THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	/	
	/	
Petitioner	/	
	/	
v.	/	Case No. SC01-2558
	/	
PAUL VANBEBBER,	/	
	/	
Respondent	/	
_____	/	

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

LAW OFFICES OF CASASSA, MANGONE, MILLER AND FAETT

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STATEMENT OF THE CASE AND FACTS

Respondent adopts the statement of the case and facts as set forth by Petitioner.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Second District Court of Appeal in State v. VanBebber, 2001 WL 1299449, Fla. L. Weekly D2558 (Fla. 2d DCA October 26, 2001). The Fourth District case which conflicts with Vanbebber, State v. Warner, 721 So.2d 767 Fla. 4th DCA 1998), aff'd on other grounds 762 So.2d 507 (Fla. 2000), is contrary to the rule of law previously set forth by this Court in State v. Sachs, 526 So.2d 48 (Fla. 1988). Allowing FLA. STAT. 921.0026(2)(j) to apply to D.U.I. charges is not contrary to public policy. Additionally, there is no basis in law or reason for Petitioner's contention that allowing ss. 921.0026(2)(J) to apply to D.U.I. manslaughter charges would create a conflict/ambiguity with ss.921.0026(3).

ARGUMENT

THE STATUTORY GUIDELINES MITIGATOR OF ss. 921.0026(2)(J), FLA. STAT. (1999) IS APPLICABLE TO DUI MANSLAUGHTER CASES

Florida Statute 921.0026(2)(j) provides that the fact that an offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse is a mitigating ground for sentence departure. FLA. STAT 921.0026(2)(j) (1999). Petitioner requests that this Court find that 921.0026(2)(j), FLA. STAT. (1999) is unavailable as a mitigator in driving under the influence cases. Petitioner asserts three grounds as a basis: that the offense of D.U.I. cannot be committed in an unsophisticated manner; that public policy against D.U.I. should render the mitigator unavailable; and that statutory construction requires finding the mitigator unavailable. For the following reasons, this Court should affirm the case below, State v. VanBebber, 2001 WL 1299449, 26 Fla. L. Weekly D2558 (Fla. 2d DCA 2001), overrule State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998), *aff'd on other grounds*, 762 So.2d 507 (Fla. 2000),

and find that Florida Statute 921.0026(2)(J) is applicable in driving under the influence cases.

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Petitioner's first argument, that D.U.I. cannot be committed in an unsophisticated manner, is unsupported by law or fact. In State v. Merritt, 714 So.2d 1153 (Fla. 5th DCA 1998), the Defendant was convicted of lewd and lascivious or indecent act on a minor and enticing a minor to commit a lewd, lascivious or indecent act. The trial court departed downward, relying on FLA. STAT. 921.0016(4)(j). In finding that the offense was committed in an "unsophisticated manner," the appellate court looked at the fact that:

> "FN3. The almost 16-year-old victim did not need to be instructed on how or what to perform; the defendant was nervous and unable to attain an erection, and his acts were artless, simple and not refined." Merritt at 1154.

Following Merritt, the 4th DCA has also looked at the fact that an act is artless, simple, and not refined as qualifying it as "unsophisticated." State v. Fleming, 751 So.2d 620 (Fla. 4th DCA 1999), State v. Baksh, 758

So.2d 1222 (Fla. 4th DCA 2000). The holdings in Merritt, Fleming, and Baksh all take into account the fact that criminal statutes must be construed liberally in favor of a defendant.

If "unsophisticated" is defined as "artless, simple, and not refined," it is difficult to see how D.U.I. could not be committed in an "unsophisticated manner." Getting behind the wheel after drinking is clearly artless. As there is nothing complicated about driving drunk, it is a simple act. It would take a stretch of the imagination to imagine a "refined" way to drive while intoxicated. The offense of D.U.I. requires no plan or complicated scheme. It is, in fact, much more difficult to imagine a D.U.I. offense as being "sophisticated." It would be inappropriate to punish a defendant for committing an offense in an unsophisticated manner simply because it is difficult to commit it in a sophisticated one.

Petitioner further relies on the definition of "sophisticated" relied on in Fleming: "having acquired worldly knowledge or refinement: lacking natural simplicity or naivete." Fleming at 620. Petitioner contends that because everyone is presumed to know the

law there is no way to commit the offense of D.U.I. with "naivete" and "without knowledge and refinement," and therefore there is no way to commit the offense of D.U.I. in an unsophisticated manner. Relying on this line of

thought, no crime could be committed in an unsophisticated manner as one is presumed to know that any crime is against the law. The mitigator at issue would be unavailable in any case and the intent of the legislature would be thwarted.

Petitioner's second contention is that public policy precludes Florida Statute 921.0026(2)(j) from being applicable to D.U.I. charges. So holding would overstep the authority of the Court. Public policy is determined by the legislature through its statutory enactments. Saunders v. Saunders, 796 So.2d 1253 (Fla. 2001). Further, it is the proper function of the Legislature, not the district court of appeal to announce public policy changes. Saunders at 1255. The court has the duty to enforce public policy after the legislature has delineated it. Kelly v. State, 795 So.2d 135 (Fla 5th DCA 2001), rehearing denied Sept. 26, 2001 at 137. In drafting Florida Statute 921.0026(2)(j), the legislature

had every opportunity to make it inapplicable to D.U.I. offenses, but it did not (it did exempt capital felonies). The constitutional separation of powers requires that only the legislature may legislate, the court shall not judicially legislate and negate the clear language used by the legislature.

VanBebber v. State, 2001 WL 1299449 (Fla. 2nd DCA 2001), *citing* Holly v. Auld, 450 So.2d 217 (Fla. 1984). Exempting 921.0026(2)(j) from being applicable to D.U.I. cases would be tantamount to the Court creating public policy.

Petitioner mistakenly cites to White v. State, 568 So.2d 886 (Fla. 1990) as requiring the legislature to interpret the statute in light of public policy. White is actually a civil case, White v. Pepsico, 568 So.2d 886 (Fla. 1990) which goes against Petitioner's position. White requires a court to look at the plain and ordinary meaning of the language in a statute before attempting to interpret its meaning in light of public policy. White at 889. The wording of the statute at issue is clear and unambiguous, the grounds are available for all offenses except capital cases. FLA. STAT. 921.0026 (1999).

Petitioner's final contention is that statutory construction requires disallowing Florida Statute 921.0026(2)(j) as a mitigator for D.U.I. offenses. In support of this argument, petitioner contends that applying Florida Statute 921.0026(2)(j) to D.U.I. cases would create conflict/ambiguity with ss921.0026(3), FLA. STAT. (1999)

which provides:

> (3) The defendant's substance abuse or addiction, including intoxication at the time of the offense is not a mitigating factor under section 2 and does not, under any circumstances, justify a downward departure from the permissible sentencing range.

This line of thought unreasonably equates "intoxication" with "unsophistication."

Intoxication was not offered as a reason for departure below, lack of sophistication was (the acts were artless, simple and not refined). There is no

prohibition for departing when a defendant is intoxicated at the time of an offense, there is merely a prohibition from using the intoxication as the grounds for departure. As “unsophistication” is not synonymous with “intoxication,” there is no conflict between the two sections of Florida Statute 921. Petitioner’s look at the dates of promulgation is therefore irrelevant.

One of the primary tenants of statutory construction is that courts have consistently required “penal statutes to be strictly construed in favor of the accused.” Butler v. State, 774 So.2d 925 (Fla. 5th DCA 2001). The wording in F.S. 921.0026 provides that the section apples to “any

felony offense, except any capital felony committed on or after October 8, 1998.” The section is limited so that the mitigators are not available in capital cases. The legislature has also specifically provided that substance abuse or intoxication at the time of the offense does not justify a downward departure. As previously mentioned, the legislature failed to exclude the crime of D.U.I. Strictly construing the statute would make section (j), the section at issue here, available in D.U.I. cases as a valid reason for departure.

It should finally be noted that the cases cited by appellant, specifically State v. Beck, 763 So.2d 506 (4th DCA 200) and State v. Warner, 721 So.2d 767 (4th DCA 1999) ignore the fact that they are in conflict with a decision of this Court. In State v. Sachs, 526 So.2d 48 (Fla.1988), this Court found that the manner of committing the offense, the fact that the offense was an isolated incident, and the fact that the defendant showed remorse were all valid reasons for a downward departure in a D.U.I. case. Taking matters a step further, Sachs has even been interpreted as holding that "remorse alone is a sufficient mitigating factor." State v. Whiting, 711 So.2d 1212 (Fla. 2nd DCA

1998), State v. Randall, 746 So.2d 550 (Fla. 5th DCA 1999). As 921.0016 contains a nonexclusive list of grounds for departure, legal grounds are set forth in case law and statute. Banks v. State, 732 So.2d 1065 (Fla. 1999). As Sachs apparently provided for remorse alone to be grounds for departure, whether a defendants actions were "unsophisticated" may, in fact, be irrelevant.

CONCLUSION

Florida Statute 921.0026(2)(j) should be a valid reason for departure in D.U.I. cases as D.U.I. can be committed in an "unsophisticated" manner, allowing D.U.I. as a mitigator would not controvert public policy as set forth by the legislature, and statutory construction requires that it be a reason to depart in D.U.I. cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Ronald Napolitano, Assistant Attorney General, 2002 N. Lois Ave., Ste. 700, Westwood Center, Tampa, Florida 33607-2366 on this the 15th day of January, 2002.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used

in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(l).

Respectfully submitted,

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