

IN THE SUPREME COURT OF FLORIDA

JAMES PATRICK BARBERA,)

Petitioner,)

v.)

STATE OF FLORIDA,)

Respondent.)

CASE NO. 68,942

C
pl

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the defendant in the trial court. Respondent was the Appellant in the court below and the prosecution in the trial court. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbols will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

On November 28, 1984, Petitioner, JAMES PATRICK BARBERA, was charged by amended information with the attempted murder of his wife (R39).

On April 30, 1985, Petitioner moved to suppress all statements made by him, and physical evidence, obtained after an illegal arrest (R53-55). The trial court granted the motion to suppress the statement and most of the physical evidence as being the fruit of an illegal arrest (R62).

On September 11, 1985, a plea conference hearing was held in the instant case (R1-34). At the hearing an alternative sentencing plan was presented to the trial court (R3,63-90). The trial court also heard the recommendations of a psychologist, Petitioner's wife, a detective who investigated the incident, and the director of admission for the Comprehensive Alcoholic Rehabilitation Programs in West Palm Beach.

The alternative sentencing plan's psychological report by Dr. Margaret Townsend included the following. At 11:00 a.m. on November 8, 1984, Petitioner received his divorce papers (R71). Appellee started drinking at noon and consumed a case of beer (R71). The next thing Petitioner remembered was that he was standing over his wife with a knife in his hand and he saw blood on his clothes (R71). Petitioner then called the police from his apartment to turn himself in (R71).

Dr. Townsend concluded that Petitioner had an alcoholic personality and certain destructive behavioral traits common to alcoholics (R73). Dr. Townsend was aware that Petitioner had

imbibed at least one case of beer prior to the incident and was a severely withdrawn, undersocialized, passive dependent, anxious, and depressed individual (R74). Based on this information, it was Dr. Townsend's opinion that Petitioner suffered a brief reactive psychosis which resulted in the stabbing of his wife (R74).

Eric Piedrman, the Director of Admissions for the Comprehensive Alcoholic Rehabilitation Programs in West Palm Beach testified that Petitioner was in need of treatment, but that his program was not right for Appellant (R4,8). Piedrman agreed with the recommended treatment program in New York, where Petitioner would have the support of his family and would be many miles away from the victim - his ex-wife (R13-14).

Investigating officer Ralph Phillips testified that there was an odor of alcohol on Petitioner's breath two hours after the incident (R21). Even though Petitioner's state of dress did not seem rational to Phillips, in Phillips opinion Petitioner did not appear to be intoxicated two hours after the incident (R22). Officer Phillips testified that he had not read the alternative sentencing plan (R24).

Petitioner's ex-wife, Zelma Barbera, testified that she wished Petitioner to be placed in prison (R6). She also testified that she would be in fear of her safety if Petitioner were paroled (R7). When questioned if whether Petitioner would be a danger in the future, Dr. Townsend testified that predicting the

dangerousness of an individual is very difficult to do, but in this case the answer would depend on keeping Petitioner off alcohol and separate from his ex-wife (R9).

The alternative sentencing plan recommended that Petitioner be sentenced to 364 days in the Palm Beach County Jail to be followed by ten (10) years probation in New York (R68). As a condition of the probation, Petitioner was required to participate in an intensive substance abuse treatment program at the Rockland County Mental Health Center in Pomona, New York (R68). The trial court informed Petitioner that he would accept the plan's recommendations if Petitioner would formally withdraw his plea of not guilty (R27). Upon learning of the court's decision to follow the alternative plan, Petitioner withdrew his not guilty plea and entered a plea of guilty which was accepted by the trial court (R27-30). The recommended guideline sentence was twelve (12) to seventeen (17) years in prison (R91). The trial court departed from the recommended guideline sentence and sentenced Petitioner to 364 days in the Palm Beach County Jail to be followed by ten(10) years probation with the special conditions directed by the alternative sentencing plan (R94). When the question arose as to what would constitute the written reasons for departure the following colloquy occurred:

MR. NEWHALL: What I'm afraid of is I don't want Ms. Grant writing an order containing every possible reason for going below the guidelines and submitting it to you for your signature.

THE COURT: We'll have another hearing --

MS. GRANT: Judge --

THE COURT: On the order that Ms. Grant submits to the court.

MS. GRANT: Judge, I'm suggesting that as your reasons for going below the guidelines you just adopt the complete alternative sentencing plan --

THE COURT: I will do so.

MS. GRANT: --as your written order.

(31-32).

The commitment information in this cause contains the alternative sentencing plan's recommendation of a substance abuse program in New York and information that the sentence was a downward guideline departure (R94). Attached as part of the commitment information was the following portion of the alternative sentencing plan:

I. INCARCERATION:

Should this plan be acceptable to the Court, the Division of Comprehensive Alternative recommends that Mr. Barbera be detained for a period of 364 days in the Palm Beach County Jail with credit for all time served. Following this period of detention, we recommend that he be placed on a probationary period of ten (10) years and transferred through interstate compact to the State of New York.

II. RESIDENCE:

The client should be allowed to reside with his sister, Rosemarie Barbera at 2 Benson Street, West Haverstraw, New York, (914) 429-9292.

III. EMPLOYMENT:

No plan of employment is being offered as the subject initially will be in treatment and his living expenses are being funded by a benefactor, Mr. Brewer - 2000 Ocean Boulevard, Delray Beach.

IV. REQUIRED RESTITUTION:

If this plan is acceptable to the court, we recommend that Mr. Barbera be required to repay the Bethesda Memorial Hospital the amount of \$3,317.28 for services required by Zelma Barbera from 11-8-84 until 11-14-84, as a result of the incident that occurred. A payment schedule should be established upon the client's employment.

V. SUBSTANCE ABUSE TREATMENT:

As a condition of probation, Mr. Barbera would be required to refrain from the use of alcohol and to attend the Substance Abuse Program of the Rockland County Mental Health Center in Pomona, New York. Mrs. Barbara Kelly has advised the writer that out-patient treatment would be available to the client. They provide an extensive program of group therapy four days a week from 9:00 A.M. until 2:30 P.M. Additionally, they offer a program of individual counseling. The type of program would be based on their evaluation and recommendation. Following the recommended treatment and rehabilitation program, the client would be required to attend Alcoholics Anonymous where he would acquire a sponsor to serve as a third party supervisor.

(R95).

The state timely filed a notice of appeal (R96).

SUMMARY OF THE ARGUMENT

It was not an abuse of the trial court's discretion to depart from the sentencing guidelines were the reasons for departure related to Petitioner being placed in an intensive substance abuse treatment program in New York where he would have the support of his family, be many miles from the victim, and where the departure related to Petitioner's impaired mental capacity due to alcohol abuse. These reasons for departure are not prohibited by the guidelines, nor factored into the guidelines, nor do they constitute an inherent component of the crime in question to be invalid per State v. Mischler, 488 So.2d 523 (Fla. 1986). To hold the reasons invalid would effectively eliminate the use of alternative sentencing programs so as to usurp judicial discretion which the guidelines were not meant to do. Petitioner therefore requests this Court to reverse the district court's decision and to affirm the decision of the trial court.

ARGUMENT

POINT INVOLVED

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM
THE GUIDELINES.

The trial court adopted the complete alternative sentencing plan as its written reason for departure (R32). The reasons for the alternative sentencing plan are exemplified through the plan's conclusions and recommendations which the trial judge attached to Petitioner's commitment papers which provides in part:

I. INCARCERATION:

Should this plan be acceptable to the Court, the Division of Comprehensive Alternative recommends that Mr. Barbera be detained for a period of 364 days in the Palm Beach County Jail with credit for all time served. Following this period of detention, we recommend that he be placed on a probationary period of ten (10) years and transferred through interstate compact to the State of New York.

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result of the incident that occurred. A payment schedule should be established upon the client's employment.

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(R95).

The conclusion to the alternative sentencing plan provided:

The Division of Comprehensive Alternatives is hopeful that the Court will view this plan as sufficiently punitive to accomplish the purpose of sentencing with respect to the best interests of society.

Mr. Barbera has been a productive member of society. The letters included with this proposal verify his reputation while employed as Chief of Maintenance at the Delray Beach Club Apartments. His performance in the United States Marine Corps and his participation as a volunteer fireman are further indications. He has no record of prior felony offenses. There is little doubt that he had a serious drinking problem and he has admitted that, nevertheless, he refrained from alcohol for three months prior to the unfortunate chain of events leading to the instant offense. He has self-detoxed in the Palm Beach County Jail.

We believe that in this case society stands to gain far more through supervision within the community than through a harsh sentence of imprisonment. In addition to the enormous cost of imprisonment it is doubtful that it functions as any sort of deterrent. Resources are

available within the community to assist this person to become a productive citizen and to provide restitution to the community.

We believe James Barbera can be restored to becoming a productive citizen, accepting full responsibility for himself and for providing support for his children.

We urge the court's careful consideration of the alternative plan herewith submitted.

(R68-69).

Thus, the plan's recommendation, which the trial judge adopted as his written reasons for departure, relate to the fact that Petitioner would be placed in an intensive substance abuse treatment program in New York where he would have the support of his family, be many miles away from his ex-wife, and where he could be restored to a productive citizen. Also, the Fourth District Court of Appeal interpreted the trial court's departure as a mitigation of sentence due to Petitioner's impaired mental capacity resulting from the abuse of alcohol.¹ Petitioner submits that both are valid reasons for departure.

In State v. Mischler, 488 So.2d 523, 525 (1986), this Court announced that there are three (3) categories of reasons for departure which are always invalid. First, reasons prohibited by the guidelines themselves will not support departure. Second, factors already taken into account in calculating the guideline score will not support departure. Third, departure is not proper where the reason involves an inherent component of the crime in

¹ The Fourth District specifically stated "[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 (Appendix).

question. It's clear that neither the placement of Petitioner in an extensive treatment program in New York nor his impaired mental capacity due to the abuse of alcohol remotely come close to falling in the category of reasons prohibited by Mischler. Analysis of the two reasons also leads to the conclusion that the guidelines were not meant to usurp the trial court's discretion in adopting the alternative sentencing plan.

Other courts in Florida have recognized that a guideline departure is permissible in order to place a defendant in a treatment program with the intent of restoring him to a productive citizen. In State v. Twelves, 463 So.2d 493 (Fla. 2d DCA 1985), the Second District held a downward departure of the suspension of all but eighteen (18) months of a ten (10) year sentence to be justified by the reason that the defendant was in need of treatment stating:

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 judgement and suspended sentences are affirmed.

463 So.2d at 493-494.

Similar to Twevles, the instant case had competent expert evidence that Petitioner had an alcohol related reactive psychosis for which he would enter an extensive substance abuse

treatment program and during the time in the program he would have the support of his family (R4,13-14,68). The sentence for Petitioner was also structured so that he could not have contact with the victim for a period of ten (10) years. Consequently, the extensive substance abuse program in New York, and not merely any treatment program, was required in the instant case.

In Dodd v. State, 471 So.2d 668 (Fla. 5th DCA 1985), the Fifth District also held that a guideline departure was justified where the defendant needed treatment. In Dodd, the upward departure was upheld in order for the defendant to be placed in a Mentally Disordered Sex Offender program.

In a different context, this Court in The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982), has noted that the application of oneself for alcohol abuse treatment is a mitigating factor in determining the extent of discipline. In Larkin the referee recommended that Mr. Larkin be suspended from the practice of law for a period of three years for misconduct which was believed to be related to alcohol abuse. This Court rejected the three year recommendation, opting to suspend Mr. Larkin for a period of ninety-one (91) days while stating:

If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession. This Court has responsibility to assure that the public is fully protected from attorney misconduct. In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline.

420 So.2d at 1081.

As this Court properly recognized, the fact that an alcohol abuse problem relates to an individual's misconduct and the individual seeks rehabilitation should be considered in determining the discipline imposed. In the instant case the trial judge should have been allowed some discretion to consider the treatment program put forth by the alternative sentencing plan. The guidelines were never meant to usurp a trial judge's discretion to consider alternative sentencing programs in sentencing. The guidelines were meant to eliminate unwarranted subjectivity in the sentencing process, but were not meant to eliminate alternative sentencing programs. Substance abuse is a treatable medical and psychological condition for which prison is not a cure. Vance v. State, 475 So.2d 1362, 1363 (Fla. 5th DCA 1985). The trial judge did not abuse his discretion in adopting the alternative plan in sentencing Appellant.

This Court has also recognized that an impaired mental capacity resulting from the abuse of alcohol may be a valid mitigating factor in determining a sentence. In Ross v. State, 474 So.2d 1170 (Fla. 1985), this Court held that the trial court erred in failing to consider possible mitigation of 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 appellant 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.

While an intoxication induced psychosis may not constitute a valid defense,² it certainly is a mitigating factor in sentencing:

"A mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance....Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state."

State v. Dixon, 283 So.2d 1 (Fla. 1973) at 10 (emphasis added).

Consequently, Petitioner's psychosis due to the abuse of alcohol should be a factor which the trial court can consider in determining the sentence to impose. Cf. State v. Holcomb, 481 So.2d 1263 (Fla. 3d DCA 1986) (defendant acting under duress from co-defendant in commission of offense was valid reason for downward departure). State v. Villalovo, 481 So.2d 1303 (Fla. 3d DCA 1986) (downward departure based on defendant's mild retardation and central nervous disfunction upheld). To hold that the reasons for departure invalid in this cause would usurp any judicial discretion which the trial court has, and effectively eliminate

² However, the intoxication in this case might have been a defense to the element of premeditation.

the use of any alternative sentencing programs in the future. Since no abuse of discretion has been shown, the departure sentence must be affirmed.

Finally, if this Court decides that the narrative alternative sentencing plan is not sufficiently specific for an evaluation of what constituted the trial court's reasons for departure this cause should be remanded for the trial court to enter its specific reasons in writing.

Also, if this Court decides that the reasons given do not support a departure on the unilateral plea bargain in this case, the sentence should be reversed and remanded with directions to permit Petitioner to withdraw his guilty plea if he chooses to do so. State v. Walden, 476 So.2d 771 (Fla. 3d DCA 1985). This would only be fair in light of the fact that Petitioner's guilty plea was only in response to the trial court's acceptance of the alternative sentencing plan³ (R27).

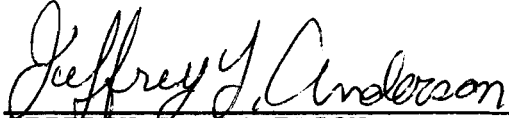
³ It should also be noted that Petitioner was successful in suppressing much of the evidence against him (R62).

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner respectfully requests that the decision of the district court be reversed and that the sentence of the trial court be affirmed.

Respectfully submitted,

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JEFFREY L. ANDERSON
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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 15th day of October, 1986.



of Counsel