IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
PARIS D. VARNER,
Respondent.

Case No. 79,912

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

BRIEF OF PETITIONER ON THE MERITS

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the defendant and Appellant below. Respondent will be referred to as Respondent in this brief. Petitioner was the State and Appellee below. Petitioner will be referred to as Petitioner or the State in this brief.

STATEMENT OF THE CASE

Respondent was charged by amended information with shooting into a building, shooting at a vehicle, and aggravated assault on September 17, 1989. (R 22-23) A jury trial was held September 18, 1990. (R 25) Respondent was found guilty of the three charges. (R 26, 29-31) The trial court issued a written order determining Respondent was eligible for adult sanctions. (R 43-44) Respondent was sentenced on October 19, 1990, to five (5) years on each count. The sentences were made consecutive with a three (3) year mandatory minimum period for the aggravated assault with a firearm. (R 35-40) Respondent's recommended guidelines sentence ranged from community control up to three and one-half (3 - 1/2) years incarceration. The trial court noted two departure reasons: (1) threatening witnesses prior to trial and, (2) total disregard for safety of others. (R 41) Respondent appealed on November 1, 1990. (R 45)

The Public Defender filed an Anders[1] brief which raised the following issue:

> DID THE TRIAL COURT ERR IN SENTENCING APPELLANT AS AN ADULT OR IN IMPOSING A SENTENCE IN EXCESS OF THE GUIDELINES?

The Second District Court of Appeal subsequently ordered the Public Defender to respond an the effect of Allen v. State, 479 So.2d 257 (Fla. 2d DCA 1985) on this case. The Public Defender

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[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

in response on July 9, 1991, noted a conflict between the Second and the First and Third Districts on the issue of threatening witnesses as a departure reason. Consequently, the Second District Court of Appeal ordered a response from the State Re: Allen, supra. The State in response on August 7, 1991, noted that an allegation of threats unsupported by record evidence was sufficient to distinguish Allen from Respondent's case.

The Second District Court of Appeal found both departure reasons invalid, reversed Respondent's sentence, and remanded with directions that he be resentenced pursuant to the sentencing guidelines on January 3, 1992. See, Varner v. State, 17 F.L.W. D163 (Fla. 2d DCA, January 3, 1992). Petitioner filed a Motion for Rehearing and Motion for Rehearing En Banc on January 16, 1992. Petitioner noted intradistrict conflict with Rodriquez v. State, 547 So.2d 708 (Fla. 2d DCA 1989), in addition to conflict with the First and Third District Courts of Appeal. Petitioner filed a Notice of Supplemental Authority citing Pinder v. State, 591 So.2d 1149 (Fla. 3d DCA 1992), which relied in part on Rodriguez, supra.

Petitioner's Motion for Rehearing was granted on April 24, 1992, to resolve the intradistrict conflict, The Second District Court of Appeal receded from Rodriguez, supra, and Boomer v. State, 564 So.2d 1232 (Fla. 2d DCA 1990), and certified conflict with the First, Third, and Fourth District Courts of Appeal. Respondent's sentence was again reversed on April 24, 1992. See, Varner v. State, 597 So.2d 426 (Fla. 2d DCA 1992). Petitioner

then invoked discretionary jurisdiction in this Court. Petitioner filed a Motion to Withdraw the Mandate and Stay Proceedings in the Second District Court of Appeal which was denied on June 10, 1992. Petitioner filed a Motion to Withdraw Mandate and Stay Proceedings in this Court on June 19, 1992.

STATEMENT OF THE FACTS

Respondent was found guilty of shooting into a building, shooting at a vehicle, and aggravated assault from events which took place on June 23, 1989. (R 22-23, 29-31) Respondent was sentenced as an adult on October 19, 1990. (R 35-40, 43-44, 65-69) He received a departure sentence based on threatening the witness and total disregard for the safety of others. (R 70) The trial court noted that either reason would be sufficient for the sentence. (R 71)

Respondent appealed the judgment and sentencing. (R 45) Respondent ordered a transcript on November 1, 1990 of the sentencing which was held on October 19, 1990. (R 48) Respondent's trial counsel filed a Motion to Withdraw which was granted. (R 50-52)

SUMMARY OF THE ARGUMENT

The trial court was correct in enhancing Respondent's sentence for threatening the witness. The penalty imposed was commensurate with the offenses (shooting into a building, shooting into a vehicle, and aggravated assault). The trial court articulated the reasons for departure in open court and in writing. The trial court did not abuse its discretion in considering the circumstances surrounding the offenses. The trial court was satisfied that a departure from the guidelines was supported by a preponderance of the evidence.

ARGUMENT

ISSUE

WHETHER THREATENING THE WITNESS IS A VALID REASON FOR DEPARTING FROM THE GUIDELINES WHEN THE SUPREME COURT AND THE FIRST, THIRD, AND FOURTH DISTRICT COURTS OF APPEAL HAVE FOUND IT TO BE A VALID REASON.

This Court in Booker v. State, 514 So.2d 1079 (Fla. 1987), reaffirmed Albritton v. State, 476 So.2d 158 (Fla. 1985), wherein it was determined the proper standard of review for departure sentences is whether the judge abused his judicial discretion. Id. at 160. This Court said: "An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable." Id., Booker, 514 So.2d at 1084.

Respondent was convicted following a jury trial on three separate charges. His guidelines sentence included community control and up to three and one-half (3 - 1/2) years incarceration. He was sentenced to five (5) years on each charge and the sentences were made consecutive with a three-year mandatory minimum an the aggravated assault which was committed with a firearm. The trial court articulated two (2) departure reasons and stated:

> With regard to the State's request for -- for departure from the guidelines, I believe that there is adequate reason to depart from the guidelines as it relates to Mr. Varner. I think the

threatening of the witness certainly is a reason to depart, and I believe there is a statutory or case law provision which says that. Total disregard for the safety of others. In this particular case I believe that there is a valid basis to depart on that reason, and I will depart for those two seasons.

* * *

[S]o I will not depart as it relates to violent propensities. But I think the threatening of the witness and I think the total disregard for the safety of others is an appropriate reason for departure in this case.

* * *

1'11 write them on the bottom of the score sheet, and I believe for sentencing purposes that is sufficient. I prefer to just write it in my own handwriting on the bottom of the score sheet. They've got spaces there for reasons for departure. I guess that is what they want them for. *So* the record will reflect I'm saying the reasons for departure would be threatening of a state witness and also total disregard for the safety of others.

MR. DAVIDSON [State Attorney]: For point of clarification, would either one of those be sufficient for this sentence or --

THE COURT: In my mind they will be.

(R 69-71)

The State had previously urged a departure sentence based on three (3) reasons. (R 58-61) Of the three (3), only one (1),

threatening the witness, is at issue in this review. The State reminded the trial court of the evidence in the following:

> The first reason would be that the testimony at trial showed that the Defendant in this case had threatened a state witness.
>
> I would cite to the Court Hall vs. State at 510 So.2d 979 wherein the Defendant had made threats to a witness in that case while he was released pending trial. Here we have the same situation. Mr. Varner was released on ROR pending this trial. He made threats to the witness in this case. You may recall the young lady who was the girlfriend of the victim, Issac -- or Madeline Issac, (phonetic) she testified to the threats and actually testified to a physical altercation with the Defendant that occurred at some high school she went to. I believe it was Osceola.
>
> State would also cite Walker vs. State for the same proposition that threatening a witness or a victim in that case was found to be clear and convincing reasons for a valid upward departure. I have that case for, Your Honor.
>
> And also in regards to threatening a witness, the State would cite Williams vs. State at 462 So.2d 36, again finding that threats made by the Defendant to the father of a victim in an assault case is sufficient and valid reasons for upward departure.
>
> (R 58-59)

In addition to Hall v. State, 510 So.2d 979 (Fla. 1st DCA 1987), Walker v. State, 496 So.2d 220 (Fla. 3rd DCA 1986), and Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1984), rev. denied,

471 So.2d 44 (Fla. 1985), this Court considered a similar case of departure in State v. **Lyles**, **576** So.2d **706** (Fla. 1991), where one of the reasons was threatening a witness. In **Lyles**, the trial court's written statement contained the following:

> The justification for the Court's departure from the sentencing guidelines is a[s] follows:
>
> 1. The Defendant threatened Cynthia Carmony, a witness in the instant case. These threats included, but were not limited to, a confrontation approximately **two** (2) weeks before trial when the Defendant was out on bond, where the Defendant said to Miss Carmony, "Bitch, I'm going to kill ... If I can't have you no one can ... It ain't over yet".
>
> *Williams v.* ***State,*** 462 So.2d 36 (1st DCA 1984);
> ***Hall v. State,*** 510 So.2d 979 (1st **DCA** 1987).
>
> **Id. at** 708.

Petitioner recognizes that in **Lyles** the State petitioned this Court to review the First District Court of Appeal's certified question regarding the retroactive application of the decision in **Ree v. State**, **14 F.L.W. 565** (Fla., November 16, 1989), **withdrawn and superseded by 565** So.2d **1329** (Fla. **1990).** However, the departure reason, threatening the witness, was clearly presented and this Court found no error. Petitioner notes that the Hall and Williams **cases** were cited in support of the departure reason. In 1989, the Fourth District Court of Appeal also upheld threats to victims and others in court as a

valid departure reason citing to Walker v. State, 496 So.2d 220 (Fla. 3d DCA 1986). Bannerman v. State, 544 So.2d 1132 (Fla. 4th DCA 1989).

It is clear that the trial court had sufficient evidence of Respondent's threats. From the record it appears the threats escalated into a physical confrontation. Fla.R.Crim.P. 3.701(a)(6); Mauney v. State, 553 So.2d 707 (Fla. 4th DCA 1989) (Held that sentencing court could rely on oral presentation of prosecutor to which no abjection was raised). Although Respondent raised no trial errors on direct appeal, it was not improper for the trial court to admit the testimony of the threats and use the threats as a valid reason to depart. Knotts v. State, 533 So.2d 826 (Fla. 1st DCA 1988), citing to State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Williams, supra; and Walker, supra.

Respondent, by his own actions, chose to create separate circumstances surrounding his crime. The trial court did not err in considering these independent events which were not scored in his guidelines sentence. Cabrera v. State, 576 So.2d 1358 (Fla. 3rd DCA 1991), citing Booker, supra. Respondent's threats were not an inherent component of the crimes charged against him. Hernandez v. State, 575 So.2d 640 (Fla. 1991).

Petitioner points out that threatening the witness or victim is a valid reason that can be narrowly defined. The First, Third and Fourth District Courts of Appeal have upheld the reason. The trial judge in this case had a firm belief that it

was valid in this case. This Court found no error when the reason was very apparent in State v. Lyles, supra. Upholding the departure reason for threatening the witness or victim is in line with the trend to safeguard the rights of all victims.

Respondent received a sentence that did not exceed the statutory maximum. **Fla.Stat.** §775.082(3)(c), (d) **(1989).** The trial judge did not abuse its discretion in ordering a departure sentence or making the terms consecutive. Fla.R.Crim.P. 3.701(b); **Fla.Stat. 9775.021 (1989).**

This Court should hold that when the record clearly supports the threats, the trial judge should not be required to ignore the surrounding circumstances.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, this Court should find that threatening a witness when supported by record evidence is a valid reason for ordering a departure from the guidelines sentence.

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 Allyn Giambalvo, Assistant Public Defender, 5100 - 144th Avenue North, Clearwater, Florida 34620, on this 23rd day of June, 1992.

OF COUNSEL FOR PETITIONER