IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-2441

STATE OF FLORIDA,

Petitioner,

-vs-

JAMES CLARK,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellant in the District Court of Appeal of Florida, Fourth District. Respondent, JAMES CLARK, was the Defendant in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R" denotes the original record on appeal, the symbol "SR" denotes the supplemental record on appeal, and the symbol "T" denotes the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

On September 23, 1992, in lower case number 92-18321 CF10A Respondent was charged by Information with two counts of sexual battery upon a child. (R:3-4). On May 25, 1994, Respondent entered a plea of nolo contendere and was adjudicated guilty. (R:5-6). Respondent was sentenced to five (5) years imprisonment to be followed by five years of probation on each count, to run concurrent. (SR).

Thereafter, on June 11, 1999, Respondent violated his probation by driving under the influence of an alcoholic beverage, by leaving the scene of an accident, and by failing to pay the cost of supervision. (R:7). Respondent denied the allegations of violation of probation. (R:12).

A hearing was held on July 20, 1999, before the Honorable Peter M. Weinstein. (T:1-11). The prosecutor stated the last time they were before the court the State asked that Respondent be sentenced to 17 years incarceration. (T:3). Pursuant to Respondent's sentencing guideline scoresheet, the recommended sentence was 9 to 12 years imprisonment with a permitted sentence of 7 to 17 years. (R:15).

Respondent changed his plea and admitted the violations. (T:5-6; R:18-19). The State objected to a downward departure. (T:7). Nevertheless, the trial judge revoked Respondent's probation and announced he would sentence Respondent to a downward departure sentence of 364 days in the Broward County Jail with credit for time served. (T:7). One reason the court gave for departure was the "previous downward departure sentence negotiated" between the State and Respondent. (T:7). The prosecutor explained the only reason the State agreed to the prior departure was so the victim would not have to go through a trial as she was eight years old at the time. (T:7). The other reasons the court gave for departure was that Respondent was successfully completing probation "until this new law violation," because of a strong recommendation for mitigation of sentence by Respondent's probation officer, and because of Respondent's age, under eighteen, at the time the crime was committed. (T:8, 10).

In as much as sexual battery upon a child is a life felony

offense, and in as much as Respondent's sentencing guideline scoresheet indicated a recommended sentence of 9 to 12 years and a permitted sentence of 7 to 17 years, the original sentence imposed by the trial court of 5 years incarceration followed by 5 years probation was generously lenient. When, upon violation and revocation of probation, the trial court imposed the sentence of 364 days county jail time, the State appealed to the Fourth District Court of Appeal, Case No. 99-2673. The State argued that the trial court abused its discretion in imposing a downward departure sentence over the objection of the State, and further argued the reasons given by the trial court for departure were not valid. The State cited to, State v. Wagner, 595 So. 2d 286 (Fla. 4th DCA 1992) for the proposition that a trial court errs when it imposes a sentence that departs downward from the sentencing guidelines when it is without the state's concurrence and without written reasons.

In his answer brief, Respondent contended 1) the State failed to object to the reasons given by the court for imposing a downward departure sentence, and 2) the trial court did not abuse its discretion in imposing a downward departure sentence where the reasons given for departure were valid. The State responded by arguing that where it had objected to the trial court imposing a downward departure sentence and the trial court immediately began stating its reasons for departure, it would have been futile for the State to object further, and thus the issue was preserved for

review.

The Fourth District Court rejected the State's arguments and affirmed Respondent's sentence, certifying conflict with the Second District's opinion in State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000), to the extent Barnes states a general objection to the imposition of a downward departure sentence is suficient to preserve an appellate argument challenging the validity of the departure.

This petition for discretionary review followed.

QUESTION PRESENTED

WHETHER, WHEN THE STATE OBJECTS TO DEPARTING DOWNWARD FROM THE SENTENCING GUIDELINES BEFORE THE TRIAL JUDGE IMPOSES A DOWNWARD SENTENCE, SUCH OBJECTION IS SUFFICIENT TO PRESERVE THE ISSUE OF THE VALIDITY OF THE DEPARTURE FOR APPELLATE REVIEW AND THE STATE DOES NOT HAVE TO SPECIFICALLY ADVISE THE TRIAL COURT THAT THE REASON(S) IS INVALID IN ORDER FOR THE ISSUE TO BE PRESERVED.

SUMMARY OF THE ARGUMENT

The proposition of law enunciated by the Second District Court of Appeal in State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000), that when the State makes a general objection to a downward departure sentence before the trial court imposes sentence, the general objection is sufficient to preserve the issue of the validity of the downward departure for appellate review.

ARGUMENT

WHEN THE STATE OBJECTS TO DEPARTING DOWNWARD FROM THE SENTENCING GUIDELINES BEFORE THE TRIAL JUDGE IMPOSES A DOWNWARD SENTENCE, SUCH OBJECTION IS SUFFICIENT TO PRESERVE THE ISSUE OF THE VALIDITY OF THE DEPARTURE FOR APPELLATE REVIEW AND THE STATE DOES NOT HAVE TO SPECIFICALLY ADVISE THE TRIAL COURT THAT THE REASON(S) IS INVALID IN ORDER FOR THE ISSUE TO BE PRESERVED.

This case is before the Court for review of the certification of the Fourth District Court of Appeal finding their decision in this case conflicts with State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000) to the extent Barnes holds that a general objection to the imposition of a downward departure sentence is sufficient to preserve an appellate argument challenging the validity of the departure.

In Barnes, the State asserted its objection to a sentence departing downward from the guidelines before the trial judge entered into the agreement with Barnes, and the trial judge noted the departure sentence was over the State's objection. The Second District believed the general objection sufficiently preserved the issue for review and reversed and remanded for resentencing pursuant to the guidelines and to permit Barnes the opportunity to withdraw his plea. The Third District has also found that the State's general objection of a downward departure sentence is sufficient to preserve the issue for appellate review. State v. Ford, 739 So. 2d 629 (Fla. 3d DCA 1999).

Where counsel's objection is clear and the judge understands the reason and nature of the objection, further objection would be pointless and is not necessary to preserve an issue for appeal. State v. Heathcoat, 442 So. 2d 955 (Fla. 1983); Hicks v. State, 622 So. 2d 14, 17 (Fla. 5th DCA 1993); Jones v. State, 714 So. 2d 627, 628 (Fla. 1st DCA 1998). In the above cited cases the objection was made in regard to jury instructions. See also LeRetilley v. Harris, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978) (regarding remarks of plaintiff's counsel during closing argument), and Webb v. Priest, 413 So. 2d 43 (Fla. 3d DCA 1982) (Medical malpractice action patient did not waive his objection to introduction of the fact that certain parties had been dropped as defendants in view of the trial court's overruling, in no uncertain terms, of the patient's strong objections voiced both prior to trial and in early stages of trial, since any further objection would have been an obviously futile gesture.).

In Fleshman v. State, 736 So. 2d 1219 (Fla. 5th DCA 1999), the appellate court applied the rationale of Heathcoat to the sentencing arena. The facts in Fleshman are that the defendant objected when it was evident the trial court intended to impose a sentence that departed upward, but she did not object to the reasons stated for departure. On appeal, that defendant argued the evidence did not support the grounds for departure found by the trial court. The appellate court commented it might be argued that by not again

objecting when the court gave its reasons for departure, Fleshman failed to properly preserve the issue. However, the Fifth District believed otherwise, and found the issue was preserved for review because when the court resorted to tracking the statute in order to assure it stated proper reasons for departure, it was evident the trial court intended to depart so any further objection would have been futile. That court further found the reasons given for departure were not supported by the record and reversed.

Here, just as in Fleshman, after the State complained and then objected to the court imposing a downward departure sentence (T:6-7), the trial court immediately stated the reasons why it was departing downward (T:7). Thus, it would have been futile for the State to object further. State v. Heathcoat; Fleshman v. State.

The State's rights of appeal are limited. Those right include the right to appeal an order imposing a sentence outside the range permitted or recommended by the sentencing guidelines. Fla. R. App. P. 9.140(c)(1)(J)(K). Petitioner thus submits when the State makes a general objection to a downward departure sentence, the general objection is sufficient to preserve the issue of the validity of the departure for appellate review.

Petitioner respectfully asks this Honorable Court to find that the Fourth District Court of Appeal's opinion in State v. Clark, No. 99-2673 (Fla. 4th DCA Oct. 25, 2000), conflicts with the opinion in State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000) and that Barnes

is correct in holding that a general objection by the State is sufficient to preserve the issue of the validity of the downward departure sentence for appellate review.

CONCLUSION

WHEREFORE, based upon the foregoing, this Honorable Court should find the decision of the Fourth District Court of Appeal in the instant case conflicts with the decision of the Second District Court of Appeal in Barnes, and that Barnes is correct in holding when the State makes a general objection to a downward departure sentence, the general objection is sufficient to preserve the issue of the validity of the departure for appellate review. Accordingly, the decision of the Fourth District should be reversed and this cause should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to Rick J. Douglas, Esquire, Intracoastal Bldg., Suite 301, 3000 N.E. 30th Place, Ft. Lauderdale, Florida 33306 on this ____ day of January 2001.

_____
BARBARA A. ZAPPI
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Petitioner, the State of Florida, hereby certifies this brief is formatted to print in Courier New 12-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
BARBARA A. ZAPPI
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. *

THE STATE OF FLORIDA,

Petitioner,

-vs-

***,**

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO BRIEF OF Respondent ON THE MERITS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO BRIEF OF Respondent ON THE MERITS** was furnished by mail to *, Esquire, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this ____ day of June 1999.

_____
BARBARA A. ZAPPI
Assistant Attorney General