IN THE SUPREME COURT OF FLORIDA

BLANCHARD ST. VAL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC07-1402
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the one-volume record on appeal, which consists of the relevant documents filed below.

The symbol "SR" will denote the Auto-Supplemental record on appeal.

The symbol "T" will denote the six-volume transcript of the trial proceedings.

The symbol "ST" will denote the one-volume sentencing transcript.

STATEMENT OF THE CASE AND FACTS

Petitioner was tried before a jury for Count I, attempted first degree murder with a firearm, Count II, attempted second degree murder, Count III, shooting into an occupied vehicle, and Count IV, shooting into an occupied vehicle. The information alleged that these offenses occurred on June 7, 2003 (R 8-9). The evidence introduced during trial established the following.

On June 6, 2003, Fritz Horeb and Naomi Dor were driving home when they saw a person approaching a stop sign on a bike (T 215). Horeb and Dor identified the person as Petitioner (T 225-243). Horeb said that Petitioner was an acquaintance and that they previously had a dispute about an incident involving a car (T 210). Horeb and Dor testified that Petitioner pulled out something that appeared to be a gun and said, "I'm going to blast you pussy ass nigger." (T 215, 243). They became frightened and drove off into a dead end (T 246).

After waiting 10-20 minutes, they decided to drive home. As they began to drive away, a person began firing at them (T 218, 246). Horeb was shot in the arm and head, and taken to the hospital (T 218-220). He stated that he never saw who shot him, could not remember hearing any shots, did not remember being taken to the hospital or meeting the detectives there (T 218-220, 223). Unlike Horeb, Dor saw the person who shot at them and identified him as Petitioner (T 248). Dor testified that she heard at least six gunshots (T 250-251).

Four officers from the Delray Police Department testified about what happened

when they arrived at the scene (T 286, 324, 331, 441). The first officer, David Weatherspoon, said that he was on patrol in the area and heard gunshots around 1:00 a.m. (T 291). Weatherspoon then saw a black male covered in blood getting out of the car saying, "I've been shot!" (T 295-96). After calling for medical help, Weatherspoon investigated around that area and found several gun casings along the sidewalk and a white T-shirt in the bushes (T 297, 302-303).

When officer Edward Deptel arrived on the scene, Dor told him that Petitioner was the shooter (T 328). She said Petitioner was wearing a white T-shirt during the shooting, and showed the police where Petitioner lived (T 245, 329).

Sgt. John Crane-Baker went to Petitioner's house in an unmarked patrol car to conduct surveillance (T 333). About an hour after arriving Baker saw Petitioner riding a bike (T 336). The bike was being followed by a car and the bike and car drove onto a driveway (T 336).

Detective Gene Sapino arrived on the scene of the shooting between 1:30-1:40 a.m. and met with both Dor and Horeb (T 442-43). Sapino interviewed Dor at the police department where she picked Petitioner out of a photo lineup (T 444). Then Sapino went to the hospital to see Horeb, and Horeb picked Petitioner out of a photo lineup (T 447). With these two identifications Sapino felt he had sufficient probable cause to arrest Petitioner and did arrest him at 10:30 a.m. on June 7, 2003 (T 450-451).

Two Crime Scene Investigators from the City of Delray went to the scene of the incident (T 348, 396). One investigator, Clyde Jones, attempted to recover latent

fingerprints from the shell casings (T 356). Jones recovered fragments, but found no intact projectiles (T 368). Jones also found two impact points in the driver side door and one round which entered through the window and hit the windshield (T 372-74).

The second investigator, Carrie Hellenbrecht, photographed and searched the vehicle at Petitioner's residence (T 398). Hellenbrecht discovered thirty-one spent casings and one live round in a bag under the rear seat of the car at Petitioner's residence (T 402-03).

Jay Mullins, a latent print and firearm examiner for the Palm Beach County Sheriff's Office, testified that the six casings found at the scene were fired from a single firearm, and that the thirty-one casings found in the car at Petitioner's house were also fired from a single firearm (T 411, 421-23). Mullins later concluded that the six and thirty-one casings were all fired from the same gun. No gun, however, was found after searching Petitioner's home and the vehicle (T 424).

Dr. Cecilina Crouse, a serology DNA examiner at the Palm Beach County Sheriff's Office crime lab, testified that she obtained genetic information from twelve of sixteen genetic markers from a stain on the white T-shirt found at the shooting scene (T 492, 508). Based on a comparison of Petitioner's DNA to these genetic markers, Crouse was unable to exclude Petitioner as a possible contributor (T 492, 508-518). Further, it was her opinion that Petitioner was the source of the DNA on the T-shirt (T 517-518).

The trial court denied Petitioner's motion for judgment of acquittal on Counts me and II, and Petitioner rested without calling any witnesses (T 529, 536). On January 12,

2006, the jury found petitioner guilty as charged on all counts (T 627).

On February 3, 2006, Petitioner was sentenced (T 627). Before sentencing Petitioner addressed the trial judge and said:

> Now, what I'm saying, certain reasons and , you know, I have learned my lesson, since I been in jail. Came in 2003, you know, done changed a lot, you know, became a better man . . . . I understand that these people got hurt, you know, but they still, still living as today, they going to work, they having they (sic) little fun out there, you know.

(T 636).

Later the trial court responded:

> I am looking at the fact that the defendant was very young when he committed the crime and considering that in mitigation, however, what I'm also looking at is the issue of responsibility and issue of intent.
>
> And I find in looking at the evidence hat came in while the jury was here and the statement of the defendant now and references to the incident now from the defense are that Mr. St. Val is not taking responsibility and not showing remorse is taking the position that it was a wild shot, someone happened to get hurt. He expressed he's sorry that someone happened to get hurt.

(T 652).

On Count I, the trial court sentenced Petitioner to life in prison with a 25 year mandatory minimum, and on Counts II-IV Petitioner was sentenced to three concurrent 15 year sentences. Petitioner obtained 973 days credit for time served (T 654).

Petitioner filed a Motion to Correct Sentencing Error and Request for Resentencing arguing that the trial court's consideration of Petitioner's lack of remorse when sentencing

him was impermissible (SR 1-14). The trial court denied the motion. (SR 97-98)

Before the Fourth District Court of Appeal, Petitioner argued that the trial court's consideration of his lack of remorse when imposing sentence violated his due process rights. *Ritter v. State*, 885 So. 2d 413, 414 (Fla. 1st DCA 2004); *K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001). And also that it was improper for the trial court to aggravate his sentence because he failed to exhibit remorse for having committed the offense." *K.N.M.*, 793 So. 2d at 1198. The district court rejected Petitioner's "contention that a sentencing judge may never take a defendant's lack of remorse into consideration when imposing sentence." *St. Val v. State*, 958 So. 2d 1146 (Fla. 4th DCA 2007. The district court reasoned that this was not a case where a defendant was punished for protesting his innocence, nor a case where a court used lack of remorse as an aggravating factor in a first degree murder prosecution. See *Tanzi v. State*, 1148 32 Fla. L. Weekly S223, ---So.2d ----, 2007 WL 1362862 (Fla. May 10, 2007); *Jackson v. Wainwright*, 421 So. 2d 1385 (Fla. 1982).

Petitioner's notice to invoke the discretionary jurisdiction of this Court, based upon express and direct conflict, was subsequently filed. By order dated September 10, 2007, this Court accepted jurisdiction and set a briefing schedule. This brief now follows.

SUMMARY OF THE ARGUMENT

Petitioner was tried before a jury and convicted of attempted first degree murder with a firearm, attempted second degree murder, and two counts of shooting into an occupied vehicle.

Before imposing a life sentence, the trial court stated that Petitioner was not taking responsibility for his actions, and not showing remorse for the crimes he was convicted of, but was only sorry that someone happened to get hurt.

It is improper for the trial court to aggravate a sentence because Petitioner failed to exhibit remorse for having committed the offense. The trial judge's consideration of Petitioner's lack of remorse violated his due process rights, and requires a new sentence hearing before a different judge.

ARGUMENT

POINT ON APPEAL

IN DETERMINING PETITIONER'S SENTENCE THE TRIAL COURT ERRONEOUSLY CONSIDERED WHETHER PETITIONER WAS TAKING RESPONSIBILITY OR SHOWING REMORSE FOR THE CRIME. THIS ERROR REQUIRES A NEW SENTENCING HEARING BEFORE A DIFFERENT JUDGE.

At sentencing, Respondent sought the maximum sentence permitted by the law, asking that Petitioner be given life in prison. Before imposing sentence, the trial court addressed Petitioner stating:

> I am looking at the fact that the defendant was very young when he committed the crime and considering that in mitigation, however what I'm also looking at is the issue of choices, the issue of responsibility and issue of intent.
>
> And I find in looking at the evidence that came in while the jury was here and the statement of the defendant now and references to the incident now from the defense are that Mr. St. Val is not taking responsibility and not showing remorse is taking a position that it was a wild shot, someone happened to get hurt. He expressed he's sorry that someone happened to get hurt.

(T 652)

Then the trial judge sentenced Petitioner to life in prison (T 654).

Consideration of Petitioner's lack of remorse in sentencing is impermissible. "Although remorse and an admission of guilt may be grounds

for mitigation of a sentence or disposition, the opposite is not true." *K.N.M. v. State*, 793 So. 2d at 1198 (Fla. 5th DCA 2001). "It is improper for the trial court to aggravate a sentence because the defendant failed to exhibit remorse for having committed the offense." *Id* at 1198. Any reliance on a lack of remorse from the defendant by a court in imposing sentence violates due process. *Ritter v. State*, 885 So. 2d 413, 414 (Fla. 1st DCA 2004); *K.N.M.*, 793 So. 2d at 1198. Even if Petitioner's failure to express remorse was not the only, or even the principal factor taken into consideration by the court in penalizing him, it is improper for lack of remorse to be even one of the reasons for imposing sentence. *Soto v. State*, 874 So. 2d 1215, 1217 (Fla. 3d DCA 2004).

Petitioner filed a motion to correct this sentencing error, but on September 14, 2006, the trial court denied the motion. The court provided three reasons for its decision.

First the trial judge said the statement concerning Petitioner not showing remorse was made in the context of the court finding that Petitioner's actions in shooting the victim were intentional, rather then careless or negligent. This reasoning is flawed. The record is clear that before imposing the maximum sentences permitted by law, the court stated that Petitioner was not taking responsibility and not showing remorse. Thus, the trial judge's statement suggested that if Petitioner conceded guilt and exhibited remorse he would be

treated differently than by maintaining his innocence. Even if this were not true, it is a sentencing error for the trial court to consider lack of remorse, even if lack of remorse is not considered in enhancing defendant's sentence. *Gilchrist v. State*, 938 So. 2d 654 (Fla. 4th DCA 2006). Simply by noting that the statement was used to determine that the act was intentional indicates that the court did consider Petitioner's lack of remorse.

In *Gilchrist* a similar situation arose at sentencing. There the trial judge stated, "He's yet to admit or concede his guilt. He had the opportunity to speak today and you had to drag the words out of his mouth. I don't see the least bit of remorse. I don't even know that he realizes what he's done is wrong." The judge also made the following comment at the hearing on the Rule 3.800(b)(2) motion: "As to whether or not I improperly considered lack of remorse and those kinds of things at sentencing, I certainly didn't consider it in enhancing the sentence. I may have considered it in not mitigating the sentence." *Id.* at 657. The *Gilchrist* court observed that the record indicated that the court did consider Gilchrist's failure to confess and lack of remorse in determining his sentence because it indicated that it was considered in not mitigating the sentence. *Id*. at 658.

Second, the trial judge did not agree that resentencing was required under the case law when the statement concerning Petitioner "not showing remorse," was seen within the full context of the sentencing pronouncements.

Again this is incorrect. Instead, even if Petitioner's failure to express remorse was not the only, or even the principal, factor taken into consideration by the court in penalizing Petitioner, it is improper for lack of remorse to be even one of the reasons for imposing sentence. *Soto,* 874 So. 2d at 1217; *K.N.M.*, 793 So. 2d at 1198 (although defendant's lack of remorse and unwillingness to admit guilt were not the only factors in the trial court's sentencing decision, these factors should not have been considered at all); *A.S. v. State*, 667 So. 2d 994, 995 (Fla. 3d DCA 1996) (although defendant's failure to take responsibility and lack of remorse were not the only factors relied upon by the trial court in imposing sentence, they need not have been to require reversal); *Lyons*, 730 So. 2d 833 (Fla. 4th DCA 1999) (defendant may not be additionally punished for failing to show remorse or for continuing to claim innocence).

Finally, the trial judge reasoned that Petitioner's case was different than the cases relied upon in Petitioner's motion because in each of those cases, a defendant maintaining his innocence was a factor in the court's sentencing decision. However, Petitioner also maintained his innocence throughout the trial and sentencing, whether through expressed or implied means. Petitioner never explicitly confessed to committing the alleged offenses.

Regardless of the circumstances, lack of remorse should never be a reason to increase a defendant's sentence. Apart from a defendant's constitutional right to maintain their innocence after the verdict, determining

the presence or absence of remorse is completely subjective. Even assuming that remorse is capable of a precise definition, identifying and quantifying a defendant's remorse is susceptible to gross error due to deception, cultural values, developmental limitations, and psychological problems. Bryan H. Ward, *Sentencing Without Remorse*, 38 Loy. U. Chi. L.J. 131 (2006). When error does occur the courts face another problem of correcting them as noted by the Supreme Court of North Carolina. There the Court reasoned that:

> Because a trial judge's determination of the factor is basically dependent upon his subjective evaluation of the defendant's demeanor, we find it impossible to formulate adequately concrete guidelines to prevent future erroneous findings. *State v. Vandiver*, 321 N.C. 570, 574 (N.C. 1988).

Although the court in *Vandiver* was deciding whether to allow trial courts to consider apparent or perceived perjury by the defendant during sentencing, the same logic would apply here–there is simply no basis on which a sentencing court can objectively assess "remorse" with any sort of certainty. See Ward, *supra* at 140. Leaving a determination of such a "subjective evaluation" of the defendant's demeanor to the trial court's discretion hardly fulfils the goal of ensuring equal justice under the law. Instead, defendant's will be subject to sentences based on each judge's perception of what lies within their hearts and minds.

This problem, the unreliability of isolating and assessing remorse, is implicitly recognized in our State's downward departure sentences. Under §

921.0026(2)(j), Fla. Stat., downward departure is permissible where the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse. All three of these elements, not just remorse, must be present before the trial court may depart under this factor. *State v. Cooper*, 889 So. 2d 119, 119 (Fla. 4th DCA 2004). Yet these safeguards do not exist in the Fourth District Court's *St. Val* opinion, even though a greater danger exists when a defendant can receive a harsher sentence than deserved because of a perceived lack of remorse.

Defendant's also face difficulties in expressing remorse. Many are from different cultures where emotions are expressed in a different manner, or they are not expressed at all. Defendants also typically have less education, and many have developmental and psychological problems. These attributes can influence both the defendant's perception of his behavior, and his ability to communicate with the court:

> The arbitrary manner in which remorse is considered at the time of sentencing is further demonstrated when trial courts engage in an excessively strict examination of the words used by defendants to express their remorse. This is unfortunate because typical criminal defendants are poorly educated, and as such they often prove to be inarticulate in daily conversation. This tendency is exacerbated by the stress of the moment, especially when attorneys advise the defendants that what they say to the judge can greatly affect the sentence that they receive. Despite this, many courts engage in a detailed "parsing" of language when deciding whether the defendant's statements

> reflect true remorse.
>
> One manner of expressing remorse seems almost always doomed to failure--that of simply saying that one is sorry. Courts often view this statement as per se inadequate and take offense to the notion that saying "sorry" is enough. 38 Loy. U. Chi. L.J. at 131, 142-143 (2006).

Thus, allowing courts to consider the presence or absence of a defendant's remorse will fail. Judges cannot fairly and accurately determine a defendant's remorse. Our justice system cannot allow judges to increase incarceration on such a flawed basis.

Because the trial court's sentencing decision was influenced, even in part, by the impermissible considerations outlined above, this Court should set aside Petitioner's sentence and order a new sentencing hearing before a different judge. *See Doty v. State*, 884 So. 2d 547 (Fla. 4th DCA 2004); *Seays v. State*, 798 So. 2d 1209 (Fla. 4th DCA 2001) (resentencing before different judge is remedy when sentence may have been influenced by improper considerations).

CERTIFICATE OF SERVICEN

Petitioner's due process rights were violated when the trial court relied on Petitioner not taking responsibility, and not showing remorse for the criminal incidents. Respondent cannot carry its burden of establishing that these impermissible factors did not influence the trial court's sentencing decision. As a result, resentencing before a different judge is required..

Respectfully submitted,

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CERTIFICATE OF SERVICEN

I HEREBY CERTIFY that a copy of Petitioner's Initial Brief has been furnished to: HEIDI L. BETTENDORF, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of October, 2007.

_____
Counsel for Petitioner

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Petitioner's Initial Brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of October, 2007.

_____
PATRICK B. BURKE
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