IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,261

ANDREAS OBOJES, ETC.,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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CERTIFIED QUESTION

WHETHER IN LIGHT OF THAT LANGUAGE CONTAINED IN HERNANDEZ v. STATE, 575 SO.2D 640, 642 (FLA. 1991), CONCERNING PREMEDITATION OR ADVANCE PLANNING, THAT REASON REMAINS A VALID REASON JUSTIFYING THE IMPOSITION OF A DEPARTURE SENTENCE IN SEXUAL BATTERY CASES?

Respondent contends that the sentencing guidelines adequately take into consideration the aggravating circumstance cited by the trial court because (1) all crimes involve premeditation or, (2) alternatively, some of the crimes for which he was sentenced involve premeditation.

Petitioner first argued that the aggravating circumstance relied on by the trial court was of a kind not adequately considered by the sentencing guidelines. Sexual battery is a general intent crime. The only mental state which is common to all rapists is the intent to engage in coerced sexual activity with the victim. It appears that respondent equates this general intent with "premeditation," whereas petitioner equates the general intent to rape with the general intent to kill and premeditation with reflection by a cool mind. A person can rape on impulse just as easily as he can kill on impulse. Petitioner's interpretation is consistent with this court's decisions in Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds, Rousseau v. State, 509 So.2d 281 (Fla. 1987); Casteel v. State, 498 So.2d 1249 (Fla. 1986). It may be that many crimes require minimal planning, and some even detailed planning, but that is not the case with the crime of rape.

Petitioner further argued that the trial court had in mind a heightened premeditation beyond that necessary to prove a particular element of a crime. Thus, the departure was warranted because the aggravating circumstance was present to a degree substantially in excess of that which ordinarily is involved in the offense. It appears that respondent takes the position that the degree of the aggravating circumstance can never justify a departure sentence. He states, "Because premeditation is an inherent component of the offense ... it can never justify a departure sentence, no matter how much planning is involved." (A.B. 9) He does not cite any authority to support this assertion.

Petitioner analogized sentencing under the guidelines to capital punishment. Premeditation is an element of first-degree murder, the sentence for which may be enhanced to death if the killing was cold, calculated, and premeditated. Thus, the death penalty is authorized based on the degree of the aggravating circumstance. Petitioner pointed out that this court has held that aggravating circumstances supporting imposition of the death penalty also justify upward departure sentences under the guidelines. Respondent asserts that petitioner's analogy is "illusory" but offers no satisfactory explanation for why this is so. He merely reasserts that the degree of the aggravating circumstance is not a basis for departure.

Alternatively, citing Casteel v. State, 498 So.2d 1249 (Fla. 1987), respondent argues that premeditation is an element of the

other offenses for which he was convicted and thus cannot be a ground for departure. There is no need to address this argument because of the heightened premeditation present in the instant case. The petitioner, nevertheless, will provide a brief analysis of the case relied upon by respondent.

In Casteel, the defendant was convicted of sexual battery with use of a deadly weapon and burglary of a dwelling while armed with a dangerous weapon. Sexual battery was used as the primary offense on the scoresheet with burglary being an additional offense at conviction. One of the grounds for departure was the defendant's use of a dangerous weapon, a knife. In his dissent, Judge Zehmer rejected this reason to aggravate the burglary offense, stating, "To allow use of an essential element of the primary offense as an aggravating factor in a subordinate or 'other' offense amounts to allowing 'the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence' and would be counting such factor twice, 'contrary to the intent and spirit of the guidelines.'" Casteel v. State, 481 So.2d 72, 75 (Fla. 1st DCA 1986) This court subsequently agreed with Judge Zehmer. Casteel, 498 So.2d at 1252. This is the portion of Casteel relied upon by respondent. Apparently, he considers the "primary offense" and "additional offenses at conviction" to be interchangeable. Petitioner does not because the guidelines scoresheet is selected based on the primary offense. If the primary offense is a general intent crime, premeditation is not

calculated into the guidelines scoresheet simply because one of the additional offenses at conviction may be a specific intent crime.

What is more relevant to disposition of the issue raised here, however, is that portion of the Casteel opinion which affirms the trial court's departure reason that the offenses "were committed in a calculated manner without pretense of moral or legal justification." Casteel, 481 So.2d at 73. The First District approved this reason stating, "Because sexual battery with use of a deadly weapon is not a specific intent crime, the calculated manner in which it was committed is not a necessary element and therefore not considered in the establishment of the recommended guidelines range." Id., at 74. Judge Zehmer agreed. Id., at 75. This court subsequently agreed with the First District stating, "Premeditation or calculation is not an inherent component of the crime of sexual battery." Casteel, 498 So.2d at 1252-1253. In Casteel, the primary offense was sexual battery (general intent crime), and the additional offense at conviction was burglary (specific intent crime). These facts are indistinguishable from those in the instant case. Here, the primary offense was sexual battery (general intent crime), and the additional offenses at conviction were burglary, robbery, and kidnapping (all specific intent crimes).

Not only was the aggravating circumstance in the case at bar not considered by the sentencing guidelines, but the trial court's reliance on this circumstance is consistent with the

penological goals of retribution and general deterrence. The circumstances under which the rape occurred aggravated the seriousness of the offense. Respondent stalked his victim for two weeks, which gave him ample time to reflect on his evil intentions and to mend his ways. Society is entitled to greater protection from a person with this mindset, particularly where the crime committed is a violent humiliating crime against the person.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to quash the decision of the First District Court of Appeal vacating the trial court's sentencing order. Irrespective of the outcome of this case on the merits, the State would urge this court to reaffirm its decision in Hoffman that lower courts must follow this Court's controlling cases and certify any disagreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by U.S. Mail to Paula S. Saunders, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 6th day of May, 1992.

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