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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division 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 this brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE

Petitioner relies on his Statement of the Case as found in the Initial Brief on the Merits .

STATEMENT OF THE FACTS

Petitioner relies on his Statement of the Facts as found in the Initial Brief on the Merits .

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE
PRESUMPTIVE GUIDELINES SENTENCE AND IMPOSING
AN EXCESSIVE ILLEGAL SENTENCE UPON PETITIONER

The Fourth District found that two (2) of the four (4) reasons utilized by the trial court for departure were valid. Petitioner contends that neither of the two reasons found by the district court in its opinion to be acceptable reasons for departure is "clear and convincing."

The fundamental flaw in Respondent's position is its failure to acknowledge or recognize that the Fourth District can not formulate its own reasons to justify a departure sentence. See Casteel v. State, 498 So.2d 1249 (Fla. 1986). It is the function of the appellate court to review the grounds articulated by the trial court for departure not formulate its own basis for departure. Since the Fourth District, itself, formulated the "circumstance of the probation violation" ground for departure, it would have been premature to address this issue in the trial court or district court before the Fourth District created it. (See Respondent's Brief p. 28).

The first ground for departure (psychological and emotional trauma) was not a clear and convincing reason for departure because it was the type of trauma inherent in being the victim of a sexual battery. See Lerma v. State, 497 So.2d 736, 739 (Fla. 1986). Recently this Court reaffirmed the rationale of the Lerma

rule in Barrentine v. State, 13 F.L.W. 196 (Fla. March 10, 1988). And further, there was no factual basis established beyond a reasonable doubt in the record to support this ground for departure.

Respondent argues that the Lerma decision is inapplicable here because Petitioner was being sentenced for the burglary offense for which he was originally placed on probation not the sexual batteries which formed the basis of the violation of probation. This argument is entirely specious. Petitioner's probation was revoked for the two (2) sexual battery violations. In his written order, the trial judge expressly referred to the psychological trauma of the sexual battery victim not to the burglary victim. Hence psychological trauma is an invalid basis for departure.

The trial judge's second articulated basis for departure was that Petitioner violated his probation within eight (8) months of being placed on probation which indicated to the trial court that Petitioner was "not suitable for rehabilitation." This Court held invalid a trial judge's finding that the presumptive range was "insufficient for retribution, deterrance, rehabilitation, and for the safety of the public." Scott v. State, 508 So.2d 335, 337 (Fla. 1987). This "failed rehabilitation ground" for departure, even if, valid in the abstract is not applicable to the situation at bar. Petitioner's presumptive guidelines sentence range was incarceration not merely additional probation

or community control. The violation of probation merely indicated that probation failed to rehabilitate him. However the rehabilitation potential of incarceration has not been tested. After Petitioner was found guilty of violating his probation, reinstatement on probation was never seriously considered nor did the guidelines recommend it. Incarceration was the sole recommended penalty. The trial judge could have sentenced Petitioner up to thirty (30) months in prison without departing. Hence this basis for departure, even if, valid is unsupported by the record. See Konyves v. State, 501 So.2d 127, 128 (Fla. 2d DCA 1987).

If this basis for departure can be alternatively portrayed as "timing of the violation," this Court has recently disapproved a "timing" or temporal basis for departure. See State v. Rousseau, 509 So.2d 281 (Fla. 1987). A probationer's commission of a substantive violation within eight (8) months of being placed on probation is not a clear and convincing reason for departure. To allow departure in the instant case would sanction an automatic basis for departure in every case where a probationer commits a substantive violation within eight (8) months of being placed on probation. Here Petitioner was placed on two (2) years probation and he successfully completed one-third of his probation period before the violation occurred.

The fourth reason for departure was as follows:

4. The Defendant's acts while on probation indicate a trend toward criminality of increasing severity and indicate the Defendant's

sociopathic tendencies making departure essential for the safety and well being of the public.

The Fourth District correctly held that the fourth ground for departure (escalating pattern of criminal activity) was not supported by the record. Ree v. State, 512 So.2d 1085, 1086 (Fla. 4th DCA 1987). In Keys v. State, 500 So.2d 134 (Fla. 1986) this Court approved as a basis for departure an escalating pattern of criminal activity. However here there is no factual basis to support this ground for departure. Respondent's argument to the contrary is meritless. Petitioner was not convicted of any subsequent more severe offense. The subsequent acts merely formed a basis for the violation of probation not convictions. See Fla.R.Crim.P. 3.701(d)(11). Thus "escalation of offenses" is totally inapplicable to the situation at bar. The alleged incident forming the basis of violation did not constitute an escalation pattern of criminality to justify a departure in the context of this case. See Echevarria v. State, 492 So.2d 1146, 1147 (Fla. 3d DCA 1986). And finally, the finding that Petitioner was a "threat to society" has been held to be an invalid basis for departure. See Keys v. State, supra at 136; Sabb v. State, 479 So.2d 845, 847 (Fla. 1st DCA 1985).

All four (4) grounds cited by the trial judge for departure are invalid or unsupported by the record. Hence Petitioner's sentence should be vacated and the cause remanded to the trial

court for imposition of a new sentence within Petitioner's presumptive guidelines sentence range. See Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

POINT II

THE TRIAL COURT'S GUIDELINES DEPARTURE ORDER
WAS NOT CONTEMPORANEOUS WITH THE PRONOUNCEMENT
OF SENTENCE UPON PETITIONER

At bar, Respondent-State filed a Motion to Aggravate or Depart from Petitioner's presumptive guidelines sentence range. R 233-235. At the March 21, 1986, sentencing hearing, Petitioner's trial counsel argued that the various grounds proposed by the State for departure were either invalid or inapplicable. R 204-211. Petitioner argued that he should receive a sentence within the presumptive guidelines sentence range. The prosecutor specified his proposed grounds for departure. R 215. The trial judge then imposed the statutory maximum sentences for the offense. R 216. The trial judge stated that he would specify his written reasons for departure at a later date. R 217. Five days later, the trial judge issued the written departure order.

Petitioner contends that the departure in this case was improper because the written order specifying the grounds for departure was not contemporaneous with the oral pronouncement of sentence at the sentencing hearing. In State v. Oden, 478 So.2d 51 (Fla. 1985), this Court citing State v. Jackson, 478 So.2d 1054 (Fla. 1985) approved the following language contained in the decision of the lower court: "It was reversible error for the trial court to depart from the guidelines without providing a contemporaneous written statement of the reason therefor at the time each sentence was pronounced." Id. at 51.

In the instant case, the trial court's issuance of a written order specifying the grounds for departure filed five (5) days after the March 21, 1986 sentencing hearing is not contemporaneous. Webster's defines "contemporaneous" as "existing, occurring or originating during the same time". Webster's Ninth New Collegiate Dictionary (1983). The defendant has a right to a sentencing hearing. The grounds for departure from the guidelines sentence, the most important feature of said hearing, were delineated after the hearing. This deprived Petitioner of the opportunity to meaningfully dispute the reasons assigned for departure. It violated Petitioner's right to due process of law. Hence the Fourth District was correct in reversing Petitioner's sentence on this basis alone.

CONCLUSION

Based on the Arguments cited herein and Petitioner's Initial Brief on the Merits, all four (4) grounds cited by the trial judge for departure are invalid or unsupported by the record. Hence Petitioner's sentence should be vacated but the cause remanded to the trial court for imposition of a new sentence within Petitioner's presumptive guidelines sentence range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AMY LYNN DIEM, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 6th day of April, 1988.



Of Counsel