SUPREME COURT OF FLORIDA

FREDERICK CAVE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Case No.: 84,643

DCA-1 No.: 89-1694

ON APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER

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I. PRELIMINARY STATEMENT

Frederick Cave was the defendant in the trial court. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the record on appeal will be used by the symbol "R" followed by the appropriate page number in parentheses and reference to the transcript of the trial proceedings or sentencing hearing will be used by the symbol "T" followed by the appropriate page number in parentheses.

II. ARGUMENT

TEMPORAL PROXIMITY OF CRIMES ALONE IS AN INVALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHEN THERE IS NO FINDING BY THE TRIAL COURT OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT.

Respondent State of Florida makes the following arguments that petitioner Cave will respond to in this reply brief: A) Mr. Cave's counsel waived any objection to departure from the sentencing guidelines based on an escalating pattern of criminal conduct; B) the First District Court of Appeal on remand correctly applied Barfield v. State, 594 So. 2d 259 (Fla. 1992); C) if the sentences have to be reversed, the trial court should be given a second opportunity to depart from the sentencing guidelines; D) the departure sentences should be affirmed because the new sentencing guidelines now permit departure based on temporal proximity; and E) the departure sentences should be affirmed because Mr. Cave made a threatening remark after his arrest. Each of these contentions will be addressed separately. Before doing so, it should be noted that the eleven-page sentencing transcript is included in the appendix of this reply brief for easier reference and in response to opposing counsel's claim that the undersigned counsel has omitted or deemphasized material facts. The sentencing transcript fully supports petitioner's arguments.

A. STATE'S WAIVER CLAIM

The State claims that Mr. Cave's court-appointed counsel was put on notice that the State was seeking a departure based on escalating pattern of criminal conduct because Mr. Cave's court-appointed counsel signed the sentencing guidelines scoresheet, admitted that the court did have the authority to depart, and

did not object to the trial court's statements that Mr. Cave could not be rehabilitated and that he was extraordinarily dangerous. It should first be noted that this is the first time that the State has raised its waiver argument, even though this is the fourth appellate proceeding involving this sentencing guidelines issue. Given that the First District Court of Appeal and this court have already ruled on the merits of the sentencing guidelines issue, it is too late for the State to now advance a waiver argument.

The fact that the trial court verbally stated at sentencing without objection from defense counsel that Mr. Cave could not be rehabilitated and that he was extraordinarily dangerous could not possibly be the functional equivalent of a finding of escalating pattern of criminal conduct by the trial court. Even if these findings had been put in writing, the departure sentences would still have to be reversed under current caselaw.

It is impermissible to base a departure sentence on the conclusion that a defendant is a dangerous individual and a threat to society. Lerma v. State, 497 So. 2d 736 (Fla. 1986); Green v. State, 545 So. 2d 359 (Fla. 2d DCA 1989); and Everage v. State, 504 So. 2d 1255 (Fla. 1st DCA 1986), *review denied*, 508 So. 2d 13 (Fla. 1987).

Unsuccessful rehabilitation is also not a valid basis for departure. Wiggins v. State, 632 So. 2d 666 (Fla. 2d DCA 1994); Middlebrook v. State, 617 So. 2d 1161 (Fla. 2d DCA 1993); Smith v. State, 608 So. 2d 89 (Fla. 2d DCA 1992); Moore v. State, 584 So. 2d 130 (Fla. 1st DCA 1991); Jones v. State, 583 So. 2d 387 (Fla. 1st DCA 1991);

Lago v. State, 582 So. 2d 118 (Fla. 3rd DCA 1991); Louissant v. State, 576 So. 2d 316 (Fla. 5th DCA 1990); Simmons v. State, 570 So. 2d 1383 (Fla. 5th DCA 1990); Sellers v. State, 559 So. 2d 378 (Fla. 2d DCA 1990); Ellis v. State, 559 So. 2d 292 (Fla. 5th DCA 1990); Maddox v. State, 553 So. 2d 1380 (Fla. 5th DCA 1989); Johnson v. State, 535 So. 2d 651 (Fla. 3rd DCA 1988); Davis v. State, 511 So. 2d 430 (Fla. 2d DCA 1987); and Tapia v. State, 509 So. 2d 354 (Fla. 2d DCA 1987).

It appears that in making this argument, counsel for the State has overlooked the fact that the First District itself in its opinion on remand in this case acknowledged that unsuccessful rehabilitation and protection of the public are not valid reasons for departure. 642 So. 2d 10, 11 n. 1 *citing* Wiggins v. State, *supra*.

Petitioner Cave strongly objects to the claim that when his trial counsel signed the sentencing guidelines scoresheet, he was somehow admitting to the lawfulness of the departure from the guidelines. When Mr. Cave's counsel signed the sentencing guidelines scoresheet, defense counsel was merely acknowledging that the prior record was accurately reflected on the scoresheet, not that an unwritten departure reason--escalating pattern of criminal conduct--was valid. Surely counsel for the State must know that in 1989 the sentencing guidelines scoresheets customarily were signed by the prosecutor and defense counsel before the trial court rendered a sentence and articulated in writing the basis of a departure sentence.

Put in proper context, Mr. Cave's counsel admitted prior to sentencing that there were proper grounds upon which the court could depart from the sentencing guidelines. It should be noted, for example, that one of the cases that the State

argued in support of departure based on temporal proximity, Gibson v. State, 519 So. 2d 756 (Fla. 1st DCA 1988), had not yet been overruled by the Supreme Court of Florida. The reversal of Gibson happened less than three months after Mr. Cave's sentencing. Gibson v. State, 553 So. 2d 701 (Fla. 1989). It was while Mr. Cave's case was pending on appeal that the Supreme Court of Florida in Barfield and State v. Dodd, 594 So. 2d 263 (Fla. 1992) held that temporal proximity alone does not constitute a clear and convincing reason to depart from the guidelines. Mr. Cave's trial counsel never conceded that a departure sentence could be sustained based on a reason not even requested by the prosecutor: escalating and persistent pattern of criminal conduct.

Finally, assuming for the sake of argument that the trial court's verbal findings could be characterized as constituting a finding of an escalating and persistent pattern of criminal conduct, the trial court was still required to sign and file a written departure order that included this reason on the same day as sentencing. Scott v. State, 629 So. 2d 1070, 1071 (Fla. 1st DCA 1994) *citing* State v. Lyles, 576 So. 2d 706 (Fla. 1991) and Wright v. State, 617 So. 2d 837 (Fla. 4th DCA 1993). It was not necessary for defense counsel to object to the failure of the trial court to put its departure reason in writing on the same day as sentencing in order to preserve the issue for appeal. Hall v. State, 598 So. 2d 230 (Fla. 2d DCA 1992).

B. APPLICATION OF BARFIELD

Assuming for the sake of argument that the First District did not violate the Supreme Court of Florida's explicit holding in State v. Dodd, *supra*, the State is

incorrect that the First District correctly applied the Barfield case on remand. The State relies on the sentencing guidelines scoresheet to support its claim that the escalating pattern of Mr. Cave's criminal conduct is "obvious" (State's answer brief at page 12). The scoresheet shows that Mr. Cave had four prior misdemeanors, but does not give any information about these misdemeanors, such as the date of the misdemeanor convictions. Without knowing if these misdemeanors in the prior record are dissimilar and remote to the primary and additional offenses at conviction, there is insufficient evidence to show that there has been a pattern of criminal activity. Darrisaw v. State, 642 So. 2d 615 (Fla. 4th DCA 1994).

With respect to the third degree burglary of a structure conviction in Mr. Cave's prior record, the State overlooks the fact that in its first opinion the First District already determined that this conviction was for the "burglary of a dwelling that involved choking the occupant..." 578 So. 2d at 768. The commission of a violent crime following a violent crime of the same nature is not an escalating pattern. Lowe v. State, 641 So. 2d 937 (Fla. 4th DCA 1994) *citing* Barfield v. State, *supra* and Lattimore v. State, 571 So. 2d 99 (Fla. 3rd DCA 1990).

The State also claims in its answer brief that the trial court, by citing to §921.001, Fla. Stat. on the sentencing guidelines scoresheet as a basis for departure, incorporated by reference §921.001(8), Fla. Stat., which authorizes departure based on an escalating pattern of criminal conduct. The State has contradicted itself on this point given that in the answer brief that it filed with this court in August of 1991 in Mr. Cave's earlier appeal, at page 32, counsel for the state claimed, "Unwritten

observations of the trial judge indicate Cave's departure sentence is factually based on his escalating criminality." More importantly, the state has ignored the requirement that the trial court must identify the escalating pattern of criminal activity in its written departure order. Wiggins v. State, *supra* at 667 *citing* Walker v. State, 593 So. 2d 301 (Fla. 2d DCA 1992) (Held: notation on scoresheet that defendant had a "unabating criminal history" fails to identify an escalating pattern of criminal activity.)

C. RESENTENCING

The State suggests that if the departure sentences must be reversed, the remedy is to remand Mr. Cave's case to the trial court to reconsider departure *ab initio*. (State's answer brief at page 18). The State's reliance upon State v. Betancourt, 552 So. 2d 1107 (Fla. 1989) is clearly misplaced. In Betancourt, the Supreme Court of Florida held that when a trial court does not know that it is imposing a departure sentence requiring written reasons for departure, the trial court at resentencing is permitted to depart from the sentencing guidelines with valid written reasons for departure. The other cases that the State cites that have implemented Betancourt[1] either involved situations where there was no indication that the trial court intended to impose a departure sentence or the trial court was not aware that it was bound by the sentencing guidelines.

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[1]Hause v. State, 643 So. 2d 679 (Fla. 4th DCA 1994); Smith v. State, 639 So. 2d 160 (Fla. 1st DCA 1994); Madraso v. State, 634 So. 2d 749 (Fla. 3rd DCA 1994); Ivey v. State, 633 So. 2d 530 (Fla. 2d DCA 1994); and Brown v. State, 632 So. 2d 1052 (Fla. 5th DCA 1994).

The State's further reliance on State v. Rinkins, 19 Fla. L. Weekly S644 (Fla. December 8, 1994) is grossly misplaced. The trial court in that case sentenced the defendant as a habitual felony offender under §775.084(4)(a)(1), Fla. Stat., but imposed a sentence more lenient than required by the habitual offender statute. The sentence imposed in Rinkins was even more lenient than that recommended by the sentencing guidelines, but the trial court did not give written reasons for departure because at the time of sentencing there was no explicit requirement for written departure reasons when the trial court was proceeding under the habitual offender statute. The Supreme Court of Florida remanded the case for resentencing, so that the trial court could provide written reasons for any downward departure from the sentencing guidelines recommendation as required by its recent holding of State v. Geohagen, 639 So. 2d 611 (Fla. 1994).

In Mr. Cave's case, the trial court judge realized that Mr. Cave's sentences were subject to the sentencing guidelines and intended to depart from the guidelines. The trial court simply based its departure on the one, and only one, reason requested by the state: temporal proximity. Where the trial court bases its departure on "temporal proximity" but fails to identify an escalating pattern of criminal conduct, as required by Barfield, and there is no other valid reason for departure given, the defendant must be resentenced within the sentencing guidelines. Smith v. State, 599 So. 2d 265 (Fla. 2d DCA 1992) and Walker v. State, 593 So. 2d 301 (Fla. 2d DCA 1992).

D. NEW SENTENCING GUIDELINES

The State argues that Mr. Cave's departure sentences should also be affirmed because the Florida legislature when it enacted the current sentencing guidelines provided that temporal proximity is a valid basis for departure from the sentencing guidelines at §921.0016(3)(e), Fla. Stat. (1993). Petitioner Cave vehemently objects to the application of the sentencing guidelines enacted in 1993 by the Florida legislature to Mr. Cave's offenses that occurred on September 19, 1988 (R-21). Such retroactive application of the new sentencing guidelines would clearly constitute an *ex post facto* violation contrary to Article I, Section 9, Clause 3 and Article I, Section 10, Clause 1 of the United States Constitution, Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987), and Article X, Section 9 and Article I, Section 10 of the Florida Constitution. *See also*, Wright v. State, 633 So. 2d 1204 (Fla. 4th DCA 1994); Reeves v. State, 605 So. 2d 562 (Fla. 2d DCA 1992).

E. ALLEGED THREAT

Respondent's counsel repeatedly suggests that the departure sentences should be affirmed because of a threatening remark that Mr. Cave allegedly made to the arresting officer on the day of his arrest. Counsel for the State has taken out of context the threat that Mr. Cave reportedly made to the arresting officer. When Mr. Cave's threatening remarks were allegedly made, Mr. Cave had just been interrogated at a hospital emergency room where he was recovering from a life-threatening injury. During the interrogation Mr. Cave told the officer that he was hungry and that if the officer would get him some food, he would recover the victim's purse. Although the

officer promised Mr. Cave food, the officer admitted at the jury trial that he never got Mr. Cave any food before he took him to jail from the hospital (T-78-79). It is a fair conclusion that when Mr. Cave was taken to jail he had just been tricked into giving a confession in return for a false promise of food and therefore was very upset at the arresting officer when the alleged threat was made.

At any rate, speculation on possible future violence by a defendant is an invalid reason for departure Stromberger v. State, 595 So. 2d 587 (Fla. 2d DCA 1992) *citing* Coleman v. State, 515 So. 2d 315 (Fla. 2d DCA 1987), *review denied*, 523 So. 2d 576 (Fla. 1988). *See also*, Broomhead v. State, 497 So. 2d 734, 735 (Fla. 2d DCA 1986). An additional reason why it would be improper to rely on this alleged threat as a basis to affirm the departure sentences is that the alleged threat never resulted in a criminal conviction. State v. Varner, 616 So. 2d 988 (Fla. 1993).

Dated this 4th day of April, 1995.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this reply brief of petitioner has been furnished by mail delivery to Stephen R. White, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 this 4th day of April, 1995.

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APPENDIX

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