

IN THE SUPREME COURT OF FLORIDA

MICHAEL L. HERRIN,
Petitioner,

vs .

Case No 75,523

STATE OF FLORIDA,
Respondent.

JUL 20 1990
CLERK OF THE SUPREME COURT
TAMPA, FLORIDA
[Signature]

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

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

At no time in this Country's history has substance abuse become such a disruptive factor. Both the private and public sectors are attempting to correct the problems. There are experiments with drug testing as a condition of both pre-employment and continued employment. Health insurance premiums are sky-rocketing for benefits paid on substance abuse. Crime rates have soared and the prisons are filled to capacity. Against this background, the Florida Legislature has promulgated a law that it is a bad thing to sell drugs within 1000 feet of a school. Mr. Herrin has been convicted of purchasing narcotics within 1000 feet of a school; and, he has benefited from a downward departure because he is a drug dependent personality. There was no evidence that Mr. Herrin was in an intoxicated condition at the time of the purchase. Thus, does Barbera create a right for all substance dependent individuals to have an entitlement to downward departures under the Florida sentencing guidelines scheme?

PROLOGUE

Drug dependency is a medical/legal problem. One discipline which combates the problem is psychiatry. Historically, the following is written:

At the turn of the twentieth century, dependence on cocaine was widespread, but it declined over a period of years of about a decade after laws were passed to restrict cocaine use. In the United States, cocaine use and dependence were uncommon for the 40 years between the late 1930s and the early 1970s.

Kaplan, Harold I. and Sadock, Benjamin J. Comprehensive Textbook on Psychiatry (Williams & Wilkins. Baltimore, Maryland. 1989 ed., p. 668.)

Cocaine users are known to commit crimes to obtain money to buy cocaine, and such crimes may involve violence. In addition, cocaine can induce paranoid ideation (see below), and there are numerous reports of episodes of homicide and attempted homicide during such cocaine-induced toxic states.

Id. at p. 671

Cocaine has come full circle.

ISSUE ON APPEAL

WHETHER A CRIMINAL DEFENDANT MUST BE
REQUIRED TO DEMONSTRATE MORE THAN DRUG
OR ALCOHOL DEPENDENCY OR INTOXICATION
AT THE TIME OF THE COMMISSION OF THE
CRIME TO BE A CANDIDATE FOR A GUIDELINES
DOWNWARD DEPARTURE?

This Court is sensitive to both the "War on Drugs" being waged in both Florida and this nation. Most recently, Chief Justice Ehrlich notes in dissent that the Florida Legislature has spoken loud and clear in promulgating multiple punishments to counter crime. See, State v. McCray, 1990 WL 59663, 15 FLW S267, —So.2d— (Fla. No. 73,249) (Opinion filed May 3, 1990). This case presents an opportunity for this Court to either clarify or modify or recede **from** your holding in Barbera v. State, 505 So.2d 413 (Fla. 1987).

Petitioner has submitted State v. Fink, 557 So.2d 129 (Fla. 3d DCA 1990) as supplemental authority. The Fink opinion was filed on February 13, 1990. No rehearing was filed by the government. The mandate issued on March 19, 1990. The Fink opinion lends support to the government's position in this review. There, Robert Fink pled no contest to a strong arm robbery charge. His guidelines sentence reflects an incarceration range of 4 1/2 to 5 1/2 years imprisonment. However, he was given a downward departure to 364 days imprisonment with a special condition that he complete an Alcohol and Drug Alcohol Abuse Program at the stockade. There was a further recommendation that Robert Fink enter and successfully

complete an outpatient rehabilitation program after release. The written reasons for a downward departure read:

Defendant is a very serious drug addict (cocaine)-- defendant is to go to stockade for rehabilitation/ followed by out-patient treatment. Victim agrees that defendant should be rehabilitated.

(text of 557 So.2d at 12)

The government took a strong exception and advised the trial court that Robert Fink had three prior felony convictions "which had been mitigated down because of his drug problem." Regretfully, the prosecutor did not direct the clerk to obtain the court files or certified copies of the convictions. The word of the prosecutor as an Officer of the Court was not sufficient. Thus, there was a failure of proof. The Fink panel writes in a footnote:

1 There was apparently no proof such downward departures. Argument of counsel is not evidence. Brown v. State, 538 So.2d 523 (Fla. 3d DCA 1989).

(Text of 537 So.2d at 129, fn 1.)

Is not what is good for the goose, good for the gander? There is a failure of proof in Fink as to prior downward departures. There is a failure of proof in Herrin as to drug addiction. At bar, Michael Herrin testified that he had been a rock cocaine addict prior to his arrest and that he had benefited from a regional residential substance abuse program. (R 6) However, Michael Herrin shared that he had suffered relapses. (R 7). Regretfully, at the time of this incident, Michael Herrin had been having social problems with his friends. He testifies:

"...and I just got in a depressed mood and went down and did something very stupid. I went down the road from where I live where they sell rock, and I bought \$10 worth of cocaine." (R 7) Then, Michael Herrin declares that if he hadn't been caught on the day of the crime that he would not have continued cocaine use. (R 7) Michael Herrin discloses that at the time of the offense there was a possibility that his behavior might revert to addiction. (R 7) This is the testimony of a recreational substance abuser, in full remission, and not the testimony of an individual under the influence of "crack" or "ice" who has no control over his life. In other words, there was no evidence of a "passionate obsession" for crack. See generally, Irizarry v. State, 496 So.2d 822, 825 (Fla. 1986) where this Court noted that a jury could have reasonably believed that Hector Irizarry murdered his ex-wife Carmen out of passionate obsession. Of course, that was a capital appeal where this Court insures on a proportionality review that each death sentence is consistent with cases involving similar circumstances; but, does not a guidelines sentence ignore proportionality? As pointed out by Judge Lehan, there was no evidence that Michael Herrin's desire for drugs was so strong that he could not control himself. State v. Herrin, 555 So.2d 1288, 1291 (Fla. 2d DCA 1990)(Lehan, A.C.J., concurring specially with opinion). There is a difference between "passionate obsession" and "fatal attraction"; and, that difference is control. The former is the addict and the latter is the abuser. Here, Michael Herrin was in full remission from his substance dependence!

There was no failure of proof in Barbera v. State, 505 So.2d 413 (Fla. 1987) as to James Patrick Barbera's intoxicated condition. Recall, Barbera had consumed a case of beer when he stabbed his former wife. At sentencing his trial counsel introduced a psychological report establishing that James Patrick Barbera possessed an alcoholic personality and destructive behavioral traits common to alcoholics. At bar, there was no proof that Michael Herrin had smoked "crack" prior to making his purchase. The proof adduced below can be characterized that Michael Herrin's purchase was "faux pas" or social blunder. In fact, the prosecution established that this was the first use of cocaine Michael Herrin had experienced since his release from a drug rehabilitation center in Fort Lauderdale. (R 9) Thus, a "cold stone sober" Michael Herrin purchased crack cocaine 1000 feet from a school. (R 9) This was not a man acting under the influence. To be blunt, this was not a "junkie scoring a fix to feed a habit."

This state does not hide its head in the sand. The law must be enforced and guidelines policies adhered to while preventative measures such as education and neighborhood treatment programs are implemented. For example, in the former, children now lose their driver's license if they dropout of school. There are proposals that welfare benefits be curtailed if children leave school prior to graduation. As to the former, if drugs cannot be controlled, there is a movement to supply street addicts with disposable needles and bleach to curb the spread of physical disease such as hepatitis and Aids. However, when there is

established at a sentencing hearing failed efforts at rehabilitation, is that failure to be rewarded by a downward departure in sentencing? Under the guidelines, would Michael Herrin have been entitled to a downward departure had this been his first and/or "once in a lifetime" purchase of crack?

Against this background, the trial court has overlooked or failed to consider the purposes of the guidelines. Florida strives for a fair sentencing system. Parole is abolished. Under the Guidelines the judiciary seeks honesty in sentencing. In other words, when similar cases are treated alike, then uniformity is achieved.

Always, there is tension between law and equity. In Florida, non-capital cases follow the law set out in the guidelines system; and, capital cases follow equity in Phase II determinations. See, Heiney v. Dugger, 558 So.2d 398, 400 (Fla. 1990) where this Court points out that occasional use of alcohol is nonstatutory mitigating evidence for Phase II recommendations.

This case is simple. Michael Herrin, cold stone sober, purchased crack while in a state of full remission. Michael Herrin did not purchase crack while under the influence of drugs or alcohol. In other words, Michael Herrin's mind was not clouded and his judgment was clear. The Second District in its opinion below makes this quite clear. See, State v. Herrin, 555 So.2d 1288 (Fla. 2d DCA 1990). The record proper supports this determination. Is Judge Parker wrong when he writes that "...a defendant must be required to demonstrate more than drug or alcohol dependency or intoxication at the time of the commission

of the crime. Otherwise, the sentencing guidelines are meaningless and should be abolished in cases where defendants attempt to attribute their actions to an alcohol or drug abuse problem.' ' Id. at 1289.

Respondent urges that the rule of law announced by the majority is correct:

In developing a precise standard of when a Barbera downward departure should apply, we hold that where competent 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.

(Text of **555** So.2d at 1289)

At bar, there was a failure of proof before the trial court of psychological problems justifying mitigation. Michael Herrin was cold stone sober when he bought his crack. He was not a then current substance abuser. Nor, did Petitioner present expert testimony that he was amenable to further treatment.

At bar, what is the mitigating circumstance which justifies the departure? Michael Herrin has benefited from one of the best treatment programs Florida has to offer. He has failed. Now, is this a mitigating circumstance to support a downward departure? To be frank, it would have been far easier to have defended a trial court's upward departure on these facts. Why? Because Michael Herrin's case presents facts in aggravation, not mitigation. Was all the time and all the money spent on Michael Herrin's drug rehabilitation a waste? A departure sentence is one which should be the exception and not the rule. This is not

the highly unusual case in which mitigating circumstances are established. The trial court's carte blanche downward departure was far too broadbased as a matter of law. The Second District has given Barbera a limited construction; and, perhaps this Court is inclined to avail itself of the opportunity to either recede from Barbera and/or modify Barbera. The Herrin holding is sound and is one to be approved.

EPILOGUE

Both state governments and the federal governments are waging a War on Drugs. Most recently, The American Lawyer in its March, 1990 edition published a "Special Edition" entitled: Can America Enforce Its Drug Laws? [fn 13 [Back issues are available from The American Lawyer, 600 Third Avenue, New York, New York 100161 The articles published are entitled:

- (1) "Should We Give Up?" by Steven Brill;
- (2) "Uzi Disarmed" by Amy Singer;
- (3) "Ten Years for Two Ounces" by Stuart Taylor, Jr.;
- (4) "High Times on the Fast Track" by Robert Safian;
- (5) "The Cocaine War in America's Fruitbowl" by Susan Beck, Pamela Brown, and D. M. Osborne;
- (6) "A Defense Lawyer Walks the Line" by Mark Voorhees;
- (7) "Columbia's Bloodied Bench" by Cameron Barr; and,
- (7) "Is Street-Level Enforcement a Bust?" by Alison Frankel and Lisa Freeland.

There is no social problem facing this state and this nation more significant than what this planet faces with substance abuse and substance addiction. The Florida Legislature has declared it a bad thing to sell drugs within a 1000 feet of a school. This case is a perfect example where a substance abuser would self-designate himself as a substance addict to obtain an entitlement to a downward departure under the state sentencing guidelines; thereby, avoiding the guidelines recommended sentencing. Is this the unusual circumstance in mitigation for securing a downward departure?


Children are at risk in Florida. Women are now delivering crack cocaine babies. The public school is only now becoming aware that it has duties to educate these children. The New York Post estimates that it will cost \$40,000.00/year to educate these children in the public school system; and, the fact that these children will be reared in dysfunctional family settings suggests that the future of these children is most guarded. The Phil Donohue Show/"Pregnant Crack Addicts": (syndicated telecast, May 25, 1990)(Transcript available through The Phil Donohue Show, Multi-Media Productions, 267 Broadway, New York, New York 10007). These children are to be educated in schools. The legacy of these children is "attention-deficit hyperactivity disorder"; and, is their future to be found in this nation's criminal justice system? From the moment of birth, their lives mirror classic Greek tragedies. The school may well be the only sanctuary these children have. Michael Herrin purchases crack within 1000 feet of a school. Michael Herrin obtains a downward departure in sentencing. What message does this simple sentence send?

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, Respondent prays that this Court will make and render an opinion approving the Second District decision filed in the case before this Court.

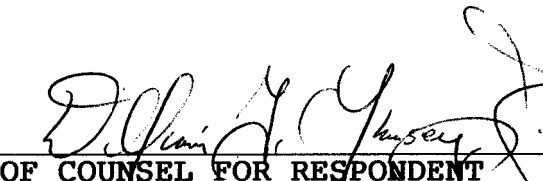
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Esquire, Office of the Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33830 on this 15th day of June, 1990.


OF COUNSEL FOR RESPONDENT