IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR, :

Petitioner, :

v. : CASE NO. 85,864

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the guidelines-departure sentence imposed on an armed robbery conviction. The trial and sentencing were held in Duval County before Circuit Judge Aaron K. Bowden. The First District Court affirmed on appeal May 12, 1995. Barr v. State, 655 So.2d 1175 (Fla. 1st DCA 1995).

The record on appeal will be referred to as "R" and the two-volume transcript as "T."

II STATEMENT OF THE CASE AND FACTS

Petitioner, Charles Frederick Barr, was convicted of armed robbery of a motor vehicle. On appeal to the First District Court, Barr argued his departure sentence was invalid, because it was based on criminal conduct for which he had not been convicted. Barr, 655 So.2d at 1177.

The facts were that Barr allegedly approached the victim in a parking lot near the Southern Bell Tower in Jacksonville as she arrived at work one morning, and demanded her car, which he took. When a police officer spotted him in the car, and attempted to pull him over, Barr fled. According to the district court opinion:

> 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.

Id. at 1176. On cross-examination of the officer at sentencing, however, defense counsel established that Barr did not appear intoxicated, did not shoot at anyone, did not hit any cars, did not cause any accidents, and did not come close to any pedestrians (T 225). Though the chase did occur during rush hour traffic, Barr's travels on I-95 were northbound, the opposite direction from that of the rush hour traffic (T 233).

Petitioner contended that, at most, this conduct constituted reckless driving, a misdemeanor for which he had been neither charged nor convicted. As a crime of which he had not been convicted, it did not support an upward departure from the

guidelines. Nevertheless, the trial court departed from the recommended guidelines of 7 - 9 years, with a permitted range up to 12 years, and sentenced Barr to 25 years in prison. The reason for departure was that

> appellant displayed a flagrant disregard for the safety of others. According to the [trial] court, appellant's reckless driving during the course of the chase with the police exposed numerous innocent citizens to serious harm.

Id.

The district court affirmed, relying primarily on a 1984 case, Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984). Finding that "[a]ppellant, at least partially, relies on the case of Felts," the district court distinguished this later case which was approved by this court. Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1988), approved, 549 So.2d 1373 (Fla. 1989). The district court found that Felts did not recite the facts on which it relied in holding that departure was not warranted because the defendant had not been charged with reckless driving. The court concluded that it is not an element of reckless driving nor inherent in the charge that "a large or numerous number of people be exposed to harm" [emphasis in original]. Id.

Judge Ervin dissented; he would find the departure was invalid under Rule 3.701(d)(11), Florida Rules of Criminal Procedure, as it is a factor relating to the instant offense for which Barr was not convicted, i.e., reckless driving. The dissent reasoned that Felts and State v. Tyner, 506 So.2d 405

(Fla. 1987) required reversal. The dissent said:

> 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.

Id. at 1178 (Ervin, J., dissenting), citing Williams v. State, 500 So.2d 501 (Fla. 1986).

Notice to invoke was timely filed, and this appeal follows.

III SUMMARY OF ARGUMENT

The district court opinion relied on its own 1984 case, and ignored later contrary cases from this court in holding that a high-speed car chase following the theft of a car constituted a valid reason for departure.

Florida law, including decisions of this court, prohibit using as a reason for departure a crime of which the defendant was not convicted. Petitioner could have been, but was not, charged with reckless driving as a result of the car chase. Since he was not convicted of this crime, it was improper to use the chase as a reason for departure, either.

The district court's distinction that Barr allegedly endangered many people, and danger to "many" others is not inherent in reckless driving is an invalid distinction. Reckless driving applies no matter how many people were endangered, or indeed, even if only property were endangered.

IV ARGUMENT

ISSUE PRESENTED

A DEPARTURE FROM SENTENCING GUIDELINES IS INVALID WHEN IT IS BASED ON CRIMINALLY PUNISHABLE CONDUCT FOR WHICH NO CONVICTION WAS OBTAINED.

The cases relied on by the First District Court, primarily Garcia, supra, are factually distinguishable from the instant case, although their factual distinctions are problematic for this argument. More important is the fact that Garcia predated this court's decision in Williams, supra, by two years, and Williams superseded and effectively overruled Garcia. In Williams, this court held that Rule 3.701(d)(11), Florida Rules of Criminal Procedure, precludes departure for an offense of which the defendant has not been convicted. 500 So. 2d at 503. Subsequent decisions of this court reaffirm this ruling. See State v. Varner, 616 So. 2d 988 (Fla. 1993) (departure invalid if based on collateral conduct that is criminally punishable); State v. Tyner, supra (courts cannot consider for departure conduct arising out of the circumstances of an offense for which the defendant has not been convicted).

In Varner, the defendant was convicted of shooting into a building, shooting into a vehicle, and aggravated assault, but the departure was based on an allegation that Varner had threatened a witness prior to trial. This court held that, since Varner had not been convicted of witness tampering, the trial court erred in using this conduct as a reason for departure. 616 So. 2d at 988-989.

In Tyner, the defendant was convicted as a principal of armed burglary, and was initially charged with two counts of first degree murder. The murders were committed by a codefendant, and the murder charges against Tyner - who did not enter the home - were subsequently dismissed. One of the reasons for departure was that two people were killed as a result of the burglary. Agreeing with the Second District, this court held that, even though the deaths were a direct result of the burglary, Rule 3.701(d)(11) prohibited the departure because Tyner had not been convicted of the murders. Tyner, 506 So. 2d at 406.

In Felts v. State, 537 So. 2d 995 (Fla. 1st DCA 1988), aff'd on other grounds, 549 So.2d 1373 (Fla. 1989), the state argued at trial that the defendant's conduct, a high speed chase resulting in a fatal accident, was a valid reason to depart from the guidelines, citing Garcia, even though the defendant was not convicted of any offense relating to the chase or accident. The First District rejected the state's argument and held departure was invalid when based on conduct arising out of an offense for which no conviction was obtained. Felts, 537 So. 2d at 998.

In Bass v. State, 496 So. 2d 880 (Fla. 2d DCA 1986), also similar to the instant case, the Second District held the high speed chase was not a valid reason for departing from the guidelines, because it was a separate offense for which no conviction was obtained. Id. at 881-82. Bass relied on the

Second District's previous decision in Tyner, and as noted above, Tyner was later approved by this court. Tyner v. State, 491 So.2d 1228 (Fla. 2d DCA 1986), approved, 506 So.2d 405 (Fla. 1987).

Not only has Garcia been implicitly overruled by intervening caselaw from this court, Garcia is also factually distinguishable from the instant case, because it involved

> 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. . .

Barr, 655 So.2d at 1176. While Barr was involved in a high-speed chase, he did not shoot at anyone, nor did he cause any accident. Also, the district court omitted one highly relevant fact, which is that, while the chase occurred during the morning rush hour, it was primarily northbound on I-95, opposite the direction of most rush hour traffic (T-233).

On the other hand, the majority opinion distinguished Felts from the instant case on the ground the facts of Felts did not demonstrate "the nature of area where the high-speed chase occurred, the time of day. . ., and whether there were any other vehicles or people on the streets at the time the chase ensued." 655 So.2d at 1177. Yet, the majority relied on the Garcia opinion, which omitted the same facts, save one: that the chase occurred somewhere in Gainesville at 3:20 a.m., a time of day from which the court could judicially notice that it would be highly unlikely for there to be many vehicles or people, if any, on the street. Both Felts and Garcia also

involved the defendants shooting at the police, a fact not present here.

While the facts distinguish Garcia from the instant case, these distinctions are problematic because Garcia 1) also could surely have been charged with other crimes as a result of shooting at the police and recklessly causing an accident, thus precluding departure based on such factors, and 2) the one useful fact - that the accident occurred at 3:20 a.m. - indicates there was no danger to "many" others. The lack of danger to many others makes Garcia indistinguishable from Felts on the very fact, the key fact, that the district court found to distinguish Felts from the instant case.

The similarity between Garcia and Felts demonstrates that the district court's distinction that danger to "many" others is not inherent in reckless driving is invalid. The reckless driving statute applies no matter how many people were endangered, or indeed, even if only property were endangered. Barr, 655 So.2d at 1179 (Ervin, J., dissenting).

Moreover, as the dissent pointed out, the real distinction between the instant case and those where "flagrant disregard for the safety of others" is a valid departure reason, involves situations where the conduct could not be separately charged as another crime. E.g., Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986) (approving departure based on flagrant disregard for 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). Barr at 1178-79. In conclusion, Garcia could not have reached the same result had the principles of Williams, Tyner and Varner been applied.

The range of holdings obviously indicates a need for this court to clarify the issue for the district courts. Important policy considerations support the need to hold the line on this principle. The most compelling is that a contrary ruling would effectively eliminate a defendant's constitutional right to trial. As this court said in Varner:

> Had Varner been charged and. . . sentenced for witness tampering, the guidelines would not have permitted a sentence as great as the one he received. This result should not be permitted, because it fosters inconsistent sentencing based on similar facts. Such a state is contrary to the basic precepts underlying the sentencing guidelines.

616 So.2d at 988; see also Barr at 1178, n.2 (Ervin, J., dissenting) ("[p]ermitting deviation from the guidelines. . . would, in essence, be circumventing established legislative punishments by eliminating a trial"); Williams, 500 So.2d at 503 (characterized permitting punishment without trial as a "Kafkaesque" situation).

The proper procedure is to separately charge and convict the defendant for each instance of criminal conduct. A departure based on conduct that constitutes a criminal offense, but for which the defendant was not convicted could effectively sentence a defendant to an incarceration period exceeding the

maximum for the offense, as in the instant case. Barr was in effect sentenced to an additional 13 years for an offense which would have been only a misdemeanor had it been charged and tried.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse his sentence because the reason for departure was invalid, and remand for resentencing within the guidelines.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sonya Roebuck Horbelt, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Charles Barr, inmate no. 311442, Holmes Correctional Institution, P.O. Box 190, Bonifay, Florida, 32425, this 27 day of November, 1995.

KATHLEEN STOVER