

11-2

IN THE SUPREME COURT OF FLORIDA

OCT 12 1991
CASE NO.

PATRICK JOSEPH MORGANTI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the criminal division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. In the brief, the parties will be referred to as they appear before this Court.

R = Record on appeal in lower court

A = Appendix to this brief

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner was charged with robbery in the circuit court of the Seventeenth Judicial Circuit. A1. He entered a plea of nolo contendere, and the trial court withheld adjudication and placed him on probation for two years. A2-4. A probation officer filed an affidavit alleging that petitioner had violated his probation. A5. After several evidentiary hearings and other proceedings, the trial court entered an order revoking his probation. R25.

The case came up for sentencing on January 27, 1986. The prosecutor moved that petitioner be declared an habitual offender. The trial court found that petitioner had three prior felony convictions, A23, and declared:

The Court does find that under this section 775.084, it is necessary for the protection of the public from further criminal activity by the defendant that he be declared an habitual felony offender and that in this particular case he should be sentenced to be incarcerated with the Division of Corrections for a period of 30 years.

A25. The prosecutor specifically requested that the trial court make additional findings as to why it was necessary to protect the public, and the trial court replied: "I will. It's obviously based upon his record." A25. The trial court adjudged petitioner guilty, and sentenced him to 30 years' imprisonment. A28.

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal, which reversed the sentence on the authority of Whitehead v. State, 498 So.2d 863 (Fla. 1986). R27-31.

When the case came up for resentencing, the trial court used a guidelines scoresheet reflecting a guidelines score of 137 points, R32, calling for a sentence of between 5-1/2 and 7 years' imprisonment under Category 3 of the sentencing guidelines as set forth in Florida Rule of Criminal Procedure 3.988. At sentencing, the trial court judge stated that he would again depart from the guidelines. He sentenced petitioner to 15 years' imprisonment. R33. The trial court entered a written order setting forth its grounds for departure from the sentencing guidelines, which were: that petitioner violated his probation within 92 days of having been placed on probation, that the violations consisted of possession of PCP, a dangerous controlled substance, and of failing to submit for an evaluation for counseling or for placement in an appropriate rehabilitation program as ordered. R34.¹

Petitioner appealed the sentence to the Fourth District Court of Appeal, which affirmed his sentence. A29-30. That court certified a question to this Court as being of great public importance, and petitioner has now sought discretionary review in this Court.

¹ Petitioner had been in possession of a dollar bill containing a residue of PCP. R28. The failure to submit for evaluation was not a ground for the revocation of probation. R29.

SUMMARY OF ARGUMENT

When sentencing petitioner for the first time, the trial court's only ground for departure was that he was an habitual offender. Since that ground for departure was improper, on resentencing the trial court should have sentenced petitioner within the recommended guidelines range. Further, the extent of departure was excessive.

POINT I

PETITIONER SHOULD BE SENTENCED WITHIN THE
RECOMMENDED GUIDELINES RANGE

At the original sentencing hearing, the only ground for departure sought by the state, and the only one given by the trial court judge, was that petitioner was an habitual offender. The trial court specifically said that the basis for this finding was petitioner's prior record, and declined to make any further findings. Since the trial court's ground for departure was improper, on resentencing the trial court should have sentenced petitioner within the recommended guidelines range. Nevertheless, the trial court again departed from the guidelines, citing new grounds for departure and the Fourth District Court of Appeal affirmed the sentence. It reasoned that, notwithstanding the fact that the only reason for the guidelines departure at the original sentencing hearing was improper, the trial court could, on resentencing, come up with new reasons for departure from the guidelines because, at the time of the original sentencing, there was case law supporting the contention that the original reason for departure was proper.

Petitioner submits that the lower court erred. In Williams v. State, 471 So.2d 630 (Fla. 1st DCA 1985), the trial court departed from the guidelines on several grounds related to the facts and circumstances in the record, which grounds for departure were supported by decisional law of the First District Court of Appeal. On appeal, the First District affirmed those grounds for departure, relying on its prior decisions, but struck another

ground for departure as being improper. The case went up to this Court, which found all the grounds for departure improper and ordered that Williams be sentenced within the recommended range provided by the guidelines. Williams v. State, 492 So.2d 1308 (Fla. 1986). Thus, notwithstanding that it was overruling prior decisional law supporting the grounds for departure, this Court ordered that where all the grounds for departure were improper the defendant should be sentenced within the recommended guidelines range. The situation in the case at bar is not significantly different from that in Williams, so that the lower court erred by ruling that the trial court could come up with new grounds for departure on resentencing.

Petitioner submits that policy reasons support his position in this cause. The law favors finality. To allow the trial court to come out with new reasons for departure on resentencing tends to turn cases into "yo-yo's" which can bounce up and down between the trial courts and appellate courts. See, e.g., Spivey v. State, 12 FLW 2248 (Fla. 3rd DCA Sept. 15, 1987) (case remanded for third sentencing).

POINT II

THE EXTENT OF THE GUIDELINE DEPARTURE WAS
EXCESSIVE

Petitioner committed the robbery, for which the trial court placed him on probation, in December 1983. Al. Hence, the extent of the guidelines departure is subject to appellate review. Booker v. State, 12 FLW 491 (Fla. Sept. 24, 1987). The standard of review is whether the trial court abused its discretion. Id. Petitioner submits that the trial court abused its discretion in sentencing him.

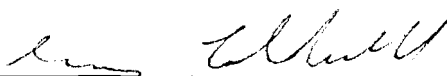
The sentencing guidelines called for a sentence of between 5-1/2 and 7 years' imprisonment. Nevertheless, the trial court sentenced petitioner to 15 years' imprisonment -- a three cell departure. There was nothing so egregious about the violation of probation by possession of a dollar bill containing a residue of PCP to warrant so great a departure. Indeed, the third-degree felony of possession of PCP, scored as an additional offense at conviction, would have added only seven points to the guideline score, so that the guidelines range would remain the same. The excessive departure constituted an abuse of discretion.

CONCLUSION

This Court should reverse the ruling of the lower court and remand this cause with directions that appellant be sentenced within the recommended guidelines range.

Respectfully Submitted,

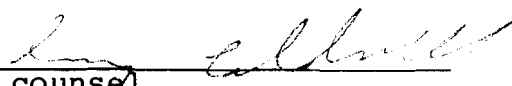
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Lee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 8 day of October, 1987.



Of counsel