

IN THE SUPREME COURT OF FLORIDA

ALVIN DAVIS,

Petitioner,

vs.

CASE NO. SC19-716

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

ANDY THOMAS
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SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

References to the State’s Answer Brief will be “(AB at [page number])” and to the Initial Brief as “(IB at [page number])”. Citations to the Record will be by “R. [page number]”.

SUMMARY OF THE ARGUMENT

The only question this Court must answer is whether Mr. Davis' perceived failure to accept responsibility is a valid sentencing factor. It is not valid because it is an infringement on the right to maintain innocence and because the Legislature excluded it in the CPC because it is a subjective issue which makes it difficult for defendants in similar situations to be sentenced to similar sentences using objective criteria. It is virtually impossible to maintain innocence while accepting responsibility. Mr. Davis entered a not guilty plea and maintained his innocence through the sentencing hearing, as was his right. Acceptance of responsibility may or may not demonstrate a potential for rehabilitation, but it does not follow that a failure to take responsibility is a valid sentencing factor.

The State argues that, even if a failure to take responsibility is an improper sentencing factor, this Court should affirm the sentence because Mr. Davis did not demonstrate that consideration of the factor affected his sentence. This Court, however, should find that it was an impermissible factor, and properly apply the fundamental error standard that has been the law in Florida on this issue for decades. Because the trial court's words can only be read to suggest that Mr. Davis' sentence was based, at least in part, on his decision to maintain his innocence, Mr. Davis is entitled to a new sentencing hearing before a different judge.

ARGUMENT

The First District Court in *Davis* wrote that “[t]he principal issue we now face is whether the trial court’s observation that Davis ‘still fail[s] to take any responsibility for [his] actions’ means the court violated Davis’s due process rights.” *Davis v. State*, 268 So. 3d 958, 962 (Fla. 1st DCA 2019). The State’s Answer Brief sets forth three main reasons it believes it does not. The first two reasons are interrelated: that failure to take responsibility is part of the trial court’s need for as much as information as possible about a defendant in fashioning an appropriate sentence and that considering this factor advances “legitimate penological interests such as rehabilitation.” (AB at 6). Although rehabilitation is a secondary goal of the criminal justice system, the imposition of a sentence can only be made using lawful factors. *See* section 921.002(1)(g), Fla. Stat. Furthermore, rehabilitation was not at issue here because Mr. Davis did not request a downward departure. A failure to accept responsibility is an invalid sentencing factor, and so whether it might indicate a possibility of rehabilitation is irrelevant.

The State’s third argument is that, even if the trial court erred in considering Mr. Davis’s failure to accept responsibility, the error was not fundamental. (AB at 22). Although the State made this argument below, (*see* Case No. 1D17-0165 Supplemental Answer Brief of Appellee at 15-16), this was not part of the certified question and the First District did not address it. A fundamental error occurs not

only when it results in a longer sentence, but when a defendant fails to receive a fair sentencing hearing based on permissible sentencing factors. *See Cromartie v. State*, 70 So. 3d 559, 564 (Fla. 2011) (errors which are equivalent to a denial of due process are fundamental). Finally, the State’s allegation that applying the correct fundamental error standard “promotes sandbagging” (AB at 23) is speculative and not at all supported by the record. In addition to this being an improper allegation of bad faith, there would be little strategic value in an attorney “sandbagging” when the sole remedy would be a new sentencing hearing before a different judge which could result in a sentence of the same length.

Due process includes a guarantee that an individual has the right to maintain innocence even when faced with evidence of overwhelming guilt. *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990). The State notes that *Holton* was a death penalty case and argues that it therefore is not relevant. This Court did not create the right to maintain innocence in the *Holton* case; that right has existed as long as our country has. Even if *Holton* did not exist, Mr. Davis has a due process right that was violated when the trial court used his protestation of innocence against him.

Mr. Davis’s exact words at sentencing were: “I am innocent.” (R. 190). “I did nothing wrong.” (R. 190). There is no disagreement as to whether Mr. Davis was maintaining his innocence at the sentencing hearing. The trial court responded

shortly afterward with “You still fail to take any responsibility for your actions.” (R. 193). It is unclear how a defendant can simultaneously maintain his innocence and accept responsibility for offenses. The State mistakenly claims Mr. Davis conflated the trial court’s consideration of failure to accept responsibility with judicial vindictiveness. Mr. Davis did not make that claim but rather asserted that he was punished for exercising a constitutional right. (AB at 14).

Mr. Davis takes particular exception with the State’s argument that asserting one’s innocence is not a true impermissible factor because it can be used in some circumstances and not others. (AB at 14,15 and 21). No one disputes that consideration of religion is an impermissible factor, but nothing prohibits a defendant from raising it on her own. The state argues that “there is no logical basis for a rule that allocutions may work in a defendant’s favor but cannot also work to his or her detriment.” (AB at 21). That is exactly what courts do in death penalty cases as to mitigating and aggravating factors, and it is part of the process when a defendant asks for a downward departure. *See Eaglin v. State*, 19 So. 3d 935, 946 (Fla. 2009) (failure to accept responsibility can never be considered as an aggravating factor).

Allowing the defendant to inject an acceptance of responsibility into the sentencing process for mitigation is one thing but it is problematic when it is the trial court and not the defendant that raises the issue. If a defendant chooses to

speak at sentencing and claim responsibility or express remorse, the trial court can either accept that claim and reward the individual appropriately, or it can disbelieve the defendant's claim and impose a different sentence, as long as it does not punish the defendant for failure to take responsibility.

The State cites to *United States v. Cruzado-Laureano*, 527 F.3d 231, 236 (1st Cir. 2008) to support its position that federal judges can increase a defendant's sentence based on a failure to accept responsibility. (AB at 16). Florida has not adopted the federal sentencing guidelines, and factors that can be considered under 18 U.S.C. § 3661 cannot necessarily be considered in Florida state courts. Mr. Davis discussed the federal sentencing guidelines in his Initial Brief at 11-12. Simply put, an individual can get up to a 3-point reduction in the offense level calculation for acceptance of responsibility but cannot get points added for going to trial. The court in *Cruzado-Laureano* held that accepting responsibility allows for a reduction in the sentencing levels under federal law. *Id.* at 237. It noted, however, that showing leniency to someone who admits guilt does not necessarily mean that a judge has a policy of penalizing those who elect to go to trial, which would be illegal. *Id. citing United States v. Thompson*, 476 F.2d 1196, 1201 (7th Cir. 1973). Nothing in the Florida or United States constitutions allows an individual to be punished for maintaining his innocence.

Mr. Davis's right to maintain his innocence did not cease when the jury came back with a guilty verdict.¹ Jurisprudence is replete with examples of persons convicted at trial who later were able to prove their innocence through post-conviction procedures. Mr. Davis entered a not guilty plea, he went to trial and was found guilty, and he maintained he was not guilty all the way through the sentencing hearing. While Mr. Davis may have given up his right to remain silent by speaking at his sentencing hearing, he never waived his right to maintain his innocence.

Consideration of an improper sentencing factor is fundamental error even if there are other proper factors considered. *Dumas v. State*, 134 So. 3d 1048 (Fla. 1st DCA 2013); *accord Williams v. State*, 8 So. 3d 1266 (Fla. 1st DCA 2009); *Johnson v. State*, 679 So. 2d 831, 833 (Fla. 1st DCA 1996). This Court should find that consideration of failure to accept responsibility is an impermissible factor and reinstate the rule that has worked for decades in every District in the state. This rule does not require resentencing in every hearing where lack of responsibility is mentioned. *See Hayes v. State*, 150 So. 3d 249, 250 (Fla. 1st DCA 2014) (trial court specifically said it was not punishing Mr. Hayes for maintaining his innocence). *see also United States v. Stanley*, 739 F.3d 633 (11th Cir. 2014). In

¹ Petitioner agrees that the presumption of innocence ends upon adjudication of guilt. *Vaccaro v. State*, 11 So. 2d 186 (Fla. 1942) (en banc). However, a defendant's right to maintain his innocence never expires.

Stanley, Mr. Stanley spoke at sentencing and maintained his innocence. However, the trial court specifically said that Mr. Stanley’s continued maintenance of his innocence was not the reason he sentenced him to 23 years in prison. 739 F.3d at 644. In contrast, the trial court here indicated not once, but twice, that the sentence was based on Mr. Davis’ failure to take responsibility.

Courts should continue the “in-context” review mentioned by Judge Kelsey and Judge Lewis. *Davis* 268 So. 3d at 975 and at 978. The sentencing comments are reviewed in context, and then the test applied is whether the comments reasonably appear to suggest consideration of the impermissible factor. (IB at 6, n1). Trial courts often are aware of factors that would be impermissible to consider at sentencing simply by presiding over the trial. Examples of these factors are the defendant’s race or national origin or religion, which could be apparent by clothing or mannerisms. That does not mean the trial court can consider any of those factors in imposing the sentence. The trial court here heard Mr. Davis protest his innocence, but it could not permissibly consider that in fashioning the sentence.

Considering lack of responsibility is impermissible not only because it violates due process but also because it was not delineated by the Legislature in writing the Criminal Punishment Code. This Court held in *Norvil v. State*, 191 So. 3d 406 (Fla. 2016) that the CPC “is unambiguous concerning the factors a trial

court may consider in sentencing a defendant.” *Id.* at 409. It also adopted a bright line rule regarding subsequent arrests being used at sentencing. *Id.* In *Hall v. State*, 823 So. 2d 757 (Fla. 2002), abrogated on other grounds recognized in *State v. Johnson*, 122 So. 3d 856, 862 (Fla. 2013), this Court found that the purpose of the CPC was to punish defendants based on objective criteria such as the severity and nature of the offense and the offender’s criminal history. *Hall*, 823 So. 2d at 759. According to this Court, the Florida Legislature provided a reasonable basis for sentencing which is not discriminatory, arbitrary, nor oppressive. 823 So. 2d at 759. Following the bright line rule that has been the law in this State for decades not only preserves due process rights during sentencing but also is consistent with the CPC. The First District noted that Florida sentencing statutes “explicitly authorize consideration of remorse and responsibility.” *Davis*, 268 So. 3d at 963. This Court should continue to follow the dictates of the Legislature which authorized the use of remorse and responsibility only in mitigation or requests for downward departures and not as a permissible sentencing factor in imposing a sentence.

Prior to the abrogation in *Davis*, where the First District Court of Appeal receded from its prior holdings in failure to accept responsibility cases, the law in the First District was clear that consideration of a lack of responsibility was an improper sentencing factor. *See, e.g., Adkinson v. State*, 133 So. 3d 607 (Fla. 1st

DCA 2014) (error for trial court to consider claim of innocence in sentencing). Every other Florida District Court of Appeal has applied the bright-line rule that consideration of lack of responsibility is an improper sentencing factor: *See e.g., Johnson v. State*, 120 So. 3d 629 (Fla. 2d DCA 2013) (trial judge may not consider a defendant's claim of innocence in imposing sentence); *Green v. State*, 84 So. 3d 1169 (Fla. 3d DCA 2012) (failure to take responsibility is an improper sentencing factor); *Allen v. State*, 211 So. 3d 48 (Fla. 4th DCA 2017) (court relying on defendant's refusal to admit guilt requires a new sentencing hearing violation of defendant's due process rights against self-incrimination); *Piccinini v. State*, 275 So. 3d 210 (Fla. 5th DCA 2019) (failure to accept responsibility an impermissible sentencing factor).

The First District gave no reason for deciding after decades of jurisprudence that it should change a policy of protecting constitutional rights and implement a new standard that undermines these rights. The Fourth District held in *Allen v. State*, 211 So. 3d 48, 55 (Fla. 4th DCA), that courts "should err on the side of protecting appellant's constitutional rights with regard to the trial court fashioning an appropriate sentence." The *Allen* court explained that the prohibition against using a lack of responsibility is to protect the individual's right of appeal, possibility of moving for a new trial, discovery of new evidence, and all other avenues of appeal. *Id.* at 54. "Allowing a sentencing court to penalize a defendant

for not admitting guilt after a conviction or adjudication would jeopardize various rights attached to these post-trial processes and chill a defendant's right to remain silent." *Id.* at 54. , Mr. Davis is asking for a fair sentencing hearing in which his due process rights are respected.

The trial court erred in relying on a perceived failure to accept responsibility because that is an impermissible sentencing factor. This Court should answer the certified question by holding that when a trial court considers an individual's right to maintain innocence in determining a sentence, that person is entitled to a new sentencing hearing before a new judge

CONCLUSION

Mr. Davis respectfully requests that this Court reverse the opinion of the First District Court of Appeal and remand with instructions that Mr. Davis receive a new sentencing hearing in front of a new judge.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Benjamin Hoffman, Assistant Attorney General, at crimapptlh@myfloridalegal.com, this day of September 18, 2019. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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