

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARVIN RAYMOND BALLARD,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

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CASE NO. 68,967

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution, and Petitioner the defendant, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellee in the Fourth District Court of Appeals, and Petitioner was the Appellant in that court. In this brief, the parties will be referred to as they appear before this Honorable Court, except that Respondent may also be referred to as the State. All emphasis is supplied by Respondent unless otherwise indicated.

The following symbols will be used:

"R"	Record on Appeal
"AX"	Appendix to Respondent's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as presented on pages one (1) through four (4) of Petitioner's Brief on the Merits.

POINT INVOLVED

POINT I

WHETHER THE FIRST REASON FOR DEPARTURE
SUB JUDICE WAS VALID?

POINT II

WHETHER THE TRIAL COURT'S SECOND REASON
FOR DEPARTURE WAS INVALID?

POINT III

WHETHER THE RULES OF PROCEDURE
SPECIFICALLY PROVIDE THAT JURISDICTION
MAY BE RELINQUISHED UPON AN ORDER OF THE
APPELLATE COURT?

SUMMARY OF ARGUMENT

POINT I

There was factual findings and legal precedent to support a departure based upon a "continuing pattern of increasing serious offenses". Therefore, the decision of the Fourth District Court was not error.

POINT II

Case law and factual findings below supported a departure based upon Petitioner's inability to accept rehabilitation.

POINT III

There was no error, nor any prejudice to Petitioner as a result of the decision of the District Court to relinquish jurisdiction to the trial court.

ARGUMENT

POINT I

THE FIRST REASON FOR DEPARTURE SUB JUDICE
WAS VALID.

Petitioner was sentenced on January 28, 1985 (R-155-160). Because the trial court did not enter a written order deliniating reasons for departure, and because the departure sentence was the subject of Petitioner's direct appeal, the Fourth District Court of Appeals ordered relinquishment of jurisdiction to the trial court, for entry of a written order of departure (A-1). The trial court complied with the order of the Fourth District Court, and issued a written Order of Departure which listed two reasons. As grounds for departure, the written order incorporated by reference the specific findings announced orally at the sentence hearing (A-2);(R-155-160).

The trial court based it's departure, in part, upon the fact that Petitioner's record demonstrated pattern of offenses which had increased in seriousness (R-156-158). The facts were recited by the court. At the time sentence was announced,, and at the time the written order of departure was issued; case law existed to support departure based upon the aforesaid reason. See Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984); Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1984); Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984). Thus, the first reason for departure was based upon case law which constituted valid legal

precedent at the time sentence was imposed See State v. Jackson,
478 So.2d 1054,1057 (Fla. 1985). The judgment and sentence of
the trial court should be affirmed.

POINT II

THE TRIAL COURT'S SECOND REASON FOR
DEPARTURE WAS NOT INVALID.

At the time of Appellant's sentencing, and the time of the written Order of Departure, legal precedent indicated that a departure sentence may proper where the defendant has demonstrated poor performance on probation, as well as a lack of amenability to rehabilitation See Burke, supra; Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984); Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984); May v. State, 10 F.L.W. 2156 (Fla. 5th DCA September 19, 1985); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984); Deer v. State, 462 So.2d 96 (Fla. 5th DCA 1985); Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984); Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984); and Bogan v. State 454 So.2d 686 (Fla. 1st DCA 1984). The trial court entered factual findings upon the record, and cited case law to support it's ruling (R-156-160). Thus, the trial court followed the order of the Fourth District Court (A-1); and entered a departure order based upon existing case law See Jackson, supra.

The judgment and sentence of the trial court should stand.

POINT III

THE RULES OF PROCEDURE SPECIFICALLY PROVIDE THAT JURISDICTION MAY BE RELINQUISHED UPON AN ORDER OF THE APPELLATE COURT.

The Fourth District Court of Appeals ordered the relinquishment of jurisdiction now at issue (A-1). The Rules of Appellate Procedure provide for relinquishment in this fashion Fla.R.App.P. 9.600(b)(1985). Petitioner's counsel was on notice that the trial court would be entering a written order of departure, and was thus availed of the opportunity, during the period of relinquishment, to offer whatever input it felt was necessary on behalf of the defendant, in regard to the imposition of sentence. Specifically having heard the trial court's oral findings, the defense was certainly free to offer legal authority which it deemed to be contrary to the trial court's apparent intent to enter a departure sentence. This is especially true in light of the District Court's instruction that the trial court, on relinquishment, consider recent developments in case law (A-1). Therefore, it is presumptive to say that any prejudice came to the defense by way of the order of the District Court sub judice.

Petitioner asserts that the trial court erred by departing more than one cell in the guidelines range, based upon a revocation of probation. Pursuant to an amendment to the Rules Of Criminal Procedure, appellate courts may not review the extent

Florida, (1986); (A-4).

Also, a departure beyond one cell is justified where the defendant has previously violated probation See Booker v. State, 10 F.L.W. 2751 (Fla. 2d DCA December 13, 1985); and Roberge v. State, 11 F.L.W. 571 (Fla. 2d DCA March 5, 1986). There was record evidence that Appellant had previously violated probation (R-157,158). Therefore, Respondent respectfully submits that the judgment and sentence of the trial court, and the decision of the District Court sub judice should be affirmed.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fourth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by courier to, MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 26th day of November, 1986.



OF COUNSEL