IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 85,864

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF - CRIMINAL APPEALS
FLORIDA BAR NO. 0325791

SONYA ROEBUCK HORBELT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0937363

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, Charles Frederick Barr, the appellant in the First District Court of Appeal and the defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, the appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referred to herein as "the State."

References to the opinion of the First District Court of Appeal, found in the appendix of this brief, will be noted by its Southern 2d citation.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of the trial court's proceedings; the symbols will be followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as reasonably supported by the record, with the following additions:

The car chase upon which the departure sentence was based began within ten minutes of the robbery. (T 47, 55-56, 65, 223-224). Officer Smith testified at petitioner's trial that during the car chase, petitioner entered and exited I-95 several times, made an illegal U-turn in a school zone, almost causing an accident, made a U-turn in a median, used the emergency lane and weaved in and out of traffic to gain access to I-95, almost caused another accident, weaved in and out of traffic at a high rate of speed, made another U-turn, finally lost control of the car, hit a highway lamp post, severing it, slid down an embankment, and came to rest in a ditch. (T 75-81). Officer Smith testified that during the chase, he exceeded speeds of 125 miles per hour, that traffic was heavy, and that it was "8:00 rush hour traffic." (T 77).

At the sentencing hearing, Officer Smith testified that the chase lasted approximately 20 minutes and that petitioner exceeded 125 miles per hour, weaved in and out of rush hour traffic, almost

caused several accidents, and used nondesignated lanes of travel. (T 223-224).

The trial judge imposed a departure sentence, finding that petitioner's conduct during the chase created an unreasonable and substantial risk of harm to the police and the public. (T 234-235).

On appeal to the First District Court of Appeal, petitioner argued that his conduct during the chase was not a valid departure reason because he could have been charged with reckless driving based on that conduct. The First District affirmed the departure sentence, finding that the trial court properly departed because appellant's conduct endangered the lives of many innocent persons, which is not an element of, or an inherent factor in, a charge of reckless driving. Barr v. State, 655 So. 2d 1175 (Fla. 1st DCA 1995).

SUMMARY OF ARGUMENT

The First District correctly held that petitioner's departure sentence, based on the endangerment of many innocent citizens during petitioner's attempt to avoid apprehension for the robbery of which he was convicted, was proper.

ARGUMENT

ISSUE

IS THE ENDANGERMENT OF MANY INNOCENT LIVES DURING AN ATTEMPT TO AVOID APPREHENSION A VALID BASIS FOR IMPOSING A DEPARTURE SENTENCE? (Restated).

The trial court based its departure on the grounds that petitioner's conduct evinced a flagrant disregard for the safety of others and clearly exposed numerous innocent citizens to serious harm. (R 39-40). In reaching its decision, the trial court relied upon Scurry v. State, 489 So. 2d 25 (Fla. 1986) and Garcia v. State, 454 So. 2d 714 (Fla. 1st DCA 1984). In Scurry, this Court held that "evincing a flagrant disregard for the safety of others, does constitute a clear and convincing reason for departure." Id. At 29. In Garcia, the First District held that a trial court may consider the circumstances surrounding a defendant's apprehension as a basis for departure. In the instant case, the trial court and the First District properly determined that the circumstances surrounding petitioner's apprehension, which demonstrated a flagrant disregard for the safety of others and endangered many innocent persons, was a valid reason for departure. The departure sentence in this case was not imposed merely because

petitioner drove at high speeds, weaving in and out of traffic recklessly. If the chase had occurred when no one was on the roads, the court probably would not have departed. Rather, the trial court departed because petitioner endangered the lives of many people during his efforts to avoid apprehension for the robbery. Endangering the lives of many persons has been accepted by the legislature as a legitimate reason for imposing a departure sentence. Section 921.0016, Florida Statutes (1993) provides in pertinent part:

> Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:
> . . . .
> (i) The offense created a substantial risk of death or great bodily harm to many persons . . . .

Although this statute provides that it is applicable to offenses committed on or after January 1, 1994, it represents the legislature's codification of prior case law holding this to be a valid reason for departure, and the reasoning applies equally to offenses committed prior to 1994. Thus, the First District's decision should be affirmed.

Petitioner contends that his departure sentence was invalid under this Court's decisions in Williams v. State, 500 So. 2d 501 (Fla. 1986), State v. Tyner, 506 So. 2d 405 (Fla. 1987), and State

v. Varner, 616 So. 2d 988 (Fla. 1993), and that the First District's decision in Garcia was overruled by this Court's decision in Williams. For the following reasons, this contention must fail.

Contrary to petitioner's assertions, the First District's decision in Garcia was not overruled by this Court's decision in Williams, supra. In Williams, this court held that a departure sentence cannot be based on the commission of an offense for which a conviction has not been obtained. Thus, the trial court in the instant case could not have departed merely because petitioner committed the offense of reckless driving. However, Williams did not hold that a departure cannot be based on circumstances surrounding a defendant's apprehension for the offense of which he is convicted when those circumstances endanger the lives of innocent people. This was the reason for the departure in the instant case. The mere fact that petitioner's dangerous conduct also constituted reckless driving, in addition to endangering the lives of innocent people, should not invalidate this reason for departure. These same considerations also distinguish the instant case from Tyner, supra and Varner, supra. Neither Tyner nor Varner held that a trial court could not consider the circumstances

surrounding a defendant's apprehension in determining whether to impose a departure sentence.

In Tyner, the defendant was convicted of armed burglary. The trial court imposed a departure sentence because two murders had been committed by a codefendant during the burglary. This Court held that this was not a valid reason for departure because the defendant had not been convicted of the murders. However, the court did not hold that a trial court cannot consider the circumstances surrounding a defendant's apprehension. For example, if the murders in Tyner had occurred during a shoot-out with the police while Tyner was trying to escape after the burglary, and the shoot-out had occurred in the presence of numerous innocent citizens, departure would have been appropriate because the defendant's conduct at the time of his apprehension would have endangered many innocent persons, in addition to constituting the criminal offense of murder. Thus, the departure would not have been based on the fact that two murders occurred during the shoot-out, but rather on the fact that the shoot-out was conduct which evinced a flagrant disregard for the safety of others and endangered many innocent lives.

In Varner, the trial court departed on the grounds that the defendant had threatened a witness. This Court held that witness

tampering is not a valid ground for departure because it is a crime in itself and a trial court cannot depart on the grounds that the defendant committed another crime for which he has not been convicted. Again, nothing in Varner prohibits a trial court from considering the circumstances surrounding a defendant's apprehension for the crime he is being sentenced for.

Petitioner's reliance on Felts v. State, 537 So. 2d 995 (Fla. 1st DCA 1988), approved on other grounds, (Fla. 1989), is also misplaced because Felts is distinguishable from the instant case. In Felts, the First District held that a departure sentence could not be based on the fact that the defendant engaged in high speed flight from pursuing officers which resulted in a fatal accident. However, there is no indication that the chase in Felts endangered the lives of many people. There is no indication that the chase in Felts occurred at a time when there was heavy traffic, or that the defendant wove in and out of heavy traffic, nearly causing several accidents. Thus, Felts is distinguishable from the instant case. Based on the facts of the instant case, the First District properly held that petitioner's conduct in attempting to avoid apprehension was a valid reason for departure.

The instant case is similar to Miller v. State, 549 So. 2d 1106 (Fla. 2d DCA 1989), reversed on other grounds, 573 So. 2d 337 (Fla.

1991). In Miller, the court upheld a departure sentence stating that "[the defendant's] actions in driving his vehicle on the wrong side of a divided highway, endangering numerous motorists, some of whom were forced off the road, justifies the trial court's departure based on [the defendant's] reckless disregard for the safety of others." Id. at 1109. As in the instant case, the defendant's conduct in Miller constituted reckless driving, an offense for which the defendant was not convicted. However, the trial court did not depart merely because the defendant's conduct constituted the offense of reckless driving. It departed because the conduct endangered the lives of many people and demonstrated a flagrant disregard for the safety of others. These are the same grounds upon which the trial court departed in the instant case, and the instant case is indistinguishable from Miller.

Because the departure sentence in the instant case was not based on the fact that petitioner committed the offense of reckless driving, but rather on the fact that his conduct endangered the lives of many innocent persons, the First District properly affirmed the sentence. The First District correctly held that endangering the lives of many persons is neither an element of reckless driving nor an inherent factor in a reckless driving

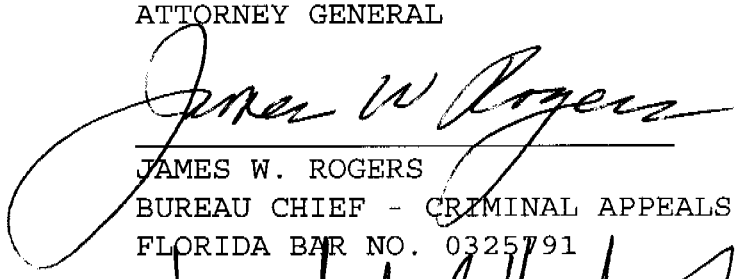
charge and is therefore a valid reason for departure. Barr, at 1177.

CONCLUSION

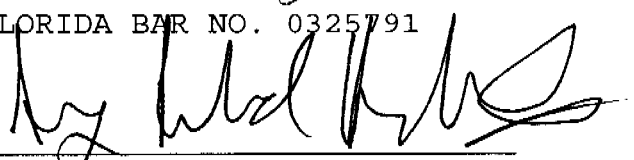
For the reasons set forth herein, the State respectfully requests that the First District's decision be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
BUREAU CHIEF - CRIMINAL APPEALS
FLORIDA BAR NO. 0325791



SONYA ROEBUCK HORBELT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0937363

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT
[AGO# 95-110961]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 18 day of December, 1995.

Sonya Roebuck Horbelt
Assistant Attorney General

[A:\BARR.MER --- 12/18/95,10:00 am]

IN THE SUPREME COURT OF FLORIDA

CHARLES FREDERICK BARR,

Petitioner,

v. CASE NO. 85,864

STATE OF FLORIDA,

Respondent.

APPENDIX

First District's opinion, filed May 12, 1995.

could have no effect on lifesaving techniques in effect as of the incident. He further suggested that there was no reason to inquire "into what somebody in Georgia did." Imprecise as this objection is, it appears to us correct that this testimony had no bearing on the issue presented in the case, which was whether Wet 'N Wild's lifeguarding on the date and time in question fell below the generally accepted standard of care. Even if studies are underway in Georgia or in West Palm Beach concerning reasons for the incidence of drowning among blacks, nothing in the record suggests that the generally accepted lifeguarding techniques employed by Wet 'N Wild that he testified to were inadequate.

[3] Finally, we agree the trial court erred in admitting Fletemeyer's deposition testimony that, in his opinion, the lifeguard used improper procedures in dragging the victim from the water and in failing to complete a written report detailing the incident which included Sullivan's name. According to Fletemeyer, these failures suggest Wet 'N Wild did not have the "overall ability to operate in a professional way." Again, we begin with the question whether the objection made in the trial court was sufficiently specific to preserve this issue for review. Wet 'N Wild objected to this testimony below on the following grounds:

> The problem with those questions and those answers, Your Honor, is he's expressing opinion [sic] about the fact that Miss Sullivan's name did not appear on an accident report. How that interacts, I have no idea, with his opinion that Wet 'N Wild violated a standard. There is no standard that requires you to list people as witnesses on accident reports. That is not an opinion testimony for him as an expert. He's just throwing that in, oh, by the way, I don't think they ran a good ship because, gee, they didn't have her name on the accident report.

Wet 'N Wild appears to be correct that Fletemeyer's testimony concerning acts of negligence apart from the failure to timely rescue the victim should have been excluded. The sole purpose behind the introduction of this testimony, as Wet 'N Wild points out, was to create the inference that if Wet 'N Wild was negligent in general, it was probably negligent with respect to this accident. However, this evidence was irrelevant since it had no tendency to prove or disprove that Wet 'N Wild was negligent in failing to observe the victim's peril and timely rescue her. On appeal, Sullivan contends this testimony was harmless but it is impossible to tell. Plaintiff's counsel evidently thought it was of value to his case or he would not have insisted on its admission.

REVERSED and REMANDED.

THOMPSON, J., and ANTOON, Associate Judge, concur.

Charles Frederick BARR, Appellant,

v.

STATE of Florida, Appellee.

No. 94-1152.

District Court of Appeal of Florida, First District.

May 12, 1995.

Defendant was convicted of armed robbery of motor vehicle, following jury trial in the Circuit Court, Duval County, Aaron K. Bowden, J., and he appealed. The District Court of Appeal, Wolf, J., held that departure sentence imposed on defendant, based on trial court's finding that defendant's reckless driving during police chase following the robbery displayed flagrant disregard for safety of others due to exposure of numerous innocent citizens to serious harm, was not invalid, notwithstanding defendant's contention that departure was based on criminally punishable conduct of reckless driving for which he was neither charged nor convicted.

Affirmed.

Ervin, J., dissented and filed opinion.

1. Criminal Law ⇐1240(2), 1277

Departure sentence imposed on defendant convicted of armed robbery of motor vehicle, based on trial court's finding that defendant's reckless driving during police chase following the robbery displayed flagrant disregard for safety of others due to exposure of numerous innocent citizens to serious harm, was not invalid, notwithstanding defendant's contention that departure was based on criminally punishable conduct of reckless driving for which he was neither charged nor convicted, since record supported trial court's finding as to defendant having exposed numerous people to serious harm, which is neither element nor inherent factor of offense of reckless driving.

2. Automobiles ⇐330

Exposure of numerous people to serious harm is neither element nor inherent factor of offense of reckless driving.

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

Robert A. Butterworth, Atty. Gen., Sonya Roebuck Horbelt, Asst. Atty. Gen., Tallahassee, for appellee.

WOLF, Judge.

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 5½ 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.

[1] 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.

[2] 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 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, Judge, 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 guide-

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.

line sentence was seven to nine years and the permitted guideline sentence was 5½ 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]

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 alley while three bystanders stood nearby);

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 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.

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).

Shabazz Randazo HARRIS, Appellant,

v.

STATE of Florida, Appellee.

No. 93-3536.

District Court of Appeal of Florida, First District.

May 12, 1995.

Defendant entered plea of no contest in the Circuit Court, Bay County, Clinton Foster, J., to charges of sale or delivery of cocaine within 200 feet of a public housing facility, and he appealed. The District Court of Appeal, Joanos, J., held that: (1) defendant was sufficiently advised of collateral consequences of his plea; (2) statute prohibiting sale of cocaine within 200 feet of a public housing facility was void for vagueness; (3) evidence established defendant's guilt of lesser included offense requiring resentencing; and (4) imposition of conditions of probation in written probation order that were not orally pronounced was error.

Reversed and remanded with directions.

1. Criminal Law ⇐273.1(4)

Defendant was sufficiently advised of collateral consequences of his plea prior to its entry where plea negotiation form showed defendant was advised of collateral consequences of his plea prior to its entry, i.e., he had actual notice of consequences of his plea before acceptance of the plea by trial court.

2. Drugs and Narcotics ⇐43.1

Statute prohibiting sale of cocaine within 200 feet of public housing facility was unconstitutionally void for vagueness for failing to give citizens fair warning as to what conduct was forbidden. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. Const. Art. 1, § 9; West's F.S.A. § 893.13(1)(i).

3. Criminal Law ⇐1030(2)

A facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if error is fundamental.

4. Criminal Law ⇐1030(1)

"Fundamental error" that can be raised for first time on appeal is error that is basic to the judicial decision under review and equivalent to a denial of due process. U.S.C.A. Const.Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐1030(2)

Defendant's failure to raise before trial court due process issue with respect to statute prohibiting sale of cocaine within 200 feet of public housing facility did not preclude District Court of Appeal's review of constitu-