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

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner relies on the Introduction as stated in the Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as stated in the Initial Brief on the Merits.

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(ARE) 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, is the correct proposition of law.

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 (ARE) INVALID IN ORDER FOR THE ISSUE TO BE PRESERVED.

In its answer brief, Respondent cites to the opinion in this case wherein the Fourth District Court commented "to the extent the State argues a different legal argument than it relied upon at trial, the State's argument is not preserved for review." (Answer Brief at p.4). To clarify, on appeal to the Fourth District, the State's argument was twofold: 1) The trial court abused its discretion in imposing a downward departure sentence over the State's objection; and 2) the reasons given by the trial court for departure were not valid.

With respect to the first part of the State's argument, Petitioner relies on the argument as stated in the Initial Brief on the merits with the following addition. Respondent, as did the Fourth District, cited to Tillman v. State, 471 So. 2d 32 (Fla. 1985) for the proposition the State's argument was not preserved for review. However, the Fourth District Court certified conflict with State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000), and not with Tillman.

Tillman held in order to be preserved for review by a higher court, the issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be a part of that presentation. Here, the State specifically objected to the trial court's imposition of a downward departure sentence. Thus, the State did preserve the issue for review where its objection was to the downward departure, in general.

The holding in Barnes was 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. Thus, the holding in Barnes is more specifically on point than Tillman, and it appears the Fourth District recognized that specificity when it certified conflict with Barnes.

Respondent's reliance on State v. Baccari, 730 So. 2d 806 (Fla. 4th DCA 1999) is misplaced as no where in that opinion is it evident the State voiced a clear objection to the downward departure. What the State was objecting to there, was that **some** of the reasons the trial court gave for departure were not valid. Here, the State objected to the imposition of the downward sentence in its totality.

Also misplaced is Respondent's reliance on State v. Henriquez, 717 So. 2d 1087 (Fla. 3d DCA 1998). The facts in Henriquez were that the State did not object or call to the trial court's attention the need for departure reasons. The State then appealed

the sentencing order, contending the absence of downward departure reasons required reversal. The appellate court affirmed, saying the State should have called to the trial court's attention the need for downward departure reasons. In the instant case, the State did object to the imposition of the departure sentence.

With respect to the second part of the State's argument on appeal to the Fourth District Court, that the reasons given by the trial court for departure were not valid, and which Respondent has presented as a second question for review to this Honorable Court, Petitioner responds as follows:

Respondent mistakenly submits the State failed to carry its burden on appeal of showing each of the reasons given for departure was invalid. Respondent correctly states Petitioner acknowledged one of the reasons given by the trial court, Respondent's age, was a statutorily legal mitigating reason. That is, Respondent was eighteen years of age when he committed the sexual offense upon a person less than twelve years of age. Under the 1992 guidelines, the guidelines which were in effect at the time Respondent committed the offense, among the mitigating circumstances a court could consider was the age of the defendant at the time of the crime. Sec. 921.141(6), Fla. Stat. (1992). However, Petitioner pointed out to the court that a defendant's age and a minimal prior record cannot by themselves support a departure sentence where

there are no other extraordinary reasons to support a downward departure. State v. Williams, 637 So. 2d 45 (Fla. 2d DCA 1994), *citing* State v. Matlock, 544 So. 2d 244 (Fla. 2d DCA 1989). Accord State v. Frinks, 555 So. 2d 916 (Fla. 1st DCA 1990) and State v. Licea, 707 So.2d 1155, 1157 (Fla. 2d DCA 1998).

The trial court also gave two other written reasons for the downward departure sentence, neither of which was valid.

1) Respondent had been on probation for 4 years and 3 months and would have successfully completed if not for the new law violation. Respondent violated probation by driving under the influence of alcoholic beverages and leaving the scene of an accident; therefore, as was argued to the appellate court, he did not successfully complete his probation.

2) There was a strong recommendation by Respondent's probation officer for the downward departure. Again, as argued to the appellate court, the fact that a defendant's probation officer recommends a downward departure sentence is not a valid reason for imposing a downward departure sentence. Scurry v. State, 489 So. 2d 25, 29 (Fla. 1986).

Thus, none of the three written reasons the court gave for departing downward were valid. Because Respondent would have successfully completed probation if it weren't for the violation was not a valid reason, and because his probation officer's recommendation was not a valid reason, Respondent's age, by itself,

could not support the departure sentence. State v. Williams; State v. Matlock; State v. Frinks; State v. Licea.

During the revocation hearing, the court also mentioned another reason for departure, because of the previous departure sentence that was imposed. However, the fact that a defendant is given a downward departure disposition pursuant to an original plea agreement with the state is not alone sufficient reason for another downward departure disposition upon revocation, unless the terms of the original plea agreement explicitly covered the sanction to be imposed in the event of violation. State v. Zlockower, 650 So. 2d 692 (Fla. 3d DCA 1995). Downward departure upon revocation requires valid reasons for departure to exist at the time of revocation. Id.

A prior downward departure is sometimes a factor but never a guarantee for a subsequent downward departure by a trial court, which must explain in writing why the departure was a factor. Franquiz v. State, 682 So. 2d 536 (Fla. 1996). The written reasons should describe why the court has or has not found the State's prior agreement to a downward departure to be a valid reason for a subsequent downward departure at the revocation sentencing. Id. Here, when the trial listed its reasons for departure, the prior downward departure was not one of those reasons.

Accordingly, when, after finding the State had not preserved the issue of the downward departure sentence for review the Fourth

District Court addressed the merits of the departure, it erred when it determined the State failed to show the three reasons given for departure were not valid. The recommendation of the probation officer for a downward departure sentence was not a valid reason, and the fact that Respondent would have successfully completed probation if he had not violated probation was not a valid reason, therefore, as shown, Respondent's age, by itself, was not a valid reason.

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); Fleshman v. State, 736 So. 2d 1219 (Fla. 5th DCA 1999). Here, before the court imposed the downward departure sentence, the State objected to the departure. The State's objection was not to any reason in particular, but to the departure in its totality; thus the issue was preserved for review.

CONCLUSION

WHEREFORE, based upon the foregoing, this Honorable Court should find the Fourth District Court's opinion in State v. Clark, 770 So. 2d 237 (Fla. 4th DCA 2000) conflicts with the decision of the Second District Court of Appeal in State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000), and further find Barnes is correct in holding that the State's general objection to the imposition of a downward departure sentence before the trial court imposes the downward sentence, is sufficient to preserve an appellate argument challenging the validity of the departure. Petitioner respectfully requests this Honorable Court to reverse the opinion of the Fourth District and remand this matter for further consideration of the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to Jo Ann Barone Kotzen, Esquire, 224 Datura Street, Suite 1300, West Palm Beach, Florida 33401 and Rick J. Douglas, Esquire, Intracoastal Bldg., Suite 301, 3000 N.E. 30th Place, Ft. Lauderdale, Florida 33306 on this _____ day of February 2000.

_____

BARBARA A. ZAPPI
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Petitioner 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).

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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.

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Assistant Attorney General