IN THE SUPREME COURT OF FLORIDA

SIDNEY NORVIL, Jr., Petitioner,	)	
vs.	)	CASE NO. SC14-746
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S REPLY BRIEF

On Review from the
Fourth District Court of Appeal

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ERROR OCCURED WHERE THE TRIAL COURT CONSIDERED PETITIONER'S SUBSEQUENT ARREST WHEN IMPOSING HIS SENTENCE.

Although the State acknowledges that the Criminal Punishment Code (CPC) does not score subsequent arrests, and emphasizes that the penalty should be commensurate with the severity of the primary offense and the circumstances surrounding the primary offense, the State still urges this Court to allow trial judges to consider subsequent arrests in their sentencing decision. *Answer Brief pages 11-23.* One of the supporting arguments put forward by the State is that the trial judge ordered a Pre-Sentence Investigation (PSI). *Answer Brief page 12.* But the purpose of the presentence investigative procedure is to furnish the sentencing court with information which will be helpful in determining whether the imposition of sentence should be suspended and the defendant placed on probation, or the type of sentence which should be imposed in light of *the circumstances of the case* and the *defendant's past record*. *Johnson v. State*, 242 So. 2d 876, 876 (Fla. 1st DCA 1971) (emphasis added). The statute requires information regarding the current crime and prior arrests and convictions. § 921.231(1)(a) & (c). It does not include subsequent arrests.

The State also cites some capital cases for support of the argument that a court may consider any evidence it deems relevant to sentencing. *Answer Brief*

page 11-12. But none of those cases considered a subsequent arrest. Instead the evidence involved prior convictions, and circumstances surrounding the primary offense. A subsequent arrest is not a circumstance surrounding the primary offense.

Consider probation with its lesser burden of proof. It is improper to permanently revoke probation based solely upon proof that a probationer has been arrested. *Hines v. State*, 358 So. 2d 183, 185 (Fla. 1978). The fact of an arrest is no evidence of guilt or of any other dishonorable act. *Brown v. State*, 338 So. 2d 573, 574 (Fla. 2d DCA 1976). Otherwise the mere fact of being arrested would, standing alone, cause a probationer to be guilty of violating the condition requiring him 'to live honorably', irrespective of his guilt or innocence of the charge for which arrested, or irrespective of whether the officer even had grounds to make such arrest. *Crum v. State*, 286 So. 2d 268, 268-69 (Fla. 4th DCA 1973).

What is a judge doing when she selects a sentence? Although that the CPC tells the judge what the lowest appropriate sentence is judges have the discretion to select a sentence above the CPC's lowest appropriate sentence. When a judge does that what is she doing?

She is doing three things. First, she is making a policy decision: she is deciding that some consideration is relevant to punishment. Second, she is making a factual decision: does this offender or offense have the consideration she thinks is

relevant to punishment? Third, she is applying the policy decision to the particular facts: she is deciding what weight to give the policy consideration if found. For example, our judge decides that burglary committed at night is worse than a burglary committed during the day. That is a policy decision. She then decides whether the defendant committed his burglary at night (a factual decision), and, if so, how much weight to give that fact in meting out the sentence (applying the policy decision to the case).

The policy consideration must be appropriate for sentencing. It is not appropriate to consider, for example, race, gender, and social and economic status, § 921.002(1)(a), Fla. Stat.; acquitted conduct (*Dinkines v. State*, 122 So. 3d 477 (Fla. 4th DCA 2013)); the failure to show remorse (*Whitmore v. State*, 27 So. 3d 168, 172 (Fla. 4th DCA 2010); or maintaining innocence (*Holt v. State*, 33 So. 3d 811 (Fla. 4th DCA 2010) to name just a few of the many improper considerations.

The Fourth District Court also allows a sentencing judge to consider prior arrests. *Jansson v. State*, 399 So. 2d 1061, 1064 (Fla. 4th DCA 1981). But these are different from subsequent arrests. A prior arrest is water under the bridge and the sentencing court must recognize that these arrests are not convictions or findings of guilt, and the defendant must be given an opportunity to explain or offer evidence on the issue of his prior arrests. *Id.* at 1064. In this circumstance the defendant's opportunity to defend his arrest record is not illusory. Either there was

no subsequent prosecution, or the prosecution was dropped (since a court may not consider acquitted conduct) and the defendant is free to address the arrest without further consequences. There is no such unfettered opportunity to explain a subsequent arrest. The defendant is hamstrung by the threat of prosecution, if not already under prosecution for the alleged offense.

The State claims that the presumption of innocence has not been violated because the allegations were substantiated and Petitioner had an opportunity to refute those allegations. *Answer Brief page 18.* How so? No discovery had taken place, no witnesses were presented, there was no opportunity to cross examine witnesses, and since counsel would advise Petitioner to remain silent regarding a pending case — no ability refute the claims. Petitioner was at a distinct disadvantage.

The State also argues that Petitioner was faced with the same decision regarding whether or not to testify that he would face at a full-fledged trial. *Answer Brief page 18, 20.* That is not correct, and that statement illustrates how skewed such sentencing hearings can be. At trial the State carries the burden to establish the charge beyond a reasonable doubt, while the defendant has no burden. *See Jackson v. State*, 575 So.2d 181 (Fla.1991); *Shelton v. State*, 654 So.2d 1295 (Fla. 4th DCA 1995). But now the State implies that Petitioner had an obligation to refute the prosecutor's statements at the sentencing hearing. This not only takes

away his right to remain silent, but any statement he would make could be used at a later trial. It is patently unfair to punish Petitioner because he failed to mount a defense by not testifying, presenting evidence to prove his innocence, or refuting an element of the crime.

Finally, the State stresses that the judge "only" sentenced Petitioner to twelve years prison. *Answer Brief page 23-23.* Petitioner's lowest permissible sentence under the CPC was 35.7 months. The trial judge, after considering Petitioner's subsequent arrest for burglary of a conveyance, sentenced him to 12 years, or 144 months, on Count One. This is approximately 1/6th of a lifetime, not an insignificant sentence.

This Court should hold that the consideration of subsequent arrests or charges during sentencing is a violation of Petitioner's due process rights.

CONCLUSION

This Court should reverse the sentence and remand for resentencing before a different judge.

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this brief has been electronically filed with the Court and a copy of it has been served to Jeanine Marie Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 22nd day of May, 2015.

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CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ PATRICK BARFIELD BURKE
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