IN THE SUPREME COURT OF FLORIDA

DONALD J. BANKS

Petitioner

vs. Case No. 93,469

STATE OF FLORIDA,

Respondent

/

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

BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts but would add the following for further accuracy regarding the issue raised:

At the sentencing hearing, the State made its objection to any departure sentence clear, and advised the court that from the discussion at the bench, the only basis for the departure was restitution, not that the court agreed that the victim was the initiator. (R. 28-29) To this assertion, there was no response from either the court or counsel for Petitioner.

The victim's mother specifically stated she would forego restitution and felt that Petitioner was getting away with what he had done to her son. (R. 30) The trial court indicated that prison does very little for anyone and observed that the Petitioner needed anger management counseling. (R. 33) After the State presented a factual basis, (R. 39-40) counsel for Petitioner then added ..

> "since we have urged the court to find there is a statutory mitigator that the victim was an initiator or provoked this offense, that this began during a time when Mr. Banks, the defendant, was helping his father do some gardening in the front of the house; that Mr. Kotila; the victim, sped past the house. Mr. Banks yelled "slow down". The victim then extended his middle finger and yelled "fuck you," at which time Mr. Banks proceeded down to the victims house where there was a further altercation resulting in these injuries to Mr. Kotila."

To this, the court responded: "alright. I have heard that, and I am not going to make any more comment on that." (R. 40)

SUMMARY OF THE ARGUMENT

It was merely alleged by counsel for Petitioner, but far from established by a preponderance of the evidence that the victim in this case was an initiator, or that his conduct provoked an aggravated battery. Further, the trial court did not rely upon this as a basis for departure, and it is clear from the instant record that the only departure reason employed was that the need for restitution outweighed the need for prison. This reason is invalid as unsupported by the record since there was no need for restitution at all since the victim's mother waived restitution. The record suggests the real reason the trial court departed was its own personal sentiments that prison does very little for anyone and that Petitioner was in need of counseling to contain his anger; these are entirely invalid reasons to depart.

ARGUMENT

ISSUE I

A DOWNWARD DEPARTURE REASON MUST BE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE, AND A TRIAL COURT ERRS IN FINDING THE NEED FOR RESTITUTION OUTWEIGHS THE NEED FOR PRISON AS A DOWNWARD DEPARTURE REASON WHEN A VICTIM FOREGOES RESTITUTION SO THERE IS IN ESSENCE, NO NEED AT ALL. (RESTATED)

Petitioner cites three cases for the proposition that a trial court is vested with great discretion in sentencing matters and weighing mitigating circumstances. All three of these cases cited by Petitioner (Arbelaez v. State, 626 So.2d 169 (Fla. 1993), cert. den. 511 U.S. 1115, 114 S.Ct. 2123, 128 L.Ed.2d 230 (1994); Jimenez v. State, 703 So.2d 437 (Fla. 1997); Bell v. State, 699 So.2d 674 (Fla. 1997) cert. den. ____ U.S. ____, 118 S.Ct. 1063 (1998)) are all death penalty cases. Although Respondent would agree that a trial court has broad discretion in the sentencing process, the State would urge that the weighing of aggravating and/or mitigating circumstances in a death penalty case, determining whether each is supported by the evidence, and assigning the weight to be ascribed to each during a separate penalty phase to determine if death is an appropriate sentence differs from the process to be employed in determining whether or not a downward departure from the guidelines is based on a valid reason supported by a preponderance of the evidence.

Petitioner urges that in light of section 921.143(2), Fla. Stat. (1995) which provides that statements by victims at a sentencing hearing shall "relate solely to the facts of the case and the impact of any harm, including social, psychological, or physical harm, financial losses and loss of earnings directly or indirectly resulted from the crime for which the defendant is to be sentenced", precludes consideration by the court of a victim's choice to forego restitution. Petitioner urges such sentiments expressed by a victim are irrelevant to the sentencing process and directly at odds with section 921.143(2), supra. Petitioner's interpretation is erroneous. A plain reading of that provision establishes only the legislative intent that a victim be heard by the court regarding the extent of the injuries sustained as a result of the crime. Petitioner next cites Perkins v. State, 576 So.2d 1310 (Fla. 1991) and State v. Merritt, 23 F. L. W. D1732 (5th DCA July 24, 1998 for the proposition that criminal statutes should be construed liberally in favor of the person charged with the crime and that these two case law authorities leave no room to conclude that the downward departure reason employed herein (that the need for restitution outweighs the need for a prison sentence) pursuant to section 921.0016(4)(e) eliminates a trial court's consideration based on a victim's desire to forego restitution. Once again, Petitioner's application of the cited case law authority does not support his assertion. Perkins v. State,

supra, involved the interpretation of what a "forcible felony" was, holding that if definiteness is lacking, a statute must be construed in a manner most favorable to the accused, and the broad rule of law for which it is cited herein by Petitioner, is not on point with the narrow issue raised and presented for this Court's consideration. Similarly, State v. Merritt, supra, cited by Petitioner, is a fact specific case involving an original plea to a guideline sentence for a lewd and lascivious act on a minor wherein the court initially imposed a 76.9 month prison sentence. Upon motion for modification, the court held a hearing and heard additional evidence, reducing to writing its reasons as well as the evidence supporting the downward departure reasons. No inquiry of any such depth was either made in the case before this Court, and the "evidence" consisted of the amount of medical bills which the court decided sua sponte necessitated restitution over a guideline prison sentence which was in direct conflict with the victim's protestation. In Merritt, the victim's father as well as the Department of Corrections officer who prepared the presentence investigation agreed that one year in jail followed by probation was appropriate and the trial court imposed a downward departure sentence in conformity with those sentiments. The District Court of Appeal upheld the departure finding that a classic case for a downward departure sentence. Here, however, the trial court completely ignored the parents' testimony, and took no meaningful

testimony to support its reason, finding instead that prison does very little for anyone. Petitioner cites section 921.001(7), Fla. Stat. (1995) which 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, and section 921.231(1)(n), Fla. Stat. (1995) which requires the extent a victim's loss or injury to be included in all presentence investigation reports, for the proposition that 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. Respondent would assert that these statutory provisions are enacted to provide a victim with a forum; to ensure that the court hears of the injury and the extent thereof and to weigh the severity or lack thereof. These provisions too were all obviously enacted in the name of victim's rights, and not, as Petitioner asserts that "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" (see Brief of Petitioner at page 8). Petitioner next cites the Florida Criminal Punishment Code to be effective October 1, 1998 as support for the legislature's intent to vest more sentencing discretion with the trial judge. Respondent would urge that the legislature's future intentions are of no moment in the instant case, although

Respondent does not quarrel over any assertion as to a trial judge's broad discretion in sentencing matters. Nevertheless, those provisions cited by Petitioner in support of his argument are clearly inapplicable. In fact, section 921.001(7) provides that sentencing outside the guidelines can be imposed on credible facts including a victim's statement regarding injury if proven by a preponderance which establishes excessive physical or emotional trauma at the hands of a defendant.

In State v. Baker, 713 So.2d 1027 (Fla. 2d DCA 1998), the trial court imposed a downward departure sentence and the District Court of Appeal reversed holding:

> "a downward departure sentence must be based upon circumstances or factors which reasonably justify mitigation of the sentence. Section 921.001(6), Fla. Stat. (1995). Such circumstances or factors supporting a departure must be established by a preponderance of the evidence."

The Baker court reversed the downward departure sentence finding that there was no credible evidence presented to support the downward departure reason relied on that the victim was an initiator, willing participant or aggressor or a provoker of the incident and also reversed the reason relied on that the need for restitution outweighed the need for prison. The District Court found in part that there was no evidence that the victim requested restitution. Respondent would urge that the need for restitution must lead to the inquiry of whose need the court is looking at.

If the purported individual in need indicates he is not, then there is no need at all, by any standard, much less by a preponderance of the evidence, and reliance on this downward departure reason is error. Petitioner urges that the victim's input cannot vitiate the reason relied on because that would be a usurpation of the authority of the trial court. The victim input is merely a factor in the weighing process as to whether there is a preponderance of evidence to support the reason. Since the need for restitution was not established by a preponderance of the evidence in the instant case, reliance thereon as a reason for departure by the trial court must, as the Second District Court of Appeal correctly held, be reversed.

ISSUE II

THERE ARE NO WRITTEN FINDINGS BY THE TRIAL COURT THAT THE VICTIM PROVOKED THE INCIDENT, AND THE FACTS ALLUDED TO AT SENTENCING DO NOT PROVIDE RECORD SUPPORT FOR THAT AS A DOWNWARD DEPARTURE, AND THE TRIAL COURT DID NOT UTILIZE AS A REASON FOR A DOWNWARD DEPARTURE THAT THE VICTIM PROVOKED THE INCIDENT. (Restated)

The Second District Court of Appeal correctly opined that the trial court never formally adopted as a reason that the victim provoked the incident as a basis for imposing a downward departure sentence. Petitioner urges that the change of plea form signed by the trial court sets forth this as a departure reason and indicates in his brief that there was abundant evidence in the record supporting such a conclusion including the State's factual basis. Although Respondent certainly recognizes the difference between an actual defense to a crime and the basis of a downward departure sentence, it would assert that taking in all variations of human conduct, it cannot possibly be said that making a universally known obscene gesture with one's hand is sufficient provocation to have one's face literally bashed in and designating the victim as an initiator. Much more importantly however since there is absolutely no record support for reliance on this as a downward departure reason, is the failure of the court to utilize this as a downward departure reason. (R. 15) Since Petitioner's assertion that this reason is listed on the change of plea form, Respondent would assert that it is on a different page that the trial judge

signed, that there is no indication that the trial judge wrote it or even read this, but there is certainly record support that the trial judge rejected it. Petitioner cites Pease v. State, 712 So.2d 374 (Fla. 1997) for the proposition that the failure to file written reasons for a departure is not fatal as long as there are sufficient oral reasons stated by the trial court in the transcript. Petitioner then goes on to stretch credulity by applying Pease to the instant facts asserting that the failure by the trial court to check the box indicating victim provocation was an oversight. This is not only sheer speculation on Petitioner's part, but flies in the face of the record where the trial court clearly rejected consideration stating after Petitioner's addition to the State's factual basis, that it was not going to make any comment on that. It is not only impossible to bootstrap that kind of a comment into a perceptible downward departure reason, but clearly negates any such asserted finding.

ISSUE III

AN APPARENT REASON FOR THE TRIAL COURT'S DOWNWARD DEPARTURE IS INVALID.

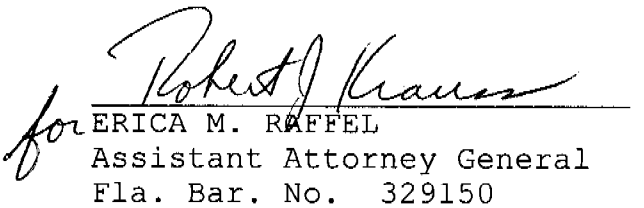
In the instant case, the trial court indicated at the time of sentencing that prison does very little for anyone. In Scurry v. State, 489 So.2d 25 (Fla. 1986), this Court found that a trial court's feeling that a recommended sentence is excessive is not a valid reason for a departure. Scurry v. State, supra at 28 and relied on in State v. Moore, 702 So.2d 604, 605 (Fla. 2d DCA 1997). (Altenbernd, Judge dissenting on other grounds) The trial court's sentiments in this regard cannot be a valid reason for a downward departure.

CONCLUSION

Based on the foregoing arguments, citations of authority and references to the record, the opinion of the Second District Court of Appeal should be affirmed, and this cause remanded for imposition of a guideline sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 Frank Louderback, 150 2nd Avenue North, Suite 840, St. Petersburg, FL 33701 this 11th day of September, 1998.

Robert J. Krauss
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