

68,942

IN THE SUPREME COURT OF FLORIDA

FILED

JUN 19 1980

CLERK, SUPREME COURT

By \_\_\_\_\_ Deputy Clerk  
CASE NO.

JAMES PATRICK BARBERA, )  
 )  
 )  
 ) Petitioner, )  
 )  
 )  
 ) vs. )  
 )  
 )  
 ) STATE OF FLORIDA, )  
 )  
 )  
 ) Respondent. )  
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 )

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PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was Appellee and the defendant. and Respondent was the Appellant and the prosecution in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

"A"                    Appendix.

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with attempted first degree murder. Petitioner pled guilty to the attempted murder charge. The sentencing guidelines recommended seven to twelve years in prison. The trial court departed from the guidelines and sentenced Petitioner to 364 days incarceration and ten years probation with the special condition that he attend a substance abuse program in New York (Appendix 1). The trial court adopted an alternative sentencing program as his written reasons for departure (Appendix 2). Respondent appealed the sentence to the Fourth District Court of Appeal.

In its decision, the Fourth District noted that the trial court had adopted the alternative sentencing plan and departed downward pursuant to the following facts:

The defendant pled guilty to the attempted murder of his ex-wife. He had consumed a whole case of beer, after which he stabbed her. A psychological report concluded that the defendant had an alcoholic personality and certain destructive behavioral traits common to alcoholics. The report also said that the defendant was "severely withdrawn, under-socialized, passive, dependent, anxious and depressed." Based on her observations, it was the psychiatrist's opinion that the defendant suffered a "brief reactive psychosis" which led to the stabbing of his ex-wife. This report, coupled with the opinion of the Director of Admissions for the Comprehensive Alcoholic Rehabilitative program in West Palm Beach, resulted in the defendant agreeing to go for treatment in a program in New York where he would have the support of his family and would be many miles away from his ex-wife.

(Appendix 1).

The Fourth District decided these were not clear and convincing reasons for departure and reversed Petitioner's sentence. The Fourth District also noted that the argument that Petitioner "[w]as too drunk at the time of the attack to know what he was doing..." did not constitute a good and sufficient reason for departure. The Fourth District subsequently denied Petitioner's motion for rehearing (Appendix 3). Petitioner thereafter filed the instant case in this Court.

#### SUMMARY OF THE ARGUMENT

By finding that a downward departure was not justified where there was competent expert evidence that Petitioner suffered from a "psychosis" at this time of the offense and where treatment, with the support of family, would be imposed, the district court's decision conflicts with State v. Twelves, 463 So.2d 493 (Fla.2d DCA 1985).

By finding that an impaired mental capacity resulting from the abuse of alcohol could not be considered in mitigating Petitioner's sentence, the district court's decision conflicts with Ross v. State, 474 So.2d 1170 (Fla. 1985).

ARGUMENT

POINT INVOLVED

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL AND WITH A DECISION OF THIS COURT.

Petitioner invokes this Court's "conflict" jurisdiction under Article V, §3(b)(3), Florida Constitution (1980) and Fla.R.App.P. 9.030(a)(2)(iv). Said rule provides that review may be sought of "decisions of district courts of appeal that: (iv) expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law."

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the Supreme Court or another district, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

At bar, the Fourth District Court of Appeal stated:

The defendant pled guilty to the attempted murder of his ex-wife. He had consumed a whole case of beer, after which he stabbed her. A psychological report concluded that the defendant had an alcoholic personality and certain destructive behavioral traits common to alcoholics. The report also said that the defendant was "severely withdrawn, under-socialized, passive, dependent, anxious and depressed." Based on her observations, it was the psychiatrist's opinion that the defendant suffered a "brief reactive psychosis" which led to the stabbing of his ex-wife. This report, coupled with the opinion of the Director of Admissions for the Comprehensive Alcoholic Rehabilitative program in West Palm Beach, resulted in the defendant agreeing to go for

treatment in a program in New York where he would have the support of his family and would be many miles away from his ex-wife.

(Appendix 1).

"Pursuant to these facts" the trial court adopted an alternative sentencing plan and departed downward from the guideline sentence. (Appendix 1). The district court reversed the departure.

In holding these reasons insufficient to support a downward departure the district court's decision expressly and directly conflicts with the Second District Court of Appeal's decision in State v. Twelves, 463 So.2d 493 (Fla.2d DCA 1985). In Twelves the Second District held a downward departure of the suspension of all but 18 months of a ten (10) year sentence to be justified based on the following reasoning:

Although the appellee developed a post-military record of criminality resulting in convictions and imprisonment, there was competent expert evidence before the trial court that the appellee suffers from Post-Traumatic Stress Disorder which may be remedied by the PAR Drug and the Bay Pines Vietnam Veterans Outreach programs. Moreover, friends, relatives and employers testified that they intend to assist the appellee in his effort to achieve rehabilitation. Based upon the foregoing, we are convinced the trial court acted within its discretionary power.

Accordingly, the judgment and suspended sentences are affirmed.

463 So.2d at 493-494.

Consequently, both Twelves and the instant case involve a downward departure where: (1) there was competent expert evidence that each defendant suffered from a "stress" or "psychosis" at the time of the crime for which he was convicted, (2) each defendant would enter a treatment program for his particular

problem, and (3) while undergoing treatment each defendant would be assisted by family and/or friends. The facts of the two cases regarding the trial court's downward departure to enable the defendants to receive treatment are almost identical. However, each district court came to a different result. The downward departure was upheld in Twelves, but the downward departure in the instant case was reversed.

In addition, the district court stated that the defendant's argument "[t]hat he was too drunk at the time of the attack to know what he was doing..." was an insufficient reason to mitigate petitioner's sentence. This is in conflict with this Court's decision in Ross v. State, 474 So.2d 1170 (Fla. 1985), which allows the trial court to mitigate a sentence due to a defendant's impaired mental capacity resulting from the abuse of alcohol. This Court held that the trial court erred in not mitigating the defendant's sentence in view of circumstances of impaired mental capacity and the evidence that the defendant was an alcoholic and was intoxicated at the time of the homicide stating:

It is apparent that the trial judge did not consider as mitigating factors the sentencing phase testimony of the appellant's family members relating to the appellant's drinking problems, the testimony of the state's key witness, Harwood, that the appellate confessed he had been drinking when he attacked the victim, or the evidence that the killing was the result of an angry domestic dispute in which the victim realized the appellant was having difficulty controlling his emotions. We find the trial court erred in not considering these circumstances collectively as a significant mitigating factor.

474 So.2d at 1174.

Thus, both cases involve similar mitigating facts with regard to a domestic dispute, alcohol abuse, and impaired mental capacity at the time of killing or attempted killing. This Court held that the trial court could, and should, consider such facts in mitigating the defendant's sentence. In the instant case the district court held that such facts could not be used to mitigate a sentence. Consequently, the decision at bar expressly and directly conflicts with this Court's decision in Ross.

Because the conflicts with Twelves and Ross are both direct and express this Court has jurisdiction to review the instant case. Moreover, because of the number of appeals from guideline departures, it is important that Florida have uniform case law regarding what reasons are valid for departing from the guidelines. It is especially important that the trial courts be informed as to whether, and when, they will be permitted to use alternative sentencing plans when confronted with a guideline sentence. The kind of conflict which is demonstrated here is precisely the type of matter which can only be resolved by this Court. Therefore this Court should accept jurisdiction of this cause and proceed to dispose of the issues after briefing on the merits by the parties.

CONCLUSION

This Court may and should review the decision of the district court of appeal in the exercise of its certiorari jurisdiction.

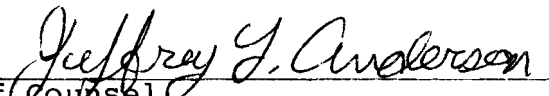
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to NOEL PELELLA, Assistant Attorney General, Room 204 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 23 day of June, 1986.

  
Of Counsel