

ORIGINAL

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SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

SEP 16 1998

VICTOR BAKER, :

Petitioner, :

vs. :

STATE OF FLORIDA, :

Respondent. :

_____ :

CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

Case No. 93,486

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 239399

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State Attorney for the Sixth Judicial Circuit, Pinellas County, Florida, filed an information charging petitioner, Victor Baker, with an aggravated battery. (R6) The state also filed an information charging appellant's brother and co-defendant, Vincent Baker, with an aggravated battery, [Case No. CRC9612819CFANO] arising out of the same incident.

The complaint affidavit (R1) stated:

.... the above named defendant on the 23 day of July 1996, at approximately 9:57 p.m. at 2048 Douglas Ave. in Pinellas County did: commit the offense of aggravated battery to wit: def. entered the bathroom where his brother was engaged in a fight, beating on the victim, and the [def.] struck the victim in the face with a closed fist several times. victim sustained a laceration to his right eye, swelling and redness. victim was transferred to Mease for treatment where he will receive stitches for the injury.

The information filed alleged that:

Victor David Baker did then and there actually and intentionally touch or strike Clarence McCal against the will of Clarence McCal thereby causing great bodily harm, permanent disability, or permanent disfigurement to his person;....

A hearing was held on December 16, 1996, before the Honorable Brandt Downey, concerning the charges against both Victor Baker and Vincent Baker. The prosecutor explained to the court that while Vincent Baker qualified as an habitual offender, appellant Victor Baker had no prior record whatsoever and was in that division [career criminal] only because of his brother's status. She stated Victor's guidelines ranged from a low of 34.5 months to a high of

57.5 months. (R35-36)

The court then inquired what the injury was to the victim. The prosecutor advised the court that the victim's injuries were quite extensive, forty stitches plus eight staples in his leg and he was still undergoing physical therapy. (R37)

At the hearing, several somewhat conflicting versions of what happened were put forth by the respective parties. Vincent Baker's attorney maintained that:

Mr. Victor Baker, the one without the record, was by far the more culpable individual. There was a dispute regarding Victor Baker's pay from the victim, and an altercation ensued. The only difference in the facts is whether or not the victim was initially the aggressor. The bottom line is the victim testified during the deposition that the substantial injury he received to his leg was unintended and a consequence of the struggle. Basically they fell into the bathroom sink, and it came off the wall and broke, causing this injury to the gentlemen's leg. Victor Baker testified to that he struck Mr. McCall in the head with some object, which he believed to be a bottle. Mr. McCall testified that Vincent, my client, never carried a weapon, never struck him with a weapon, did not cause any injury to his leg. The injury was unintentional and a consequence of the action. Otherwise, I guess what Vincent is, is a principle.

Prosecutor: Judge, in reviewing the notes, it appears that Victor struck the victim in the head with an object, but then thereafter they jointly attacked him in the bathroom where they are punching and kicking him, if I'm reading the depo notes correctly. R38-9

Appellant's counsel then spoke up saying:

The object, from the prospective of Victor -- everybody is unclear about, quote, this object. It very easily could have been Victor's fist. There was a beer bottle found in the bathroom, apparently. The victim's

wife and the victim -- the victim's wife is looking right at the victim in a hallway where the bathroom door is located. Couldn't confirm at all that anything was used. Although, they found this thing later. I asked whether or not Mr. Baker had been drinking -- or excuse me, the victim had been drinking. You know, he admitted he did that, he had been that night. It was a situation where those guys were day laborers. Victor a day laborer, worked for the victim, and in fact part of his wages were the rent for he and his brother. That is, he and his brother actually lived in this house. A dispute ensued over pay, and while the dispute with this regard to pay is in process in the living room area of the house, Vincent Baker walks down the hall and knocks on the bedroom door to apparently confront the victim's wife about a job she got him, and the victim points down the hall to find out why Vincent is confronting his wife, in a loud manner, as I understand it, about this other thing, and it's at that point where Vincent may allege that the victim gets a little pushy, and Victor now comes down the hall, and he sees that. So, I mean, I'm not suggesting to the court that the guy doesn't have some significant injuries. We asked him about that in detail. We saw some pictures at the deposition, photographs at the deposition, and he still apparently is in physical therapy. We looked at his scar here.

Court: But this is a leg that hit the sink that fell?

defense counsel: And they all tumbled in.

Prosecutor: If I can approach.

Court: Yes.

Prosecutor: There is also quite a laceration on the head.

Vincent Baker's counsel: Allegedly caused by Victor striking him.

Appellant's counsel: Allegedly. I suggest to the court I took a good look at him on Friday, and I didn't see any permanent damage there. I'm not suggesting that the photographs don't

depict it, a rather deep laceration. We looked at his eye. I don't see any permanent injury. I will suggest there is some to his leg.

Prosecutor: Also, Judge, in addition to that, factually, after he was shoved into the bathroom and the sink fell and embedded in his leg, both defendants continued to hit the victim with their fists and kick him. And in fact Mr. Victor apparently admitted to the officer after the fact that he enjoyed every punch he took.

Appellant's counsel: I looked at this victim. He's about 6'1", 6'2" and I won't make a big deal out of it, but both brothers are about 5'7". Be that as it may. R40-42

Apparently, after some discussion off the record, Vincent Baker came into court and entered a plea of guilty in exchange for a four year guideline sentence. Vincent acknowledged he was entering his plea because it was in his best interests to do so in order to avoid possible habitualization. However, under oath he stated that the victim had started the fight and in self defense he [Vincent] had thrown the victim off of him and onto the sink whereby he had cut his leg. (R50)

Further discussion was had as to appellant. Defense counsel argued that Vincent and the victim had been going at it in the bathroom and fallen, which Victor had nothing to do with. The only permanent injury the victim received was the cut on his leg which occurred as a result of Vincent and the victim falling into the sink. The wound on the victim's head inflicted by Victor was superficial, although the prosecutor countered that she didn't consider eight or nine stitches, superficial. The prosecutor did note that appellant had no prior record, although he did score for

a mandatory prison sentence. (R53-4)

The court then offered appellant a sentence of five years probation a condition of which would be one year in county jail. The prosecution indicated that it would object to such a sentence. (R55) After the court accepted appellant's plea, he was sentenced in accordance with the court's offer. The court indicated it would be imposing restitution as a condition of probation and a hearing at a later date would determine the amount. (R59-60) The judge acknowledged he was imposing a departure sentence and that he had completed a supplemental guideline scoresheet indicating his reasons in writing. (R60) The judge stated:

I indicated on -- one of my reasons that the offense was committed, in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse. I needed to get something out of his mouth on the record so that to show that was the reason for departure. I also indicated as a reason, the victim was an initiator, willing participant, aggressor or provoker of the incident. I also indicated the need for payment of restitution to the victim outweighs the need for a prison sentence. Further that the defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct of the aggravated battery. The aggravated battery being the falling of the sink that caused the greater injury to the victim in this case, and I think the facts are sufficient to show that Victor Baker was not the main cause of that of the -- although certainly the victim was injured as a result of the entire circumstances that involved both of the Baker brothers. Be that as it may, I have departed.
R61-2

At a subsequent hearing, the court imposed restitution in the amount of \$1,120.00. [Appendix 1]

Thereafter, the State filed a notice of appeal contesting the

downward departure. (R24) The District Court of Appeal, Second District in an opinion issued June 5, 1998, [Appendix 2] reversed appellant's sentence and remanded for resentencing within the guidelines. The appellate court found that the trial court's reasons were unsupported by the evidence and that petitioner's lack of a prior record was an invalid reason for a departure. The appellate court also certified the following question as being of great public importance:

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 PRISON SENTENCE TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE?

Petitioner filed a motion for rehearing, but this was denied by the court on July 7, 1998. Petitioner thereafter filed his notice to invoke the discretionary jurisdiction of this court on July 14th, 1998. This court ordered petitioner to file his initial brief on or before September 28, 1998, but postponed its decision on jurisdiction. The matter is now before this court for its decision in the case.

SUMMARY OF THE ARGUMENT

In light of the current statute, 775.089 Fla. Stat., which mandates restitution in all cases where it is applicable, the necessity of establishing a specific dollar amount, establishing that the victim has requested restitution and establishing the defendant's ability to pay is superfluous. In the instant case there was no dispute or doubt that the victim had suffered significant physical injuries as a result of the charged offense and evident restitution would be called for. Under these circumstances it was proper for the trial court to use need for payment of restitution as a reason to depart and to make it a condition of petitioner's probation.

The trial court need only find one reason in order to justify a downward departure sentence. There were several conflicting versions concerning the circumstances of the offense. As the trier-of-fact, the trial judge had to resolve the conflicts and determine what the circumstances actually were. The district court in essence usurped the trial judge's function by holding there was no credible evidence presented to support the mitigators that petitioner was a minor participant in the criminal conduct and that the victim was the instigator of the incident.

ARGUMENT

ISSUE I

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 PRISON SENTENCE TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE?

This particular question has apparently never been directly addressed in Florida. In its opinion, the Second District stated:

We recognize that, ordinarily, the defendant's ability to pay restitution need only be considered at the time of enforcement of the restitution order. See § 775.089(6)(b), Fla. Stat. (1995). However, the purpose of sentencing a defendant to a downward departure sentence based on the above departure reason is to reimburse victims for their loss and it necessarily presupposes that restitution can be paid. If the defendant does not have the ability to pay restitution, the purpose of such departure is defeated.

The undersigned notes that an analogous argument was often made by the State in the days when substance abuse was a valid mitigating factor. The State was always quick to argue that while it was obvious the defendant had a substance abuse problem, there was no evidence that he or she was amendable to treatment, which was also a required showing. The State's rationale was substantially the same, unless there was some reasonable possibility that the defendant would be helped by drug treatment, then what was the good in giving him or her a departure sentence.

The Second District's rationale is much the same. If the defendant can't pay the restitution owed, then what good will it

serve to give the defendant a departure sentence based upon that factor. The undersigned would acknowledge that a defendant's amenability to treatment is speculative at best and therefore should require a least some possibility of a successful outcome.

However, the same doesn't hold true for restitution. It is virtually assured that if the defendant is incarcerated there is no hope the restitution owed will be paid until such time as he is released. If the defendant is placed on probation and payment of restitution is made a condition of such probation, then there is at least a reasonable possibility that restitution will be paid in a timely fashion.

As applied to petitioner's case, common sense would tell us that the victim is not going to receive a single penny from Vincent Baker until he is released from incarceration some four years hence. However, the victim should expect to collect from Victor Baker, in a somewhat more timely fashion, some, if not all of the restitution owed him because his probation conditions requires that he do so.

It must be pointed out that a court isn't required to determine the defendant's ability to pay restitution when it is imposed initially. Sperry v. State, 671 So.2d 856 (Fla. 4th DCA 1996). Case law on the subject would lead us to believe courts making such determinations routinely start with the basic assumption that anyone can get a job paying \$5.00 per hour, at the least. Bain v. State, 642 So.2d 578 (Fla. 5th DCA 1994). The trial court made payment of restitution a condition of petitioner's

probation, so he has an incentive to comply or suffer the penalty of violation if he fails to do so.

The district court found there was no evidence establishing the amount of restitution or even that the victim had requested restitution. This holding seems to ignore the obvious. First, it was clearly established and no one disputed that the victim had suffered significant physical injuries and was still undergoing therapy, although admittedly a specific dollar amount had not yet been set. The current statutes would appear to dictate that payment of restitution is a "**given**" in such situations,¹ therefore, whether the victim requested it is immaterial.

Furthermore, there was no indication this victim, or any victim for that matter, would turn down restitution if it was ordered. The requirement that there must be evidence of these factors to justify a departure sentence based upon the need for payment of restitution seems superfluous under the circumstances.

¹ 775.089. Restitution

(1) (a) In addition to any punishment, the court **shall** order the defendant to make restitution to the victim for:

1. Damage or loss caused directly or indirectly by the defendant's offense; and

2. Damage or loss related to the defendant's criminal episode,
unless it find clear and compelling reasons not to order such restitution.

ISSUE II

THERE WAS SUFFICIENT PROOF OF AT LEAST ONE MITIGATING FACTOR SO AS TO JUSTIFY THE TRIAL COURT'S DEPARTURE SENTENCE.

The Second District's opinion stated there was no credible evidence that either Petitioner was an accomplice to the offense and a relatively minor participant in the criminal conduct or the victim was an initiator, willing participant, aggressor, or provoker of the incident. There was certainly evidence put forth from which the trial judge could have deduced petitioner's role in the offense. The trial judge stated:

Further, that the defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct of the aggravated battery. The aggravated battery being the falling of the sink that caused the greater injury to the victim in this case, and I think the facts are sufficient to show that Victor Baker was not the main cause of that of the -- although certainly the victim was injured as a result of the entire circumstances that involved both of the Baker brothers.

There was no dispute that the falling of the sink caused the primary injury to the victim. Petitioner's brother, Vincent Baker, stated, while he was under oath, that the victim had started the fight and he [Vincent] had thrown the victim off of him and into the sink which resulted in the sink breaking and cutting the victim's leg. There was also the initial sworn complaint prepared by the police which stated that petitioner had entered the bathroom where his brother was engaged in a fight with the victim and that petitioner had struck the victim with a closed fist several times.

Admittedly there were several different versions about what had actually happened put forth by the various parties, some laying more blame and some less on petitioner. However, it was up to the trial judge as the trier-of-fact to sort all these out and resolve the conflicts. It was impermissible for the District Court to in essence re-weigh and re-evaluate the evidence before the trial court. Tibbs v. State, 397 So.2d 1120 (Fla. 1981); State v. Garcia, 431 So.2d 651 (Fla. 3rd DCA 1983).

Petitioner argues that there was a preponderance of competent evidence presented to the trial court which supported its findings that Victor Baker was a minor participant in the conduct which lead to the victim's serious injuries and that the victim instigated the incident, as well as, its finding that payment of restitution to the victim outweighed the need for petitioner's incarceration. Moreover, any doubts as to the applicability of a departure reason must be resolved in the defendant's favor. Wilson v. State, 567 So.2d 425 (Fla. 1990).

CONCLUSION

In light of the arguments made and the authorities cited, petitioner asks this Honorable court to reverse the decision of the District Court of Appeal, Second District and affirm the sentence imposed by the lower court.

APPENDIX

A1. Order of Restitutution in the amount of 1,120.00.

A2. Opinion of the Second District Court of appeal
filed June 5, 1998.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia Davenport,[✓]
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on
this 14 day of September, 1998.

Respectfully submitted,

Allyn Giambalvo

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(727) 464-6595

ALLYN GIAMBALVO ✓
Assistant Public Defender
Florida Bar Number 239399
14250 49th Street North
Clearwater, FL 33762

AG/dlc

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)
)
Appellant,)
)
v.)
)
VICTOR D. BAKER,)
)
Appellee.)
_____)

CASE NO. 96-05191

Opinion filed June 5, 1998.

Appeal from the Circuit
Court for Pinellas County;
Brandt C. Downey, III, Judge.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Patricia E. Davenport, Assistant
Attorney General, Tampa, for
Appellant.

James Marion Moorman, Public
Defender, and Frank D. L.
Winstead, Assistant Public
Defender, Clearwater, for
Appellee.

WHATLEY, Judge.

Received By

JUN 08 1998

Clearwater Appeals
Public Defenders Office

The State appeals the downward departure sentence imposed on
Victor D. Baker. Baker entered a plea and was adjudicated guilty of aggravated

battery. We agree with the State that each of the trial court's five stated reasons for departure is either improper or unsupported by sufficient record evidence.

Therefore, we reverse.

First, we conclude that Baker's lack of criminal record is not a valid reason for departure because this fact is considered in calculating the guidelines.

See Byrd v. State, 531 So. 2d 1004 (Fla. 5th DCA 1988).

Next, we conclude that the remaining departure reasons given by the trial court were not supported by sufficient evidence. A downward departure sentence must be based upon circumstances or factors which reasonably justify mitigation of the sentence. § 921.001(6), Fla. Stat. (1995). Such circumstances or factors supporting a departure sentence must be established by a preponderance of the evidence. Id.

In the present case, the trial court found that Baker was an accomplice to the offense and was a relatively minor participant in the criminal conduct. It also found that the victim was an initiator, willing participant, aggressor, or provoker of the incident. However, there was no credible evidence presented to support these two findings. Therefore, these findings may not be used to support a departure sentence.

In addition, the trial court found that the need for payment of restitution outweighed the need for a prison sentence. This factor was also not supported by a preponderance of the evidence. There was no evidence

establishing the amount of restitution or even that the victim requested restitution. In addition, there was no evidence establishing Baker's ability to pay restitution. We hold that there must be evidence of these factors to justify a departure sentence based on the need for payment of restitution.

We recognize that, ordinarily, the defendant's ability to pay restitution need only be considered at the time of enforcement of the restitution order. See § 775.089(6)(b), Fla. Stat. (1995). However, the purpose of sentencing a defendant to a downward departure sentence based on the above departure reason is to reimburse victims for their loss and it necessarily presupposes that restitution can be paid. If the defendant does not have the ability to pay restitution, the purpose of such a departure sentence is defeated.

Based on the foregoing, we certify the following question as being of great public importance:

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 PRISON SENTENCE TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE?

Finally, the trial court found that the offense was committed in an unsophisticated manner and was an isolated incident for which Baker has shown remorse. However, the only statement indicating any possible remorse by Baker was prompted by the trial court's questions. After imposing a departure sentence,

the trial court noted that it had written its reasons for departure on Baker's scoresheet. The trial court then inquired:

THE COURT: Mr. Baker, you hold no ill will towards the victim in this case, do you?

BAKER: "Honestly I can say that he initiated the incident, but, I mean . . ."

THE COURT: Do you hold any ill will towards him individually?

BAKER: To him after this?

THE COURT: Yes.

BAKER: No. I'm not stupid.

THE COURT: Are you sorry that this happened?

BAKER: Yeah, I'm sorry it happened.

THE COURT: I indicated on--one of my reasons that the offense was committed, in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.

I needed to get something out of his mouth on the record so that to show that was the reason for departure.

There was no expression of remorse by Baker before the trial court's inquiry or before the trial court noted its departure reasons. We conclude that Baker's guided statements did not provide sufficient evidence to support the

departure sentence, especially where they were given after the sentence and departure reason were announced.

Accordingly, we reverse Baker's sentence and remand for resentencing within the guidelines. Since Baker's sentence was the result of a plea agreement between Baker and the trial court, Baker should be given the opportunity to withdraw his plea on remand. See State v. Cohen, 667 So. 2d 438, 439 (Fla. 2d DCA 1996).

Reversed and remanded; question certified.

PATTERSON, A.C.J., and QUINCE, J., Concur.

CIRCUIT/COUNTY COURT, PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. CRC96-12823CFANO-M

STATE OF FLORIDA
vs.

VICTOR DAVID BAKER

SPN: 01623276

FILED
CLERK OF DISTRICT COURT
97 FEB 13 AM 8:14
H. J. ...
CLERK

The following was done in open Court this 7TH day of
FEBRUARY, 1997.

Upon a restitution hearing, IT IS CONSIDERED AND ORDERED that
restitution is hereby ordered for Clarence McCal, in the amount of \$1,120.00
which shall run joint and several with the co-defendant. This restitution
shall be a condition of the defendants probation

DONE AND ORDERED on FEBRUARY 7, 1997 in
Clearwater, Florida.

JUDGE


(GF-88)

DJZ

cc. Joe PROBATION