

IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY SCOTT,

Petitioner,

v.

CASE NO. 69,234

STATE OF FLORIDA,

Respondent.

CLERK

By 

ON DISCRETIONARY REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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II STATEMENT OF THE CASE AND FACTS

On May 22, 1984, petitioner was convicted of armed robbery and armed burglary and sentenced to concurrent terms of 25 years in state prison (OR 14-18). The sentencing judge found eight reasons for departing from the recommended guidelines range (OR 20-21). On appeal to the First District, that court rejected all but three reasons for departure and remanded for resentencing. Scott v. State, 469 So.2d 865 (Fla. 1st DCA 1985). That court also detected an error in the sentencing guidelines score-sheet, and determined that the correct guidelines range would be 5 1/2 - 7 years. Id.

At resentencing, petitioner received concurrent 20 year sentences (R 12-16) as a departure from the recommended range of 5 1/2 - 7 years (R 17). To justify the departure again, the sentencing judge wrote:

1. The defendant created an extreme risk to the safety of many citizens in his attempt to escape apprehension following the commission of the crime.

2. The sentencing guidelines recommendation of 5 1/2 - 7 years is insufficient for retribution, deterrence, rehabilitation and for the safety of the public.

3. The defendant's criminal history indicates that a prison term of 5 1/2 - 7 years is inadequate punishment for this defendant.

(R 18-19).

On his second appeal to the First District, reason #3

was rejected on authority of Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and State v. Mischler, 488 So.2d 523 (Fla. 1986) (Appendix at 2-3). The First District approved reason #1 (Appendix at 2). The court questioned whether reason #2 was valid, but approved it anyway, and certified conflict:

We note, however, that there is now a conflict among the district courts¹ over the validity of the second ground; and, in light of recent Supreme Court opinions, we seriously question whether this ground remains valid.² We nevertheless stand on our prior decision with respect to this ground, but certify the apparent conflict with Wilson v. State, 11 F.L.W. 913 (Fla. 5th DCA Apr. 17, 1986) to the Supreme Court.

¹Compare Chaplin v. State, 11 F.L.W. 902 (Fla. 1st DCA Apr. 16, 1986) with Wilson v. State, 11 F.L.W. 913 (Fla. 5th DCA Apr. 17, 1986).

²In Williams v. State, 11 F.L.W. 289 (Fla. June 26, 1986), the court held that the recited reason that "the recommended sentence under the guidelines is not commensurate with the seriousness of the crime" was not a valid reason because "a trial judge may not substitute his own opinion for that of the Sentencing Guidelines Commission simply because he does not agree with the presumptive sentence." 11 F.L.W. at 290. The second reason in the case sub judice represents little more than the trial court's disagreement with the recommended sentence.

Id. at 2.

On August 25, 1986, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the First District should have struck reason #2. This is because the judge's language indicates his mere disagreement with the recommended guidelines range. Such disagreement cannot be upheld as a clear and convincing reason for departure. If it were upheld, it would lead to wholesale departure from the guidelines any time a particular judge felt the recommended guidelines range was too lenient. This Court must strike reason #2 and remand for resentencing.

IV ARGUMENT

ISSUE PRESENTED

THE COURT'S SECOND REASON FOR DEPARTURE IS INVALID BECAUSE IT REFLECTS LITTLE MORE THAN THE TRIAL COURT'S DISAGREEMENT WITH THE RECOMMENDED GUIDELINES SENTENCE.

The language reflected in reason #2 has consistently been approved as a reason for departure by the First District. See, e.g., Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984); Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985); and Chaplin v. State, 488 So.2d 555 (Fla. 1st DCA 1986). The Fifth District has recognized that such language is clearly improper, since it manifests simply a judge's disagreement with the recommended guidelines sentence, which cannot serve as a valid reason for departure. Wilson v. State, 11 FLW 913 (Fla. 5th DCA Apr. 17, 1986).

In two recent opinions, this Court has also expressed disapproval of such language wherein the sentencing judge expresses some disagreement with the recommended guidelines range. In Scurry v. State, 489 So.2d 25 (Fla. 1986), the judge found that "a lesser sentence is not commensurate with the seriousness of the defendant's crime". Id. at 28. This Court held:

Reason 10...flies in the face of the rationale for the guidelines. In effect this reason reflects a trial judge's disagreement with the Sentencing Guidelines Commission and is not a sufficient reason for departure.

Id. at 29.

Likewise, in Williams v. State, 11 FLW 289, 290 (Fla. June 26, 1986), this Court found:

It is also improper to depart based on the trial court's perception that the recommended sentence under the guidelines is not commensurate with the seriousness of the crime. The different categories of crimes, the various scoring opportunities, and the disparate punishment ranges are clearly bottomed on this objective. The guidelines were enacted "to establish a uniform set of standards to guide the sentencing judge" and "eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense and offender-related criteria and in defining their relative importance in the sentencing decision." In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983). Accord Santiago v. State, 478 So.2d 47, 48 (Fla. 1985); Hendrix, 475 So.2d at 1219-20. A trial judge may not substitute his own opinion for that of the Sentencing Guidelines Commission simply because he does not agree with the presumptive sentence. Cf. Allen v. State, 476 So.2d 309, 310 (Fla. 2d DCA 1985) (trial judge may not depart simply because he thinks a harsher sentence will deter others). To permit every trial judge to determine his or her own sentence would result in the total elimination of the sentencing guidelines.

Whether the judge uses the language of "not commensurate with the crime" or "insufficient for retribution, etc.," is not important. The use of any language which expresses a disagreement with the presumptively-correct range must not be sanctioned. To do so would lead to wholesale departure any time the judge, in his own opinion, believed the recommended sentence was too light. This Court has properly

viewed reasons for departure more strictly than the intermediate appellate courts. Now is not the time to retreat from this trend. This Court must not permit the guidelines scheme to be abrogated by a particular judge's philosophy concerning punishment. If so, we will see a return to the disparate sentencing practices which existed prior to the adoption of the guidelines. This Court must strike reason #2 and direct that petitioner be resentenced.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court vacate his sentences and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Michael Anthony Scott, #282180, Post Office Box 500, Olustee, Florida, 32072, this 15 day of September, 1986.


P. DOUGLAS BRINKMEYER