herrin, 555 So.2d at 1289. However, the presentation of these facts does not mean Barbera held that a defendant must actually be intoxicated at the time of the offense. The Barbera court stated "(w)e do not, however agree with the district court that intoxication or substance abuse cannot be a clear and convincing reason for a downward departure." Barbera, 505 So.2d at 413. (emphasis added). The plain meaning of this statement indicates the Barbera court created two reasons for downward departure: one being intoxication and the other substance abuse. The trial court in the present case chose to apply the second reason.

The Second DCA's holding that a defendant must have his mind clouded by alcohol or drugs when a crime is committed is illogical. It is arbitrary to distinguish between those substance abusers who are intoxicated at the time of the offense and those who are not. When a chronic substance abuse problem forces a person to do something he or she would not normally do, that person's mind is already impaired. Actual intoxication is merely a possible symptom of the true motivation. Therefore, this court should reverse Herrin, based on Barbera and the clear established pattern of decisions following Barbera.

The Second District also held that even if alcohol or drug dependency was a valid reason to depart, there was insufficient evidence to support a finding the Petitioner was a current

drug abuser. This is incorrect. Mr. Herrin testified he was using crack every day in late 1986. He voluntarily sought treatment and spent months in a rehabilitation center. He stayed clean for over a year until he broke down from social pressures and attempted to obtain some crack. After his arrest, Herrin again sought treatment for his addiction. So the trial court had Herrin's own testimony that he was addicted and the fact that he had twice voluntarily sought and undergone treatment for his illness. Though Herrin managed to avoid using crack for an extended period of time, this did not mean he no longer had a problem. The trial court stated this was "not uncharacteristic from what I'm seeing with crack." Though a cliche, it is well-settled that drug and alcohol abusers are never actually "cured" of their illness. The trial court heard Mr. Herrin's testimony firsthand and had the opportunity to observe his demeanor. Based on the evidence and his experience, the trial judge was able to find Mr. Herrin was a substance abuser, and this finding of fact should not have been disturbed by an appellate court.

The trial court also listed that Mr. Herrin was "amenable to rehabilitation" in its reason for departure. The Second District Court of Appeal held that in its view "no case in Florida" permits a downward departure for that reason. Id. However, it appears that other District Courts have permitted downward departures based on a defendant's chances for rehabilitation. See, e.g., State v. Fink, 557 So.2d 129 (Fla. 3d DCA 1990); State v. Whiddon, 554 So.2d 651 (Fla. 1st DCA 1989); State v. Lacey, 553

So.2d 778 (Fla. 4th DCA 1989); State v. Forbes, 536 So.2d 356 (Fla. 3d DCA 1988); State v. Morales, 522 So.2d 464 (Fla. 4th DCA 1988). In Fink, the trial court sentenced the defendant downward from the guidelines. The court stated that "the defendant is getting older and he will see the light one of these days, and sometimes we just have to work with some people more than others . . . and he is not violent . . . He is doing this to support a habit . . . ." Fink, 557 So.2d at 129. The Third District affirmed holding that the defendant's drug addiction and amenability to rehabilitation were proper bases for downward departure. Id. at 130. The courts have recognized the fact that there is no logical correlation between a defendant's need for medical treatment and an extended term of imprisonment in the state correctional system. Vance v. State, 475 So.2d at 1363; Youna v. State, 455 So.2d 551, 552 (Fla. 1st DCA 1984). The decisions holding that a downward departure is justified where a defendant shows a reasonable chance for rehabilitation, recognize that prison is no cure for drug dependency. This court should also recognize amenability to rehabilitation as a valid departure reason. With the overcrowded prison system unable to effectively deal with the increasing influx of drug criminals, the trial courts need the added flexibility to mitigate a sentence where a lengthy prison term is unnecessary. The Second District's ruling in Herrin should be reversed.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Petitioner respectfully asks this Honorable Court to reverse the instant decision and reinstate the trial court's original judgment and sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 16th day of May, 1990.

Respectfully submitted,

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