IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR,

Petitioner,

vs. CASE NO.: 85,864

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Charles Frederick Barr, defendant and appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the First District's opinion below, which is contained in the appendix attached hereto, will be designated by the symbol "A" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Article V, Section 3(b)(3) of the Florida Constitution provides, in pertinent part, as follows:

> The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must appear within the four corners of the majority decision," and "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Further, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So. 2d 135, 139 (Fla. 1980).

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

The First District's decision in this case does not expressly and directly conflict with decisions of this Court and any conflict between the first and second districts has been legislatively resolved. Thus, this court should deny review.

ARGUMENT

ISSUE

DOES THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN STATE V. VARNER, 616 So. 2d 988 (Fla. 1993), STATE V. TYNER, 506 So. 2d 405 (Fla. 1987), WILLIAMS V. STATE, 500 So. 2d 501 (Fla. 1986) OR BASS V. STATE, 496 So. 2d 880 (Fla. 2d DCA 1986)?

In the instant case, the First District held that the departure sentence imposed was valid because it was based on "appellant's conduct surrounding his apprehension for the armed robbery. Because this conduct endangered the lives of many innocent persons and demonstrated a flagrant disregard for the safety of others, it constituted a clear and convincing reason for departure." (A 1-2). The First District noted that although appellant could have been charged with reckless driving as a result of the high-speed chase, the departure sentence was valid because "it is neither an element of the offense of reckless driving nor an inherent factor in a reckless driving charge that a large or numerous number of people be exposed to serious harm." (A 5-6).

The First District's decision does not conflict with State v. Varner, 616 So. 2d 988 (Fla. 1993), State v. Tyner, 506 So. 2d 405 (Fla. 1987), or Williams v. State, 500 So. 2d 501 (Fla. 1986). Those decisions hold that a departure sentence cannot be based on a crime for which the defendant was not convicted. In Tyner, the defendant was convicted of robbery and the trial court

departed based on two murders for which the defendant was not convicted. In Williams, the defendant was convicted of burglary and theft charges and a departure sentence was imposed based on the defendant's failure to appear for sentencing. In Varner, the defendant was convicted of firearms charges and aggravated assault and a departure sentence was imposed based on witness tampering. In the instant case, the departure sentence was not based on the fact that appellant had committed the offense of reckless driving, it was based on his endangering numerous people in his attempt to avoid apprehension for the robbery for which he was convicted. Thus, the decision in the instant case does not conflict with the foregoing decisions of this court.

The First District's decision superficially appears to conflict with the decision of the Second District in Bass v. State, 496 So. 2d 880 (Fla. 2d DCA 1986). In Bass, interpreting then extant statutes, the court recognized that a departure sentence based on the endangerment of many lives is valid but held that this was not true when the conduct which endangered lives could have resulted in a charge of reckless driving. Id. at 881-882. Bass was almost certainly erroneous because it infringed on the constitutional right of the prosecutor to select charges and the statutory authority of the trial judge to consider the circumstances of the crime in determining the sentence imposed. Regardless, Bass is now moot because section 921.0016(3)(i), Florida Statutes (1993) has been adopted to specifically provide that a departure sentence based on "a substantial risk of death or great bodily harm to many persons"

is valid. Thus, any conflict which may have existed between the first and second districts has been resolved and this court should deny review.

CONCLUSION

Review should be denied.

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 Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 17 day of July, 1995.

SONYA ROEBUCK HORBELT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR,

Petitioner,

v. CASE NO. 85,864

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX

Opinion of District Court of Appeal affirming trial court, May 12, 1995.

94-110584

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CHARLES FREDERICK BARR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 94-1152

93-12478-CF

RECEIVED

MAY 15 1995

CRIMINAL APPEALS
DEPT. OF LEGAL AFFAIRS

Opinion filed May 12, 1995.

An appeal from the Circuit Court for Duval County. Aaron K. Bowden, Judge.

Nancy A. Daniels, Public Defender; Cynthia L. Hain, Certified Legal Intern, and Kathleen Stover, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Sonya Roebuck Horbelt, Assistant Attorney General, Tallahassee, for appellee.

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MAY 12 1995
DEPT. OF LEGAL AFFAIRS
Division of General Legal Services

Docketed
5-18-95
Florida Attorney General

WOLF, J.

Barr appeals from a judgment and sentence after a conviction for armed robbery of a motor vehicle. Appellant contends that his departure sentence was invalid because it was based on criminally punishable conduct for which he was not convicted. The record clearly shows that the departure was based on appellant's conduct surrounding his apprehension for the armed

robbery. Because this conduct endangered the lives of many innocent persons and demonstrated a flagrant disregard for the safety of others, it constituted a clear and convincing reason for departure.

Appellant was charged by information with the November 24, 1993, armed robbery of a motor vehicle from Patricia Maddox, and with possession of a firearm by a convicted felon. The charges were severed and the robbery charge proceeded to trial.

Evidence was presented at the March 22, 1994, trial that appellant approached the victim as she pulled into the parking lot at Southern Bell Tower in Jacksonville, and that he took her car after showing her a pistol he had hidden under his coat. The victim immediately reported the theft. A Jacksonville police officer spotted the stolen car, and when he attempted to pull the car over, appellant fled. The chase occurred when traffic was heavy--it was 8:00 a.m. rush-hour traffic, and speeds exceeded 125 miles per hour. Appellant made several illegal U-turns and almost caused several accidents during the chase. The jury convicted appellant on the robbery charge.

On March 23, 1994, the state filed a notice of intent to seek a departure above the recommended sentencing guidelines range as a result of the unreasonable risk to others created by the defendant.

On March 29, 1994, appellant was sentenced to 25 years in prison, which was an upward departure from the guidelines.

(Appellant's recommended guideline sentence was seven to nine years, and the permitted range was 5 1/2 to 12 years). A three-year mandatory-minimum was imposed for use of a firearm. After hearing argument from the state and appellant, and testimony from the officer Smith about the car chase, the court entered a written departure order. The court's reasoning for the departure was that appellant displayed a flagrant disregard for the safety of others. According to the court, appellant's reckless driving during the course of the chase with the police exposed numerous innocent citizens to serious harm.

In Garcia v. State, 454 So. 2d 714 (Fla. 1st DCA 1984), this court specifically determined that a defendant who leads police on a high-speed chase, shoots at the police, and who is involved in a wreck during a high-speed chase, may receive a departure sentence based on his conduct during the chase. (In accord Ward v. State, 568 So. 2d 452 (Fla. 3d DCA 1990), a defendant whose conduct puts many people at risk may receive a departure sentence). In Miller v. State, 549 So. 2d 1106 (Fla. 2d DCA 1989), reversed on other grounds, 573 So. 2d 337 (Fla. 1991), the second district upheld a departure sentence based on the defendant knowingly creating a great risk of injury or death to a large number of persons. In that case, the police began pursuing the defendant on a tip that he was selling batteries from his car and a high-speed chase ensued. The defendant traveled south in a northbound lane of traffic at speeds between 50 and 80 miles per

hour. Traffic was forced to swerve off the road, and the defendant's car collided head-on with another car.

In Campos v. State, 515 So. 2d 1358, 1360 (Fla. 4th DCA 1987), the fourth district acknowledged that the conduct of a defendant "who personally created an extreme risk to the physical safety of law enforcement officers and innocent citizens by firing several shots from a Uzi semi-automatic rifle at pursuing police officers during the high-speed chase in heavy traffic on I-95 at speeds over 100 miles per hour setting the case apart from the ordinary robbery" would justify an upward departure from the sentencing guidelines.

Appellant urges us, however, to depart from this line of cases and hold that a high-speed chase which endangers the lives of a large number of people should not constitute a valid reason for a departure sentence because the defendant was not charged and convicted of reckless driving. Appellant, at least partially, relies on the case of Felts v. State, 537 So. 2d 995 (Fla. 1st DCA 1988), decision approved, 549 So. 2d 1373 (Fla. 1989), for this proposition. Appellant's position is not well taken for several reasons.

First, there is no indication in the Felts opinion that the defendant endangered anyone other than himself and his fellow passenger. The Felts opinion is silent about the nature of the area where the high-speed chase occurred, the time of day the chase occurred, and whether there were any other vehicles or

people on the streets at the time the chase ensued. While the opinion stated that the reason given for the departure was the unnecessary danger to many persons, it cannot be determined if this allegation was supported by the record. Indeed, as the fifth district stated in Strawn v. State, 576 So. 2d 877, 879 (Fla. 5th DCA 1991), while placement of a substantial number of bystanders at risk during the commission of a robbery constitutes a valid reason for departure where the record fails to support such an allegation, a departure sentence could not be upheld.

In the instant case, the facts demonstrate that chase occurred on busy thoroughfares during rush hour, several accidents almost occurred, and appellant's behavior posed a direct threat to a substantial number of people. In addition, in Felts, supra, the uncharged crimes would include not only reckless driving but also vehicular homicide based on the death of the passenger (who was the only person who can be shown to have been endangered from the facts recited in the opinion). Thus, all the factors justifying the departure in Felts were inherent in the uncharged offenses. In the instant case, the only charge that appellant argues which could have been brought as a result of the high-speed chase was reckless driving.[1] Clearly, it is neither an element of the offense of reckless driving nor

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[1]Even if other charges could have been brought, we are unaware of any offense where it is an inherent factor of the offense that a large group of people's lives were endangered.

an inherent factor in a reckless driving charge that a large or numerous number of people be exposed to serious harm.

The judgment and sentence are, therefore, affirmed.

MINER, J., concurs; ERVIN, J., dissenting with written opinion.

ERVIN, J., dissenting.

Because I consider that the sole reason given for the upward departure sentence imposed on appellant is invalid under Florida Rule of Criminal Procedure 3.701(d)(11), as it is a factor relating to the instant offense for which he was not convicted, *i.e.*, reckless driving, I respectfully dissent.

Appellant was convicted of armed robbery of a motor vehicle. The recommended guideline sentence was seven to nine years and the permitted guideline sentence was 5 1/2 to 12 years in prison. The court imposed an upward departure sentence of 25 years and gave as its sole reason for departure appellant's "flagrant disregard for the safety of others," as evidenced by his flight from the police to avoid capture and his reckless driving which exposed numerous citizens to serious harm. As the majority points out, evidence was presented disclosing that appellant led the police on a high speed chase on a busy interstate highway. Speeds exceeded 125 mph; appellant made several illegal U-turns and nearly caused several accidents during the pursuit.

I consider that reversal is required under Felts v. State, 537 So. 2d 995, 997-98 & n.7 (Fla. 1st DCA 1988), approved, 549 So. 2d 1373 (Fla. 1989). In Felts, the defendant was convicted of armed robbery, and a departure sentence was imposed, partly because he drove the victim's car at excessive speeds in an attempt to elude the authorities, resulting in an accident which killed an accomplice. The state argued that the defendant's high speed flight from the pursuing officers constituted an extreme

risk to the physical safety of both citizens and law enforcement officers, that such conduct was not inherent in the offense of robbery, and that it could support departure as it was not factored in the scoresheet. Therefore, the state contended that the court could lawfully depart from the guidelines based on circumstances surrounding the offense, and it cited Garcia v. State, 454 So. 2d 714 (Fla. 1st DCA 1984). This court, relying on Williams v. State, 500 So. 2d 501 (Fla. 1986), and State v. Tyner, 506 So. 2d 405 (Fla. 1987), held that the departure reason given was invalid, because it involved circumstances surrounding the offense for which a conviction was not obtained. Accord Bass v. State, 496 So. 2d 880, 881-82 (Fla. 2d DCA 1986) (rejecting as a valid departure reason the fact that the defendant had endangered the lives of many people during a high speed chase, because such conduct constituted a charge arising from the same criminal episode which was not filed against the defendant, *i.e.*, reckless driving).

Rather than follow the above case law, the majority chooses instead to follow Garcia. Garcia, however, was decided before the two supreme court decisions cited in Felts, namely, Williams and Tyner, both of which held that rule 3.701(d)(11) prohibits departure sentences based on reasons relating to the instant offense for which convictions have not been obtained.[2]

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[2]In Williams, the trial court's reason for departure was the defendant's failure to appear for sentencing. In determining the same to be invalid, the supreme court explained that failing to appear for sentencing in a criminal case is itself a criminal

The other cases the majority cites, Campos v. State, 515 So. 2d 1358 (Fla. 4th DCA 1987), and Miller v. State, 549 So. 2d 1106 (Fla. 2d DCA 1989), rev'd on other grounds, 573 So. 2d 337 (Fla. 1991), merely cite Garcia or Scurry v. State, 489 So. 2d 25 (Fla. 1986) (finding that conduct evincing flagrant disregard for the safety of others may be a valid reason for departure). These cases do not mention the rule applied in Williams and Tyner.

Because Garcia was decided prior to Williams and Tyner, and because Campos and Miller do not refer to these two supreme court decisions, I consider the better course is to follow Felts, which clearly applied the precedent established in the two supreme court decisions. In so saying, I note that cases which have upheld departure sentences based on conduct evincing flagrant disregard of the safety of others involve situations where the conduct could not be separately charged as another crime. See, e.g., Burgess v. State, 524 So. 2d 1132 (Fla. 1st DCA 1988) (upholding departure based on flagrant disregard for safety of others where defendant shot two victims who were standing in an

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offense, yet the defendant was not charged or convicted of such crime. Permitting deviation from the guidelines for failure to appear would, in essence, be circumventing established legislative punishments by eliminating a trial. Moreover, a departure sentence based on such reason was violative of rule 3.701(d)(11), which prohibits departures based on offenses for which the defendant was not convicted.

In Tyner, the supreme court reversed an upward departure based in part upon the deaths of two persons during a burglary. The court explained that departure could not be grounded on the deaths, because the defendant was not convicted of them.

alley while three bystanders stood nearby); Webster v. State, 500 So. 2d 285 (Fla. 1st DCA 1986) (approving departure based on flagrant disregard for the safety of others where defendant shot the victim outside a nightclub in the presence of 30 to 40 witnesses, and there was evidence that one witness was within three feet of the victim).

In the case at bar, appellant clearly could have been charged with reckless driving, which is defined in section 316.192(1), Florida Statutes (1993), as driving a vehicle "in willful or wanton disregard for the safety of persons or property." The statute makes no mention of the number of persons whose safety is threatened; consequently, whether a defendant threatens the safety of one or many, the charge of reckless driving applies. Departure based on criminal conduct for which appellant was neither charged nor convicted, in my judgment, amounts to the imposition of an additional 13-year sentence for conduct which would, at most, be punishable by six months of imprisonment for a second violation. § 316.192(2), Fla. Stat. (1993). This type of departure sentence is precisely that which Williams prohibits.

I would therefore reverse appellant's departure sentence and remand for imposition of a guideline sentence. See Shull v. Dugger, 515 So. 2d 748 (Fla. 1987).