IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

NOAH POWELL, III,

Respondent.

Case No. 89,964

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as being an accurate synopsis of the events which transpired on the trial court level. However, respondent would make the following additions:

At the pre-trial conference, the prosecutor strenuously argued that respondent Powell deserved nothing less than a prison sentence. After hearing from both the prosecutor and defense counsel, the trial judge called the parties to the bench. The substance of their discussions was not recorded. Immediately thereafter, respondent Powell entered a plea of guilty:

> Before the Court is Mr. Noah Powell in 95-08136. We would ask permission to withdraw the previously entered plea of not guilty and tender to the court a plea of guilty.
> It's our understanding that Mr. Powell would have a cap of five years state prison sentence and a pre-sentence investigation will be conducted. Mr. Powell will return for sentencing after that is completed.
> Court: Mr. Loughery [prosecutor], anything to add to that?
> Mr. Loughery: The only thing I would suggest is that we need at least six weeks for the sentencing. I ask you to not set it on Monday or Tuesday, (R55-56)

The written plea form signed by respondent also indicates a cap of five years. (R11-12) Nothing else was specified concerning any other aspect of respondent's sentence during the change of plea or in the written plea form.

At the sentencing hearing, several months later, a different prosecutor was present. He was uninformed that the state had abandoned its objection to the downward departure. He voiced an

objection to respondent Powell receiving a downward departure sentence. The prosecutor did not specifically object that the sentence imposed was a conditional split sentence and therefore illegal. Nor did he argue the trial court did not have the authority to suspend the entire sentence or impose a period of probation or community control less than the suspended portion.

SUMMARY OF THE ARGUMENT

The testimony of the respondent and his family, as well as, the victim in tandem with the information contained in the pre-sentence investigation, was adequate to support the departure sentence imposed based upon respondent's need for mental health treatment.

A sentence is not illegal merely because it is not listed as one of the alternatives in Poore v. State, 531 So. 2d 161 (Fla. 1988). The statutes in question do not specifically prohibit or limit the amount of time that may be suspended or specifically require that the period of probation or community control equal the entire suspended period.

Most importantly, the sentence imposed in the instant case doesn't circumvent or thwart the intent of the guidelines. Unlike the other district court cases which it has been represented as being in conflict with, the trial court here properly treated the sentence imposed as a departure sentence by filing valid written reasons for departure.

Since a trial court can impose an unauthorized sentence, as opposed to an illegal sentence, as part of a negotiated plea, and since the state apparently waived its objections at the time respondent entered his plea, then the trial court was entitled to impose the sentence in question, even if it was an unauthorized sentencing alternative.

ARGUMENT

ISSUE I

WHETHER THE RECORD SUPPORTS A FINDING THAT RESPONDENT IS AMENDABLE TO TREATMENT AND THERE IS A REASONABLE POSSIBILITY THAT SUCH TREATMENT WILL BE SUCCESSFUL. [as stated by petitioner]

The thrust of petitioner's argument is, and was below, that there was an insufficient evidentiary basis for the trial court's first rationale, that respondent Powell needs and is amendable to treatment for his mental condition. In addition, reason two, the victim's wishes that respondent not be prosecuted or go to prison, was not a valid reason to warrant a departure sentence.

The appropriate function for an appellate court in a sentencing guidelines appeal is to review the reasons provided to support the departure and to determine whether the trial court abused its discretion in finding circumstances or factors which reasonably justified aggravating, or in this case mitigating the sentence. State v. Traster, 610 Sa. 2d 572 (Fla. 4th DCA 1992). If any one of the judge's reasons for departure is valid, then the departure sentence must be affirmed. 921.001(5) Fla. Stat.

In the instant case, the District Court specifically found that the statutory reason for departure, respondent's need for mental health treatment, was adequately supported by the record. The District Court specifically rejected the petitioner's contentian that more extensive or expert testimony was needed.

We conclude that the testimony of the defen-

> dant and his family, coupled with the information in the presentence investigation,' adequately supported this reason for departure. [citation ommitted] This one valid reason will support the downward departure sentence.

There is no dispute that the incident was due in major part to respondent's inability to deal with his anger toward his ex-girlfriend, Ms. F., with whom he had broken up. Respondent, still smarting from the breakup, saw her with another fellow. This angered respondent to such an extent, he assaulted her. Respondent's ex-girlfriend stated, "Noah needs some help with his temper, and if y'all can provide that for him I think it would make him a better person. I guess that was the only way he knew how to take out his anger toward someone was through striking them or fighting them," (R69) On page 3 of respondent's pse-sentence investigation report, Ms. Field's was quoted as saying she and respondent had seen each other on a weekly basis since the incident and there had been no problems. Respondent's mother indicated she would work with him in any way she could if he were put into some sort of program. (R68) Respondent Powell stated he had already signed up for a counseling program his job provided, and the probation officer had recommended the S.H.A.R.E. program.

Contrary to the petitioner's assertions, there was more on the record than respondent's self-serving statements. There was Ms.

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[1] A copy of respondent's presentence investigation report was attached as an appendix to appellee's brief in the court below. Appellant made no objection and the court apparently considered the report in making its holding. For this court's benefit, respondent has attached a copy of the report as an appendix to his answer brief.

Fields's evaluation that respondent had a problem dealing with anger toward others. Respondent's mother indicated she would assist him in any way possible if he were put into some sort of program to deal with this. While expert testimony might have been helpful, it wasn't mandatory where there was other evidence to support the trial court's conclusion. This reason alone, would support the departure sentence imposed.

The District Court did not resolve the issue of whether the victim's request for leniency could be a proper reason for a downward departure, choosing not to do so for reasons of public policy and because the alternative ground alone was sufficient to support the trial court's sentence. However, because the petitioner has chosen to address the issue in its brief, respondent will also address the issue.

Respondent disputes petitioner's contention that the request of the victim is an invalid reason for a downward departure. The cases cited do not support this contention. State v. Usery, 543 So. 2d 457 (Fla. 4th DCA 1989), clearly indicates the court found the victim's wishes to be an invalid reason for departure, only because the offense in question had occurred prior to the amendment of the rules of criminal procedure. Because of Article X, section 9 of the Florida Constitution, these changes could not be applied retroactively to affect the judgment and sentence. The other case cited, State v. White, 532 So. 2d 1083 (Fla. 5th DCA 1988), also took place prior to the amendments. 921.0016 Fla. Stat. (1993) provides:

> (4) Mitigating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to: ....,

This language would seem to indicate there are other reasons than those listed which, when a sufficient evidentiary basis has been presented, can be valid mitigators. There can be no debate that the victim, Ms. F., didn't want respondent Powell to be prosecuted, let alone go to prison. Therefore, sufficient evidence being present on the record, the court should have been able to consider the victim's wishes in mitigation.

Petitioner argues that 921.143 Fla. Stat. limits the victim's input at sentencing to "the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime. However, 960.001 Fla. Stat.- Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems, also provides:

> (5) The right of a victim, who is not incarcerated, including the next of kin of a homicide victim, to be informed, to be present, and to be heard when relevant, at all crucial stages of a criminal or juvenile proceeding, to the extent that this right does not interfere with constitutional rights of the accused, as provided by s.16(b), Art.1 of the State Constitution.

Presumably a victim has as much right to be heard when they chose to speak in mitigation, as they do when they speak in aggravation.

Respondent can fully appreciate the District Court's concerns that a victim, particularly in cases of domestic violence, might be lulled or intimidated into requesting leniency for the defendant.

However, the trial court can always question the victim as to her (or his) motivation in requesting leniency and decline to utilize it as a basis for mitigation if it finds the request to be suspect. Guideline sentencing still remains discretionary in the sense that, even if a sufficient basis for an aggravating or mitigating factor clearly exists, the court may still decline to impose a departure sentence.

ISSUE II

IS A CONDITIONAL SUSPENDED SENTENCE A VIABLE SENTENCING ALTERNATIVE?
[as stated by petitioner]

ISSUE III

IF THERE EXISTS A VALID REASON FOR A DOWNWARD DEPARTURE, MAY A TRIAL COURT IMPOSE A TRUE SPLIT SENTENCE IN WHICH THE ENTIRE PERIOD OF INCARCERATION IS SUSPENDED?
[as stated by petitioner]

ISSUE IV

MAY A TRIAL COURT IMPOSE A TRUE SPLIT SENTENCE IN WHICH THE PERIOD OF COMMUNITY CONTROL AND/OR PROBATION IS SHORTER THAN THE SUSPENDED PORTION OF INCARCERATION?
[as stated by petitioner]

Respondent has chosen to address these three issues together, as they are essentially part and parcel of the same question, ie. the legality of respondent Powell's sentence. Petitioner challenges respondent's sentence as being a conditional suspended sentence which is not one of the five permissible sentencing alternatives listed in Poore v. State, 531 So. 2d 161 (Fla. 1988).

In its opinion, the lower court concluded that the sentencing alternatives listed in Poore merely reiterated the sentencing options available in 1988. The District Court pointed out that subsequent statutory enactments may have made the list of sentencing options in Poore out-of-date. The District Court acknowledged conditional suspended sentences were controversial because they suspended all, not just a portion, of the period of incarceration

and the period of community control and probation was shorter than the suspended period of incarceration they replaced.

Concluding that both options were authorized, the District Court noted that 948.01(6) allowed trial courts to impose a split sentence, "whereby the defendant is to be placed on probation . . . upon completion of any specified period of such sentence which may include a term of years or less." The statute did not delineate the minimum of the term "or less". The statute called upon trial courts to "stay and withhold the imposition of the remainder of sentence imposed upon the defendant and direct that the defendant be placed upon probation . . . after serving such period as may be imposed by the court." The District Court declined to create any sort of minimum period of incarceration. The District Court held that where there was a valid reason for a downward departure, it could not be concluded the legislature had precluded trial courts from using a totally suspended prison sentence as a "sword of Damocles" over the probationer or community controllee.

Furthermore, the District Court rejected the conclusion of other district courts that the period of probation/community control had to equal the suspended sentence.

> "Section 849.01(6) does not expressly mandate that the period of probation or community control must be equal in length to the suspended portion of the prison sentence. Given the different purposes of incarceration and probation, it is not obvious why the length of probation in a true split sentence must always equal the suspended portion of the sentence of incarceration.

Petitioner argues this type of sentencing alternative is being

used to thwart the guidelines. However, respondent counters by stating the trial court, in this instance, did not thwart the guidelines. To the contrary it gave, in accordance with guideline requirements, valid reasons for imposing a downward departure sentence.

Petitioner also argues that since the suspended portion of respondent's sentence spans twelve years, but the community control and probation periods only cover six years, this leaves six years unconnected to either probation or community control. Petitioner quotes from Helton v. State, 106 So. 2d 79 (Fla. 1958) which states, "...the power to suspend the imposition of sentence upon a convicted criminal can be exercised by a trial judge only as an incident to probation under Ch.948,..." This argument misapprehends the meaning of the word "incident".

Incident is defined in the American Heritage Dictionary as, "something contingent upon or related to something else." In this instance, the suspension of the entire twelve years is contingent upon or related to the successful completion of community control and probation by respondent, not just the six year portion taken up by community control and probation.

It is somewhat paradoxical that the trial court could have sentenced respondent to two years community control followed by four years probation, assuming valid reasons for departure were given, but by couching it in terms of a suspended sentence, the identical sentence became an unauthorized sentence.

Presumably, conditional split sentences are frowned upon,

because of concerns trial judges might try to circumvent the guidelines by imposing the requisite number of years to satisfy the recommended sentencing range, but then suspend some OK all of it in lieu of community control or probation. See State v. Carder, 625 So. 2d 966 (Fla. 5th DCA 1993). While this could conceivably be a problem, this is not the situation here. The trial judge did articulate and file a written rationale for the downward departure sentence imposed. In the other cases cited where conditional split sentences have been held invalid, it does not appear that those trial courts filed valid reasons for departure.

As an alternative rationale for upholding the decision of the District Court and affirming the sentence of the trial court, respondent would point to Davis v. State, 661 So. 2d 1193 (Fla. 1995) which holds that an "illegal sentence" is one that exceeds the maximum period set forth by law for a particular offense and is correctable as a matter of law. An unauthorized sentence is one while not exceeding the statutory maximum for that offense, is not specifically authorized by law and must be corrected on appeal or in a post conviction relief proceeding.

While a trial court cannot impose an illegal sentence pursuant to a plea agreement, William5 v. State, 500 So. 2d 501 (Fla. 1986), it can impose a sentence not specifically authorized by statute as part of a negotiated plea. While the agreement set forth in the written plea only states there will be a five year cap, on the other hand, the state had apparently waived its objections at the time respondent entered his plea. This being the case, the court

was within its bounds when it imposed the sentence because the sentence was merely an unauthorized sentence, not an illegal one.

Because there was a plea agreement between appellee and the court, if this court vacates appellee's current sentence because it finds the court's written rationale invalid or unsupported by the evidence, then he is entitled to withdraw his plea, Upon remand, after appellee's plea is withdrawn, the trial court is not precluded upon a subsequent plea or conviction, from resentencing appellee to a departure sentence, provided a sufficient factual basis is presented and the court justifies the departure with contemporaneous, written reasons. State v. Gordon, 645 So. 2d 140 (Fla. 3rd DCA 1994).

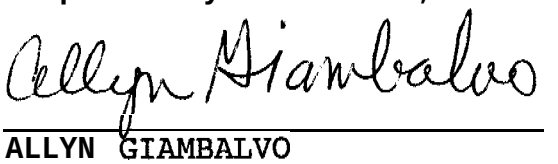
CONCLUSION

Respondent asks this Honorable Court to affirm the holding of the District Court of Appeal, Second District.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Deborah F. Hogge, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 29 day of April, 1997.

Respectfully submitted,



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AG/dlc

APPENDIX

1. **Copy of Pre-Sentence Investigation Report.**