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IN THE SUPREME COURT
STATE OF FLORIDA

DONALD J. BANKS,

Petitioner,

vs. Case No. 93,469

STATE OF FLORIDA

Respondent.

PETITION FOR REVIEW OF DECISION OF SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

On January 16, 1997, the State filed a one count information charging Petitioner, (hereinafter Donald Banks), with aggravated battery. The arrest affidavit states that the victim in this case, Mark Kotila, was driving home through his neighborhood when Banks yelled at him to slow down. Once Kotila parked in his driveway, Banks came over and placed him into a headlock, knocking him to the ground and punching him several times in the face. (R2-3)

On August 26, 1997, Banks entered a plea of nolo contendre to the charge. The trial court indicated on the change of plea form that this was a departure sentence based on the need for restitution and that the victim provoked or initiated the offense. (R11) Banks' guideline scoresheet totaled 96 points with a recommendation of 68 months in state prison. The maximum sentence was 7.08 years and the minimum sentence was 4.25 years. (R14) In that section of the guideline scoresheet in which any applicable reasons for departure are delineated for checking off, the trial court only indicated that the reason for departure was the need for payment of restitution to the victim outweighed the need for a prison sentence indicating there were major medical costs. (R15)

At the change of plea hearing before the Honorable Lauren Laughlin, Circuit Court Judge, Banks' testified that he was sorry the incident occurred and that an injury took place. He stated that it was not in his demeanor (sic) to hurt anybody or have

himself hurt. (R28) The State objected to any departure sentence. (R28)

Mr. Kotila testified that the incident caused his eye to be blown out of its socket, that he had no feeling on the right side of his face, and had a metal plate in his eye socket for the rest of his life. Kotila stated that he would not be able to enter the armed forces because of the incident and that he suffered sharp shooting pains and headaches when he goes out into the sun. He further stated this was going to be with him for the rest of his life and that he was facing the possibility of further surgery. He felt that four years probation was not sufficient for what Banks had done to him. (R29-30)

Mr. Kotila's mother, Kathy, testified that she felt the punishment was too lenient and that she would forego restitution in lieu of allowing Banks to get away with what he had done to her son. Mrs. Kotila didn't believe Banks' statements of remorse. (R30)

Mr. Kotila's father also testified that the punishment did not fit with what had happened to his son because it was not just a minor nose bleed or black eye, but rather a permanent injury. Further surgery complications were possible and vision problems could continue in the future. (R31-32)

The trial court expressed its concern that these type incidents occur far too frequently based on very little

provocation. (R32-33) The trial judge assured the Kotila's that the medical bills would be taken care of and expressed sorrow for what occurred to Mr. Kotila. (R33-34) The trial court further acknowledged Banks expression of remorse, but cautioned him on getting his anger under control or else he would experience the unpleasantness of prison life. (R35)

The State provided a factual basis for the plea. The State indicated that Banks punched the victim several times in the face causing an orbital bone to be broken. The incident was precipitated by a situation in which Banks was helping his father do some gardening in front of the house. Mr. Kotila sped past the house and Mr. Banks yelled, "slow down". Mr. Kotila then extended his middle finger and yelled "fuck you," at which time Mr. Banks proceeded down to Kotila's house where the altercation resulting in the injuries to Kotila occurred. (R39-40) The trial court responded that it would not make any more comment on that. (R40)

The trial judge accepted the plea and placed Banks on four years probation and ordered him to complete an anger management class. The trial court made a finding that there was a need for restitution because the medical bills and future medical costs of the victim were "extremely great." (R37)

On September 10, 1997, the State filed a notice of appeal of the downward departure sentence.

On April 13, 1998, the trial court entered a restitution order directing Banks to pay restitution to Kotila in the amount of $6,902.32.

On June 12, 1998, the Second District Court of Appeal reversed the downward departure sentence, but certified the following question to this Court:

> WHAT FACTORS MUST BE PROVEN BY A PREPONDERANCE OF THE EVIDENCE TO ESTABLISH THAT THE NEED FOR PAYMENT OF RESTITUTION OUTWEIGHS THE NEED FOR A PRSION SENTENCE TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE?

On July 10, 1998, Banks timely appealed the district court's decision.

These proceedings followed.

SUMMARY OF THE ARGUMENT

The district court has no authority to effectively repeal a statute by holding that no set of facts or circumstances can justify a trial court's reliance on section 921.0016(4)(e), Fla. Stat. (1995), when a victim objects or agrees to forego restitution in lieu of a prison sentence violates the separation of powers doctrine. A trial court retains its discretion to rely on section 921.0016(4)(e), Fla. Stat. (1995), in departing downward from the sentencing guidelines even where the victim agrees to forego restitution. Had the legislature intended to allow victims to control whether they received restitution or that the offender would serve a prison sentence, it would have expressly said so. Instead, it allowed a trial court to determine whether the need for restitution outweighs the need for a prison sentence.

The trial court's finding that the victim instigated or provoked the incident is adequately supported by the evidence. The trial court made written findings supporting this factor on the change of plea form. The failure of the trial judge to check an additional box on the guidelines scoresheet was an inadvertent error. The record reflects that the trial court's failure to discuss this further at the sentencing hearing was in deference to the sensitivity of the issue before the victim, not because there was inadequate evidence of provocation.

ARGUMENT

I. A VICTIM'S DESIRE TO FOREGO RESTITUTION FOR A PRISON SENTENCE IS IRRELEVANT TO THE SENTENCING PROCESS AND SHOULD NOT ELIMINATE A TRIAL COURT'S DISCRETION TO DEPART DOWNWARD IN SENTENCING A DEFENDANT WHEN THE NEED FOR RESTITUTION IS OUTWEIGHED BY THE NEED FOR A PRISON SENTENCE.

The district court's decision reversing the trial court's downward departure sentence allows the victim's desires to exclusively control whether the need for payment of restitution outweighs the need for a prison sentence and runs afoul of the historic principle that sentencing judges are vested with broad discretion in determining whether mitigating factors support a downward departure. Arbelaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied, 511 U.S. 1115, 114 S.Ct. 2123, 128 L.Ed.2d 230 (1994). Moreover, the certified question posed by the district court ignores a body of precedent which holds that the weight assigned to a mitigating circumstance in sentencing is within the trial court's discretion and subject to review only for an abuse of discretion. Jimenez v. State, 703 So.2d 437, 441-442 (Fla. 1997); Bell v. State, 699 So.2d 674 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1063 (1998). To allow a victim's desires to essentially repeal the statute, and thereby usurp legislative intent, is not within the authority of the district court.

The district court's reasoning that, in view of the opposition by the victim, no factors justify a finding that the need for

restitution outweighs the need for a prison sentence is expressly contrary to the limitations set forth in section 921.143(2), Fla. Stat. (1995). That section provides that statements by victims at a sentencing hearing shall "relate solely 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 for which the defendant is being sentenced." Thus, whether a victim agrees to forego restitution in exchange for a prison sentence is irrelevant to the sentencing process and directly at odds with s. 921.143(2), Fla. Stat. (1995).

Bearing in mind that criminal statutes should be construed liberally in favor of the person charged with a crime, see e.g., Perkins v. State, 576 So.2d 1310 (Fla. 1991), and State v. Merritt, 23 FLW D1732 (Fla. 5th DCA , July 24, 1998)(trial court reasonably interpreted mitigating factors for downward departure guidelines sentence), there is no room to conclude that section 921.0016(4)(e) permits a victim to forego restitution and eliminate a trial court's consideration of this factor in determining whether a downward departure is appropriate. Had the legislature intended such a result, it would have expressly said so. Because the legislature has seen fit to pass a number of statutes which provide for a victim's input into the sentencing process, it should not be assumed that it intended for victim's motivations for revenge to be

substituted for the objective assessment of the sentencing judge in applying reasons for departure sentences, either upward or downward. To hold otherwise would reverse a longstanding trend towards objectivity in sentencing and away from vigilante justice. For example, section 921.001(7), Fla. Stat. (1995), provides that a sentence may be imposed outside the guidelines range based on credible evidence that a victim or next of kin, suffered excessive physical or emotional trauma. Similarly, section 921.143, Fla. Stat. (1995), provides that a sentencing court shall permit the victim to appear for the purpose of making a statement at sentencing. Section 921.231(1)(n), Fla. Stat. (1995), requires the extent of the victim's loss or injury to be included in all presentence investigation reports. These statutes reaffirm the legislature's intent in vesting a trial court with the authority to determine the applicability of mitigating factors, and not leaving that decision to a victim.[1]

In the instant case, the trial court went into great detail in explaining why the need for restitution outweighed the need for a prison sentence. The trial court expressed that Mr. Banks lack of a prior record, the requirement to attend anger management

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[1]Even stronger evidence of the legislature's intent to vest more sentencing discretion with a trial judge is its recent passage of The Florida Criminal Punishment Code, consisting of sections 921.002-921.0026, Florida Statutes, effective October 1, 1998. Sections 921.0026(1) and (2), Fla. Stat. (Supp. 1998), provide that a downward departure sentence may be based on factors included, but not limited to, those set forth in the statute.

counseling, the extensive medical bills incurred by the victim, and were the reasons for concluding the need for restitution outweighed the need for a prison sentence. (R32-34) Contrary to the State's assertions before the district court, such factors are properly considered by a trial court in determining the applicability of section 921.0016(4)(e).[2] The weight accorded to those factors by the trial court in the instant case was not an abuse of discretion, and therefore, the district court's decision must be reversed.

II. THE WRITTEN FINDINGS BY THE TRIAL COURT THAT THE VICTIM PROVOKED THE INCIDENT ALONG WITH THE FACTS SET FORTH IN THE RECORD SUPPORTED A DOWNWARD DEPARTURE BASED ON SECTION 921.0016(4)(f), FLA. STAT. (1995).

The district court opined that the trial court never formally adopted the fact that the victim provoked the incident as a basis for imposing a downward departure sentence. However, the change of plea form signed by the trial court sets forth that the departure sentence was based on the victim having "provoked or initiated the offense." (R11) Moreover, there was abundant evidence in the record supporting such a conclusion, including the State's factual basis, which stated that there was a traffic altercation which precipitated the incident because Mr. Banks was not satisfied with the victim's speeding in the neighborhood. (R39-40) As the State

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[2]Banks does not contend that the lack of a prior record or requirement to attend anger management counseling, by themselves, are sufficient factors warranting a downward departure, but rather are inherent in the application of section 921.0016(4)(e), Fla. Stat.

recites in some detail from the sentencing transcript, the victim was speeding through a residential neighborhood when Mr. Banks yelled, "slow down," at which time the victim extended his middle finger and yelled "fuck you". Having been provoked by the victim's behavior, Mr. Banks then proceeded to the victim's house down the street where the altercation ensued. (R40) Unfortunately for Mr. Banks, although the trial judge did state that provocation was a basis for the downward departure sentence on the change of plea form, it failed to check the box on the sentencing guidelines scoresheet reflecting the victim's provocation as an additional basis for its downward departure.[3]

In Pease v. State, 22 FLW S624 (Fla. Oct. 9, 1997), this Court held that the failure to file written contemporaneous reasons for a departure sentence is not fatal as long as there are sufficient oral reasons stated by the trial court in the transcript. As noted by the dissent in Pease, the trial judge "did not orally pronounce reasons for departure at the time of sentencing but rather simply made some comments during the course of the lawyers' arguments that

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[3]Contrary to the district court's conclusion that the trial court never adopted provocation as a mitigating factor, Banks no contest plea was entered "pursuant to discussions with the Court," and "with the understanding" that the departure sentence was "based upon the need for restitution and that the victim provoked or initiated the offense." (R26) Although the State made its objections to provocation known, the trial court never indicated otherwise. Any doubt as to the trial judge's intentions, however, should be resolved by its adoption of the change of plea and the specific factors listed for the departure sentence on the change of plea form. (R11-12)

Pease had a strong support system and that this was his first probation violation." 22 FLW at S626, n.3. The concurring opinion of Justice Overton in Pease points out that the initial reasons for requiring written reasons to accompany a departure sentence was to ensure that trial judges thought through the reasons for *increasing* a defendant's sentence and allow adequate appellate review. 22 FLW at S625.

Applying Pease to the instant case compels the determination that the trial court's failure to check the box indicating victim provocation as an additional reason for departure is an oversight that should not work to Mr. Banks' detriment. Clearly, the transcript reflects that the only reason the trial court did not expressly state provocation as a mitigating factor at the time of sentencing was in deference to the sensitivity of the issue in the presence of the victim,[4] not because it did not believe the mitigating factor applied. Form should not prevail over substance when it is clear that the trial court did adopt provocation as a basis for a downward departure on the change of plea form. (R11-

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[4]The record reflects that the trial court attempted to avoid a confrontation with the victim in determining the applicability of provocation as a mitigating factor. First, there was an off the record bench conference concerning the matter. (R26) Second, in listing its oral reasons for departure, the trial judge stated that it had taken Banks lack of a criminal record into account "as well as the fact that he also - well, I'm not going to make any comment about facts which may be in dispute. So let's just leave it at that." (R38) Later on, in response to the specific issue of provocation, the trial judge stated, "I've heard that, and I'm not going to make ***any more*** comment on that." (R40)(Emphasis added).

12) Accordingly, this Court should reverse the district court's determination that the trial court did not formally adopt provocation as a basis for the departure sentence and hold that the facts on this record support the application of section 921.0016(4)(f), Fla. Stat. (1995) as a separate basis for upholding the downward departure sentence.

Conclusion

The district court has no authority to effectively repeal a valid statute by holding that section 921.0016(4)(e), Fla. Stat. (1995), cannot be relied on by a trial judge when a victim agrees to forego restitution in lieu of a prison sentence. Also, the trial court had an adequate evidentiary basis to determine that Banks was provoked by the victim. While provocation does not excuse his behavior, it is a statutorily recognized basis for departure.

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 Regular U.S. Mail this 24th day of August, 1998, to: ERICA M. RAFFEL, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Westwood Center, Tampa, FL 33607-2366

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