

Supreme Court of Florida

ORIGINAL

No. 80,551

DONALD LEWIS SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

[June 10, 1993]

PER CURIAM.

We have for review Smith v. State, 604 So. 2d 944 (Fla. 1st DCA 1992), which certified the following question of great public importance:

Do defendant's efforts to cover up a crime allow sentencing guidelines departure?

We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer in the negative consistent with our opinion in State v. Varner, 18 Fla. L. Weekly S241 (Fla. Apr. 15, 1993). The opinion below is quashed and remanded for reconsideration in light of Varner.

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

BARKETT, C.J., concurs specially with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

BARKETT, C.J., specially concurring.

Regardless of whether the concealment of a murder is a crime for which the defendant was not charged, a departure from the sentencing guidelines cannot be based on an inherent component of the crime in question. State v. Mischler, 488 So. 2d 523 (Fla. 1986). Concealment of a murder by the murderer is "a factor common to nearly all crimes in the sentencing category." Lerma v. State, 497 So. 2d 736, 739 (Fla. 1986) (applying Mischler to the stated reasons for departure in a sexual battery case, i.e., dangerousness of the defendant and helplessness of the victim).

Although I agree with the majority that State v. Varner, 18 Fla. L. Weekly S241 (Fla. Apr. 15, 1993) also applies, I would reverse the decision based on Mischler as well.

Application for Review of the Decision of the District Court of
Appeal - Certified Great Public Importance

First District - Case No. 91-512

(Alachua County)

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