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IN THE SUPREME COURT OF FLORIDA

VICTOR RAYMOND JORY,

Petitioner,

vs. CASE NO. 85144

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON JURISDICTION

Jeffrey G. Thompson
KLAYMAN, THOMPSON & KONTOS
Suntree Station, Suite 104
7025 North Wickham Road
Melbourne, Florida 32940
(407) 242-9777
Florida Bar No. 0373915
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Victor Raymond Jory was the defendant in the trial court and the appellant in the lower court and will be referred to herein as petitioner. The State of Florida was the plaintiff in the trial court and the appellee in the lower court and will be referred to herein as respondent.

All references to the Original Record on Appeal in the Fifth District Court of Appeal (one volume) will be designated by the symbol "OR" followed by the appropriate page number. All references to the Supplemental Original Record on Appeal in the Fifth District Court of Appeal (five volumes) will be designated by the symbol "SR" followed by the appropriate volume and page number. All references to the appendix to this brief will be referred to by the symbol "App" followed by the appropriate page number.

STATEMENT OF FACTS AND CASE

Petitioner was convicted on November 14, 1990, of ten counts of lewd and lascivious assault upon a child less than sixteen years of age, one count of promotion of a sexual performance by a child less than eighteen years of age, and one count of use of a child less than eighteen years of age in a sexual performance. The victim testified at trial that he was sixteen years old at the time of the sexual acts. (SR, v. IV at 159, 165, 179).

Appellant was originally sentenced by the lower court on January 22, 1991, to a total of 150 years in state prison to be followed by a total of thirty years supervised probation. (SR, v. III at 555-556). Petitioner appealed his convictions and sentence to the fifth district court of appeal under case number 91-334. On March 13, 1992, the fifth district reversed petitioner's sentence based on an erroneously calculated scoresheet. *Jory v. State*, 596 So.2d 1126 (Fla. 5th DCA 1992).

Petitioner was resentenced on July 7, 1992. (OR at 1-49). The recommended guideline sentence was 17 to 22 years in prison. (OR at 71). The lower court departed upward and imposed the identical sentence as before. (OR at 72-77, 82-97).

Petitioner again appealed, and on June 3, 1994, the fifth district upheld the upward departure sentence. (App. A at 1-4). On June 15, 1994, petitioner filed a Motion for Rehearing or Certification or for Rehearing En Banc (App. E at 1-4), which was denied on January 6, 1995. (App. B at 1). On February 1, 1995, petitioner filed his Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

The rule of law applied by the fifth district court of appeal in the instant case is that a trial court's finding that a defendant is a danger to society, by itself, is a valid reason for upward departure from the sentencing guidelines. This rule of law expressly and directly conflicts with rules of law announced by the second, fourth and first district courts of appeal in several cases.

The controlling facts underlying the trial court's upward departure in the instant case are the defendant's remarks at his initial sentencing maintaining his innocence and expressing dissatisfaction with the criminal justice system. Substantially the same controlling facts existed in *State v. Mischler*, 488 So.2d 523 (Fla. 1986). In *Mischler* this court held that a defendant's continuing assertion of innocence and expression of dissatisfaction with the criminal justice system could not validly support an upward departure from the sentencing guidelines.

ARGUMENT

Issue I

THE RULE OF LAW ANNOUNCED BY THE FIFTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH RULES OF LAW ANNOUNCED BY THE SECOND, FOURTH AND FIRST DISTRICT COURTS OF APPEAL.

Article V, section 3(b)(3), of the Florida Constitution permits the supreme court to review the decision of a district court of appeal if that decision "expressly and directly conflicts with a decision of another court of appeal or of the supreme court on the same question of law." Such a conflict can exist in two ways. Either an announced rule of law may conflict with another appellate court's expressions of the law, or a rule of law may be applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case." *City of Jacksonville v. Florida First National Bank of Jacksonville*, 339 So.2d 632 (Fla. 1976) (England J., concurring); *Nielson v. City of Sarasota*, 117 So.2d 731 (Fla. 1960). Both types of conflict exist in the instant case.

The rule of law applied by the fifth district court of appeal in the instant case is that a defendant's statements at sentencing can establish that he is a "real future danger to society," and no other valid reason for departure need be established to justify an upward departure from the sentencing guidelines. *Jory v. State*, 19 FLW(D) 1217 (Fla. 5th DCA June 3, 1994). This rule of law is in direct conflict with rules of law applied by the second, fourth and first district courts of appeal.

Several second district cases have held that a trial court's finding that a defendant is a danger to society is an invalid reason for departure. In *Harris v. State*, 531 So.2d 1018, 1019 (Fla. 2d DCA 1988), the court held that "standing alone, danger to society is an invalid reason for departure." In *Roa v. State*, 574 So.2d 1126, 1128 (Fla. 2d DCA 1991), the court reiterated this rule of law saying "the third reason listed for departure, that defendant is extremely dangerous, has been held invalid by this court." Finally, the second district court, in its February 18, 1994, decision in *Wiggins v. State*, 632 So.2d 666 (Fla. 2d DCA 1994), again established that this rule of law is the law currently being applied in that district. In *Wiggins* the court, citing *Harris*, ruled that "protection of the public is a valid reason [for departure] only if it is coupled with another reason." 632 So.2d at 666.

Thus, the clearly established rule of law in the second district is that a finding by a trial judge that a defendant is a danger to society, by itself, is not a valid reason for an upward departure from the sentencing guidelines. This rule of law directly and expressly conflicts with the rule of law applied in the instant case: that a trial court's finding that a defendant is a danger to society is, by itself, a valid reason for upward departure. (App. A at 3-4).

Both the fourth and first district courts of appeal have also held that a trial court's determination that a defendant is a danger to the community is not a valid reason for an upward

departure. In *Morgan v. State*, 528 So.2d 991 (Fla. 4th DCA 1988), the fourth district, citing *Keys v. State*, 500 So.2d 134, (Fla. 1986), held that "being a 'danger to the community' is . . . an invalid reason for departure." And in *Busby v. State*, 556 So.2d 1208, 1211 (Fla. 1st DCA 1990), the first district said:

> the trial court's explanation [for departure was] that the appellant poses a continuing and immediate threat to every female. In *Mitchell v. State*, 507 So.2d 686 (Fla. 1st DCA 1987), this court held that the trial court could not depart from the guidelines for the "protection of the community." We find little difference between that departure ground and the one given in the instant case. Accordingly, this departure ground is likewise invalid.

Accord, Ridgeway v. State, 555 So.2d 960 (Fla. 1st DCA 1990) (the protection of society is not a valid reason for departure).

The ground for departure held sufficient by the fifth district in the instant case, that the defendant posed a "real future danger to society," is no different than the protection of or danger to the community grounds found invalid by the first and fourth districts.

Thus, the rule of law followed by the first, second and fourth district courts of appeal, that danger to or protection of society is, by itself, an invalid ground for an upward departure, directly and expressly conflicts with the fifth district's decision in this case, and this court should accept jurisdiction to resolve the interdistrict conflict.

Issue II

THE CONTROLLING FACTS IN THE INSTANT CASE ARE SUBSTANTIALLY THE SAME AS THE CONTROLLING FACTS OF *STATE v. MISCHLER*, 488 So.2d 523 (Fla. 1986), AND THE RULE OF LAW APPLIED TO THESE FACTS PRODUCED A DIFFERENT RESULT IN EACH CASE.

In his sentencing order the trial judge below gave the following as one of his reasons for upward departure:

> 4) *THE DEFENDANT IS NOT AMENABLE TO REHABILITATION AND POSES A DANGER TO SOCIETY*
>
> This ground is found to exist beyond every reasonable doubt, *without regard to the defendant's prior record*. See *Louissant v. State*, 576 So.2d 316 (5th DCA 1990). The defendant's comments before this Court clearly show that the defendant sees nothing wrong with his conduct in this case. He is unable to percieve any reason to change. The defendant views his conduct to be lawful and blames a system that is "prejudicial against homosexuals" for his plight.
>
> The facts show that the defendant preys upon young boys from broken homes, who lack a father figure in their lives. Somehow, the defendant is able to induce these children to participate in his world of perversion and crime.
>
> This defendant is not amenable to reasonable rehabilitation. See *Busby v. State*, 556 So.2d 1208 (1st DCA 1990); *Mendenhall v. State*, 511 So.2d 342 (5th DCA 1987). (App. D at 4) (OR at 75) (Emphasis in original).

In upholding a portion of this upward departure ground the fifth district said, "Jory's statements clearly indicate that he does pose a real future danger to society." (App. A at 3-4). Thus, it is petitioner's statements at sentencing that formed the factual basis for the fifth district's upholding of the trial court's departure sentence.

Petitioner's comments at sentencing were as follows:

> Your Honor, you have not been present throughout these proceedings from the very beginning, but from the very beginning and throughout over twenty months of pre-

trial incarceration the government has continually and repeatedly manipulated, misled and deliberately misconstrued the realities of this case.

The case was initiated by an illegal search warrant obtained in violation of the constitutional protections of the Fourth Amendment. There is ample evidence and information already on the record to substantiate that the search warrant was procured in violation of the premise of [*Franks vs. Delaware*] and its prodigy [sic].

Judge Budnick clearly agreed with me that the confidential informants were not credible and reliable and it is clear from the information on the record that the police knew this.

The government brought many false charges against me, dropping and nol prossing charges at its convenience, to manipulate the Courts and to prevent me from making bail which would have enabled me to better assist in the preparation of my defense.

The government has filed false motions with the Court intentionally and in bad faith to interfere with my rights to counsel.

These allegations are all part of the record as it exists already.

The government continually throughout these proceedings fed the media in an attempt to try this case in the press and create a negative inherent prejudice in the potential jury pool and then had the gall to cry "foul" when defense attorney spoke to the press.

The government has used intimidation, inuendo and ostracism to attempt to prevail upon defense counsel to not exert theirselves on my behalf.

This case has been a case where delay has been a benefit to the prosecution. The prosecution have [sic] manipulated for the delay for tactical advantage and has severely prejudiced my defense. Just as the police solicited false information to get a search warrant, the prosecution solicited and received false testimony to get this conviction[,] manipulating Bobby's mother's emotions to get her to misrepresent the truth on the witness stand.

In the pretrial hearing in July[,] before the first jury that we picked[,] Assistant State Attorney Meryl Allawas intentionally miscited and misrepresented mandatory authority case law to the Court so that she would be able to maintain jurisdiction in this case after the Court indicated that it was prepared to dismiss the charge. This case would have been lost if it had not been for her intentional misrepresentation of mandatory case authority.

After twenty months of pre-trial incarceration I was just wore out and convinced that I could not and would not receive a fair trial. So, finally just to get this

out of the Circuit Court and into a higher court jurisdiction I consented to proceed with a tainted venue, who without doubt must have been inherently prejudiced from pre-trial publicity, despite the claimed responses to the contrary.

This has not been a criminal prosecution. It has been a lifestyle persecution, a classic example of homophobia, a judicial system run amuck where dislike and prejudice have overcome reason and fact.

The persecutors of this case have outrageously abused the judicial process and flagrantly violated my Fourth, Fifth, Sixth and Fourteen [sic] Amendment Rights guaranteed by the United States Constitution, not to mention the rights of true victims of sexual abuse and assault. True victims of sexual abuse and assault, both women and children, should be outraged at the gross abuse of judicial resources squandered on a case where the alleged victim says he is not a victim and says this was not a crime.

From the inception of this case the govermnent has deliberately misled the Court and the public to manipulate inherent prejudice to outweigh and to overcome facts and reason.

As to the trial itself, no where [sic] in my search through the Florida State Statutes could I find any law about the size of a person being part of the criteria of when he could legally consent to sex, yet obviously the size of the alleged victim in this case, which is the result of a gastro-intestinal birth defect that impeded his normal growth and development, had a significant influence on this Court.

Nor could I believe any Court could find reasonable or credible the mother's guess as to his age in a case where obviously if the mother thinks that I corrupted her son that she would hate me and even if she thought he had long since passed the legal age would be willing and perhaps eager to testify, ["O]h, I don't think he looks like he was legal age.["] The Court knows as fact that the mother does not know the alleged victim's age at the time of the incident because she wasn't there (SR, v. III, at 542-547).

Petitioner's trial defense was that the alleged victim in the instant case was sixteen years old at the time of any sexual contact. This defense was supported by the alleged victim, who testified at trial that he was sixteen at the time of the sexual acts. (SR, v. IV at 159, 165, 179). Petitioner's comments at

sentencing can only be interpreted as his expression of dissatisfaction with the criminal justice system and a reassertion of his innocence based on his belief that the alleged victim was sixteen and the alleged victim's testimony that he was sixteen at the time of the sexual acts. Thus, the only facts underlying the upward departure sentence in the instant case are the petitioner's assertion of his innocence at sentencing and his expression of dissatisfaction with the criminal justice system.

In *State v. Mischler*, 488 So.2d 523 (Fla. 1986), this court addressed the validity of an upward departure from the guidelines based on facts substantially the same as the facts in this case. In *Mischler* the trial court had departed upward based on the defendant's statements in her presentence investigation report. These statements amounted to Mischler's "maintaining her innocence and voicing her opinion on the workings of the criminal justice system in America." *Id.* at 525. This court, in finding this reason an invalid basis for departure, held that "lack of remorse to support a departure sentence cannot be inferred from either the mere exercise of a constitutional right or a continuing assertion of innocence." *Id.* *See also State v. Sachs*, 526 So.2d 48, 51 n.1 (Fla. 1988).

The facts underlying the trial court's departure sentence in the instant case are substantially the same as those in *Mischler*. Petitioner, in his comments to the trial court at sentencing, merely continued his assertion of innocence and expressed his dissatisfaction with the criminal justice system. Although such

comments did not endear him to the trial judge, they are insufficient to support an upward departure under *Mischler*.

CONCLUSION

Based upon the foregoing argument and the authorities cited herein, petitioner respectfully asks this Court to accept jurisdiction to resolve the conflict between the decision of the fifth district court of appeal in the instant case and the decisions of the other district courts of appeal and of this Court in the cases cited.

Respectfully submitted,

Jeffrey G. Thompson
KLAYMAN, THOMPSON & KONTOS
Suntree Station, Suite 104
7025 North Wickham Road
Melbourne, Florida 32940
(407) 242-9777
Florida Bar No. 0373915
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by mail to Mark Dunn, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, this 9th day of February, 1995.

Jeffrey G. Thompson
KLAYMAN, THOMPSON & KONTOS
Suntree Station, Suite 104
7025 North Wickham Road
Melbourne, Florida 32940
(407) 242-9777
Florida Bar No. 0373915
Attorneys for Petitioner