

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 RICHARD P. HOPE,)
)
 Respondent.)
 _____)

Case No. 70,646

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DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the Second District Court of Appeal. Respondent, RICHARD P. HOPE, was the defendant before the trial court and the Appellant in the Second District Court of Appeal. The parties will be referred to by their proper names or as they stood before the trial court. The record on appeal will be designated by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The defendant, Richard P. Hope, was convicted of the offenses of bribery, a violation of §838.015(1), Florida Statutes (1981) and giving, offering or promising unlawful compensation, a violation of §838.016(2), Florida Statutes (1981) (R.140-141, 248-251; 264). Richard P. Hope orchestrated the transactions which culminated in the payment of a bribe to former chief circuit Judge Arden Merckle and secured a reduced sentence in a criminal case against Hope's nephew, David Wynn Hope, III. On October 11, 1985, the trial court departed from the sentencing guidelines and sentenced Hope to five years in state prison and assessed a fine of \$5,000 on the bribery conviction, to be followed by five years probation on the unlawful compensation conviction (R.3666, 245; 250). The defendant's guidelines score of 62 placed his recommended sentence in the category of any "non-state prison sanction". As summarized by the Second District Court of Appeal, the trial court departed from the recommended guidelines sentence for the following reasons: (1) the defendant orchestrated and participated in a scheme highly destructive of the criminal justice system by securing the services of an attorney to accomplish the bribe of a circuit judge; (2) the defendant's purpose was to obtain leniency for his nephew to the detriment of the general public's right to a lawful sentence and to the prejudice of all other cases being prosecuted; (3) the legislature has not specified sufficient punishment for the crimes for which the defendant was charged

and; (4) the penalty provided by the recommended guidelines was not sufficient. Hope v. State, ___ So.2d ___ 12 F.L.W. 1243 (Fla. 2d DCA Case No. 85-2370, Opinion filed May 15, 1987). Though agreeing that there was no reasonable doubt that the trial judge would have exceeded the guidelines on the basis of the above-cited reason #1 alone, the Second District Court stated that it could not conclude that that reason, alone, was sufficient to warrant departure; and the court certified the following question as one of great public importance:

WHETHER THE COMMISSION OF THE OFFENSE OF OFFERING A BRIBE TO A SITTING CIRCUIT JUDGE TO INFLUENCE HIS FAVORABLE TREATMENT OF A DEFENDANT IN A CRIMINAL PROCEEDING PENDING BEFORE THE JUDGE IS, IN AND OF ITSELF, A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE IN SENTENCING THE PERSON OFFERING THE BRIBE?

Pursuant to the Second District's opinion, the State filed its notice to invoke this Court's discretionary jurisdiction pursuant to Fla. R. App. P. 9.030(2)(A)(v).

CERTIFIED QUESTION

WHETHER THE COMMISSION OF THE OFFENSE OF OFFERING A BRIBE TO A SITTING CIRCUIT JUDGE TO INFLUENCE HIS FAVORABLE TREATMENT OF A DEFENDANT IN A CRIMINAL PROCEEDING PENDING BEFORE THE JUDGE IS, IN AND OF ITSELF, A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE IN SENTENCING THE PERSON OFFERING THE BRIBE?

SUMMARY OF THE ARGUMENT

Offering a bribe to a sitting circuit judge in order to obtain the judge's favorable treatment of a defendant in a criminal case pending before the court constitutes a clear and convincing reason for departure from the recommended guidelines.

ISSUE

WHETHER THE COMMISSION OF THE OFFENSE OF OFFERING A BRIBE TO A SITTING CIRCUIT JUDGE TO INFLUENCE HIS FAVORABLE TREATMENT OF A DEFENDANT IN A CRIMINAL PROCEEDING PENDING BEFORE THE JUDGE IS, IN AND OF ITSELF, A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE IN SENTENCING THE PERSON OFFERING THE BRIBE?

ARGUMENT

The trial court below departed from the recommended guideline's sentence based, in part, on reasons which have been declared invalid; and the Court's one remaining valid reason is the subject of this appeal. Though the Second District Court agreed that there is no reasonable doubt that the trial judge would have exceeded the guidelines solely on the basis of the reason that the defendant orchestrated and participated in a scheme highly destructive of the criminal justice system by securing the services of an attorney to accomplish the bribe of a circuit judge, the district court stated that it could not conclude that that reason was sufficient to warrant departure. Hope v. State, ___ So.2d ___, 12 F.L.W. 1243 (Fla. 2d DCA Case No. 85-2370, Opinion filed May 15, 1987). Recognizing that departure cannot be based on a reason that is an inherent component of the crimes for which the defendant is sentenced, State v. Mischler, 488 So.2d 523 (Fla. 1986), the Second District Court stated:

While in Merckle, we are able, and we believe required by the circumstances in regard to then Judge Merckle, to distinguish Mischler,

we are unable to find those same distinguishing factors in regard to appellant Hope. Mr. Hope was a private citizen with no more duty, responsibility or obligation to the public than any other private citizen. This is in great contrast to the duties, responsibilities and obligations of then Judge Merckle as not only a sitting circuit judge but the chief judge of his circuit. The legislature has not chosen to differentiate regarding the degree of punishment that pertains to an act of bribery depending upon the status or office held by the official being bribed. Neither is it a proper reason for departure to equate the sentence of the one bribing with the sentence of the one being bribed. State v. Huggins, No. 85-2170 (Fla. 2d DCA Feb. 4, 1987) [12 F.L.W. 466]; McCarthy v. State, 492 So.2d 462 (Fla. 5th DCA 1986); Allen v. State, 476 So.2d 309 (Fla. 2d DCA 1985); Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985).

[12 F.L.W. at 1243]

Hope was convicted of bribery and giving, offering or promising unlawful compensation.

Bribery means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty. §838.015(1), Fla. Stat.

Section 838.016(2), Florida Statutes provides:

It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by

law for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission which the person believes to have been, or which is represented to him as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty.

Departures from the presumptive sentences established in the guidelines must be articulated in writing and are to be made only for clear and convincing reasons. Rule 3.701(b)(6), Fla. R. Crim. P. In the instant case, the State would urge that the trial court's departure sentence be upheld. The defendant initiated and involved himself in a scheme highly destructive to the criminal justice system by securing the bribe of the chief circuit judge in order to insure lenient treatment by the judge in an extremely serious pending criminal case. In State v. Mischler, 488 So.2d 523 (Fla. 1986) this Court stated that "clear and convincing" reasons require that the facts supporting the reasons be credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted. Id. at 525. The Mischler court held, inter alia, that the special relationship between the defendant and her employer was an "inherent component" of the crime of embezzlement and could not be used to justify departure. In the original Mischler appeal, Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984) the district court stated:

"A judge who takes a bribe for a favorable ruling, or a public official who accepts illegal payoffs for his or her vote, are examples of white-collar criminals who defy the very reason for their being. True, they enjoy elevated social status, which the guidelines decree should not be used against them, but much more than social status is involved when those whom we appoint or elect to chart the course of the Republic, desecrate their oaths of office or profession. Such repugnant odious behavior is a prostitution of that which they swore to protect and is clearly a convincing reason why a trial judge may depart the guidelines."

(emphasis added) Id. at 38-39.

Though bribery, by its own definition, must involve a public servant and the performance of an official duty, the defendant's criminal actions resulted in the chief circuit judge receiving Hope's monetary bribe in exchange for imposing an unjustly lenient sentence in a serious criminal case. Hope's criminal conduct resulted in an egregious breach of the public trust and, accordingly, departure was warranted on that ground alone. The integrity of the judicial system would not have been compromised but for the defendant's corrupt actions; and just as in Merckle v. State, ___ So.2d ___, 12 F.L.W. 1245 (Fla. 2d DCA, Opinion filed May 15, 1987), the instant departure sentence should be upheld.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, your Respondent respectfully requests this Honorable Court affirm the departure sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Joel Hirschhorn, Esquire, 2766 Douglas Road, Miami, Florida 33133, this 7th day of July, 1987.

K. Blanco

OF COUNSEL FOR RESPONDENT