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IN THE SUPREME COURT OF FLORIDA

VICTOR RAYMOND JORY,

Petitioner,

vs. CASE NO. 85,146

STATE OF FLORIDA,

Respondent.
_____/

On Appeal from the Fifth District Court of Appeal

PETITIONER'S REPLY BRIEF

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Recognizing "future danger to society" as an invalid reason for an upward departure sentence when based on a defendant's continuing assertion of innocence or opinions concerning the criminal justice system, the state suggests that petitioner's comments before the trial court were *not* an assertion of innocence and an expression of his opinions concerning the prosecution against him, but were a statement of "his unalterable belief that 'consensual' sex with a child can *never* be a crime." This broad and inflammatory interpretation amounts to a corruption of petitioner's comments and a misrepresentation the record.

Petitioner has never said anything about the victim's *consent* as having some bearing on his *innocence* in this case. Consent has *only* been raised in this appeal to demonstrate the absence of distinguishing or aggravating factors in this statutory rape prosecution, which should have had some bearing on petitioner's *sentence*.

The state also argues that the trial court based its finding that petitioner posed a future danger to society on factors other than petitioner's comments. However, as Judge Sharp pointed out in her objective, thorough and well-reasoned dissent: "[T]he trial judge's conclusion that Jory is dangerous to society because he preys 'upon young boys from broken homes' . . . is not supported by this record. There was no proof of any pattern of such conduct with other boys."

Issue II

The state tacitly acknowledges that "future danger to society" is an invalid basis for an upward departure when based on speculation that a defendant will commit crimes in the future by suggesting the trial court had relied on "a combination of factors" which permitted an accurate

reading to be made of petitioner's future criminal conduct. But the record fails to support the various allegations and conclusions contained in the state's brief, except where they are clearly inherent in or elements of the crimes of which petitioner was convicted.

Issue III

The state insists the record does not reflect that the trial court prepared its written departure order prior to petitioner's resentencing hearing, but then goes on to demonstrate that the record does indeed bear out this fact. The state also contends petitioner waived this defect in the resentencing by not raising it before either the trial court or the district court. This contention not only lacks legal merit, it is another misrepresentation of the record.

Issue IV

Sentencing errors that are determinable from the record may be raised for the first time on appeal without contemporaneous objection in the trial court. The record in this case reflects that, under the circumstances of this case, the penalty imposed by the trial court, the absolute maximum allowed, is disproportionate and bears no correlation to the gravity of those circumstances.

Issue V

The trial court imposed a total of twelve special conditions of probation without orally pronouncing any of them. The state's assertion that petitioner "fully understood the terms of probation" finds no support in the record.

Issue VI

No evidence was ever presented concerning the circumstances surrounding the making of the videotape in this case, and the state's suggestion that the videotape, by itself, reflects the heightened level of premeditation or calculation required to justify an upward departure sentence is specious at

best. This Court's opinions in *State v. Obojes*, 604 So.2d 474 (Fla. 1992), and *Marcott v. State*, 650 So.2d 977 (Fla. 1995), clearly teach that the heightened level of premeditation or calculation needed to justify a departure sentence in a case of sexual battery or lewd and lascivious conduct must amount to a "careful plan or prearranged design *formulated with cold forethought*." The evidence in this case does not even begin to approach that level.

ARGUMENT

Issue I

"Future danger to society" is not a valid reason for an upward departure from the sentencing guidelines when based on inferences derived from a defendant's continuing assertion of innocence or opinions concerning the criminal justice system, and no other support exists in the record for this conclusion by the trial court.

Recognizing "future danger to society" as an invalid reason for an upward departure sentence when based on inferences derived from a defendant's continuing assertion of innocence or opinions concerning the criminal justice system, the state suggests that petitioner's comments before the trial court, upon which the trial court based its departure in this case,[1] were *not* an assertion of innocence and an expression of his opinions concerning the prosecution against him, but were a statement of "his unalterable belief that 'consensual' sex with a child can *never* be a crime." (Answer Brief at 6) (emphasis in original). In support of its conclusion, the state relies exclusively on petitioner's comment that "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." (SR, v. III, at 545-46) (Answer Brief at 6). In reality, however, this broad and inflammatory interpretation amounts to a corruption of petitioner's comments and a misrepresentation of the record.

Petitioner has never said anything about the victim's *consent* as having some bearing on his *innocence* in this case. Consent has *only* been raised by counsel in this appeal to demonstrate the

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[1] Although the trial court provided five reasons for departure, only "future danger to society" was upheld by the district court. *Jory v. State*, 647 So.2d 152 (Fla. 5th DCA 1994).

absence of distinguishing or aggravating factors in this statutory rape prosecution, which should have had some bearing on petitioner's *sentence*. (See, e.g., Petitioner's Initial Brief at 15, n. 5). If petitioner had ever wanted to raise consent as an issue, he certainly could have done so by attacking the constitutionality of § 800.04, as others have done. *See, e.g., Jones v. State*, 640 So.2d 1084 (Fla. 1994). But consent was *never* the basis for petitioner's claim of innocence; only the child's *age* was.[2] Moreover, the alleged victim in this case testified *repeatedly* he was sixteen when the sexual activity shown on the videotape took place[3] (SR, v. IV, at 159, 165, and 179), while the only evidence offered to show otherwise was the hearsay "date" shown in the videotape (SR, v. IV, at 144) and the victim's mother's opinion testimony after having viewed the videotape one time, the evening before she testified. (SR, v. IV, at 107, 111). Although the jury chose to believe the victim's mother over the victim, resulting in petitioner's convictions in this case, a jury's determination of guilt and a subsequent conviction for even the most heinous crimes do not deprive a defendant of the right to maintain his or her innocence or to criticize the "system" without the risk of reprisal at sentencing.

The state also urges this Court to believe the trial court based its finding that petitioner posed a future danger to society on factors other than petitioner's comments, but the factors described in the

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[2] As petitioner said in his comments to the trial court:

> Nor could I believe any Court would 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 546-47) (emphasis added).

[3] Since the alleged victim has never been prosecuted, let alone convicted, for perjury concerning his testimony at trial, the state's assertion that he "lied as to his age" (Answer Brief at 2) is little more than rhetorical excess.

state's brief lack any references to the record. (Answer Brief at 8-9). Of course, the explanation for this omission is that the record does not support the trial court's conclusion that petitioner poses a danger to society. As Judge Sharp pointed out in her objective, thorough and well-reasoned dissent:

> With regard to the trial judge's conclusion that Jory is dangerous to society because he preys "upon young boys from broken homes," that conclusion is not supported by this record. There was no proof of any pattern of such conduct with other boys. Although there are suggestions in the record that this may have been the case, the actual evidence presented at trial is not legally sufficient to establish those facts by a preponderance of the evidence as required by section 921.001(5), Florida Statutes.
>
> The evidence at this trial concerned only this one victim and this one video tape. There was no evidence of any other improper activities by Jory with other young boys.

Jory, 647 So.2d at 159 (Sharp, J., dissenting) (footnotes omitted). Not even the majority opinion below purports to rely on the conclusions reached by the trial court.

Issue II

"Future danger to society" is not a valid reason for an upward departure from the sentencing guidelines when based on speculation that a defendant will commit crimes in the future, and no other support exists in the record for this conclusion by the trial court.

Again, the state tacitly acknowledges that "future danger to society" is an invalid basis for an upward departure sentence when based on speculation that a defendant will commit crimes in the future by suggesting the trial court relied on "a combination of factors," including petitioner's comments at sentencing, which permitted an accurate reading to be made of petitioner's future criminal conduct. (Answer Brief at 10). Once again, however, the state has failed to locate any evidence in the record to support the various allegations and conclusions contained in its brief, although there are several places in the record where the state's conclusions are contradicted.

For instance, the state claims the evidence showed that petitioner "preyed upon a young boy from a broken home, who lacked a father figure in his life" and that he "ingratiated himself in the boy's life by showering him with attention, money and promises of cars." (Answer Brief at 12). In fact, the evidence shows that the boy's *mother* had known petitioner since as far back as 1978 (SR, v. IV, at 108), when the victim was five or six years old,[4] but that the victim did not meet petitioner until he was ten or eleven years old. (SR, v. IV, at 108). Further, it was the victim's *mother* who sought out petitioner's company for her son, because her son "respected" petitioner and *she* believed petitioner could be a "father image" for her son. (SR, v. IV, at 108-09). Finally, although there is evidence that petitioner paid the victim for some work done at a

[4] The victim's date of birth is June 13, 1972. (SR, v. IV, at 158).

furniture store (SR, v. IV, at 191), *there is absolutely no evidence* that petitioner "ingratiated himself in the boy's life" or "showered him with gifts and money."

The state also claims petitioner "carefully planned, controlled, directed and starred in a child pornography film for subsequent commercial distribution." (Answer Brief at 12). Following this assertion, the state includes a rare citation to the record. Ironically, however, the portion of the record cited, which contains the trial judge's findings and rulings during argument on petitioner's motion for judgment of acquittal, supports the opposite conclusion as that advanced in the state's brief:

> [Judge Richardson:] But what evidence is there that the defendant produced or directed this film? *He clearly didn't promote it by way of the evidence in the light most favorable to the state. I can't see where he promoted it as defined by the statute.*
>
> . . .
>
> Therefore, I'm of the opinion that although *there has been no evidence that the defendant produced or promoted the performance in terms of trying to manufacture it for sale*, that he did direct it.

(SR, v. IV, at 147, 152) (emphasis added).

The remaining factors mentioned in the state's brief clearly have no merit since they are all inherent in or elements of the crimes of which petitioner was convicted.

Issue III

The record clearly reflects that the trial court prepared its written departure order in advance of the sentencing hearing, and this constitutional defect in the sentencing process has never been waived.

The state insists the record does not reflect that the trial court prepared its written departure order prior to petitioner's resentencing hearing, but then goes on to demonstrate that the record does indeed bear out this fact. The transcript of the resentencing hearing clearly reveals there were no breaks or interruptions between the time the prosecutor and defense counsel made their respective arguments[5] (R at 7-32) and the trial court's pronouncement of its departure sentence. (R at 32-42). Further, the trial court's oral pronouncement of its departure sentence matches verbatim its written order. (R at 72-77). The fact that the trial court was reading its *previously-prepared* written departure order from the bench could hardly be more obvious.

Next, the state contends petitioner waived this defect in the resentencing by not raising it before either the trial court or the district court. This contention not only lacks legal merit,[6] it is another misrepresentation of the record.

Petitioner presented his objection to the trial court's preparation of its written departure order in advance of the resentencing hearing in his Motion to Modify or Mitigate Sentence (R at 105), which was denied by the trial court without a hearing. (R at 119). Petitioner also raised

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[5] No evidence was introduced at either of petitioner's sentencing hearings.

[6] *See, e.g., State v. Rhoden*, 448 So.2d 1013, 1016 (Fla. 1984); *Taylor v. State*, 601 So.2d 540, 541-42 (Fla. 1992); *Hackney v. State*, 456 So.2d 1209, 1210 (Fla. 5th DCA 1984); *State v. Ashley*, 549 So.2d 226, 227 (Fla. 3rd DCA 1989).

this argument before the district court and has attached as an appendix to this brief copies of his initial and reply briefs filed in the district court.[7]

Issue IV

The 150-year departure sentence imposed by the trial court for a single episode of consensual sexual activity is manifestly disproportionate and violates the Florida Constitution's prohibition against cruel *or* unusual punishment, and no contemporaneous objection was required to preserve this issue for appeal.

Although, admittedly, petitioner did not submit evidence of the sentences imposed in other statutory rape cases to prove that the sentence imposed in this case is grossly disproportionate to sentences typically imposed in such cases, there would seem to be no logical reason or other impediment preventing this Court from subjecting this case to proportionality review in the same manner as death penalty cases. *See Hale v. State*, 630 So.2d 521 (Fla. 1993).

As for the claim that this error has been waived, it is well-settled that sentencing errors that are determinable from the record may be raised for the first time on appeal without contemporaneous objection in the trial court. *State v. Rhoden*, 448 So.2d 1013, 1016 (Fla. 1984); *Taylor v. State*, 601 So.2d 540, 541-42 (Fla. 1992); *Hackney v. State*, 456 So.2d 1209, 1210 (Fla. 5th DCA 1984); *State v. Ashley*, 549 So.2d 226, 227 (Fla. 3rd DCA 1989).

Without question, many convictions under § 800.04, Florida Statutes, involve circumstances that warrant the maximum penalty provided by law, and petitioner makes no contrary argument here. Petitioner submits only that, under the circumstances of this case, the maximum possible penalty is

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[7] The argument on this point can be found in section I B of petitioner's briefs.

disproportionate and bears no correlation to the gravity of those circumstances. *See State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992).[8]

Issue V

The trial court failed to orally pronounce the special conditions of probation imposed upon petitioner, and the record fails to establish that petitioner had actual notice of those conditions.

The portion of petitioner's resentencing hearing described in the state's brief (Answer Brief at 23) establishes only that petitioner was aware of three special conditions of his probation, one of which the trial court agreed to delete. (R at 43-44). The trial court imposed a total of twelve special conditions of probation (R at 95-96) without orally pronouncing any of them. (R at 41). The state's assertion that petitioner "fully understood the terms of probation" (Answer Brief at 23) once again finds no support in the record.

Issue VI

None of the other reasons for departure relied upon by the trial court are supported by the record, including "premeditation and calculation."

No evidence was ever presented concerning the circumstances surrounding the making of the videotape in this case, and the state's claim that the videotape, by itself, reflects the heightened level of premeditation or calculation required to justify an upward departure sentence is specious at best. The videotape contains unedited sexual activity. It begins sometime after the activity has commenced, and it ends sometime before the activity ceases. There is no plot, there is no dialogue, and there are no

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[8] The cases cited in the state's brief bear no similarity to the instant case: both involved non-consensual sexual batteries, one by a step-father against his eight-year-old son, *Stemper v. State*, 576 So.2d 425 (Fla. 4th DCA 1991); the other case is a pre-guideline case involving the violent rape of an *adult* woman. *Golden v. State*, 509 So.2d 1149 (Fla. 1987).

characters. In short, the tape lacks any of the usual indicia of even a pornographic movie intended for distribution.

Additionally, the trial court acknowledged on more than one occasion that the identity of the video photographer was unknown. (e.g., SR, v.IV, at 155; R at 74). The victim testified without contradiction or rebuttal that the video photographer was a friend or acquaintance of *his*, and that "we [he and petitioner] didn't know the tape was going." (SR, v.IV, at 163). The videotape, itself, was seized from the home of someone other than petitioner. (SR, v. IV, at 71). Where, then, is the evidence to sustain the trial court's conclusion that *petitioner* "carefully planned" to videotape himself and the victim or that "each sexual act" between them was "carefully planned and choreographed" *by petitioner*?

This Court's opinions in *State v. Obojes*, 604 So.2d 474 (Fla. 1992), and *Marcott v. State*, 650 So.2d 977 (Fla. 1995), clearly teach that the heightened level of premeditation or calculation needed to justify a departure sentence in a case of sexual battery or lewd and lascivious conduct must amount to a "careful plan or prearranged design *formulated with cold forethought*." *Obojes*, 604 So.2d. at 475; *Marcott*, 650 So.2d at 979 (emphasis added). The evidence in this case does not even begin to approach that level.

CONCLUSION

Based upon the foregoing argument and the authorities cited herein, petitioner respectfully requests this Court to quash the decision below and remand this cause to the district court with directions to remand to the trial court for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by mail/delivery to Steven J. Guardiano, Senior Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida, this 26th day of July, 1995.

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