

IN THE SUPREME COURT OF FLORIDA

KEVIN BELL,)
)
 Petitioner,)
)
 vs.) CASE NO. 72,979
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Argument	1-3

WHETHER A DEPARTURE SENTENCE IN AGGRAVATION
UPON A REVOCATION OF PROBATION MAY BE BASED
UPON FACTUAL CIRCUMSTANCES OF THE PROBATION
VIOLATION WHERE THE DEFENDANT IS ACQUITTED OF
THE SUBSTANTIVE CRIME ON WHICH THE VIOLATION OF
PROBATION IS BASED.

Conclusion	4
Certificate of Service	4

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Burney v. State</u> , 402 So.2d 38 (Fla. 2d DCA 1981)	3
<u>Holland v. State</u> , 466 So.2d 207 (Fla. 1985)	2
<u>Kocsis v. State</u> , 467 So.2d 384 (Fla. 5th DCA 1985)	3
<u>State v. Perkins</u> , 349 So.2d 161 (Fla. 1977)	2
<u>Young v. State</u> , 519 So.2d 719 (Fla. 5th DCA 1988)	2

OTHER AUTHORITIES

Florida Rules of Criminal Procedure

3.701(d)(11)	1
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ARGUMENT

WHETHER A DEPARTURE SENTENCE IN AGGRAVATION UPON A REVOCATION OF PROBATION MAY BE BASED UPON FACTUAL CIRCUMSTANCES OF THE PROBATION VIOLATION WHERE THE DEFENDANT IS ACQUITTED OF THE SUBSTANTIVE CRIME ON WHICH THE VIOLATION OF PROBATION IS BASED.

Apparently, respondent misreads Mr. Bell's brief. Respondent may change its description of petitioner's argument as "commendable" upon learning that petitioner did contend that a conviction must be obtained before facts regarding criminal conduct may support a departure sentence, even upon violation of probation. Petitioner argued throughout his initial brief that the proscription of Florida Rules of Criminal Procedure 3.701(d) (11) against departures based on factors for which convictions are not obtained should apply equally to initial sentencing and sentencing upon revocation of probation (Petitioner's Brief - 7,9-14).

Respondent scoffs at reference to the principle of fundamental fairness, claiming petitioner used it as a hackneyed phrase without significant meaning (Respondent's Brief - 9). Petitioner here uses the direct quotations from this Court that recognize and apply this principle's application to acquitted facts, so that respondent may give it due respect.

We agree with Wingate [v. Wainwright, 464 F.2d 209 (5th Cir. 1972)] that it is fundamentally unfair to a defendant to admit evidence of acquitted crimes.

State v. Perkins, 349 So.2d 161,163 (Fla. 1977) (emphasis by petitioner).

The fundamental unfairness which occurs when a defendant is forced to defend against similar fact evidence of a crime for which he has been acquitted is simply not present in cases like the present one where the defendant has never had to stand trial on the collateral charge. In the former situation, the defendant has been charged with a crime and been made to defend against it. The prosecution has been unable to persuade a jury of his guilt. To later allow introduction of evidence of this crime is not only repugnant to the notions of fair play, but an acquittal on the charges raises serious doubts about the relevance of evidence itself.

Holland v. State, 466 So.2d 207,209 (Fla. 1985) (emphasis by petitioner).

Nightmarish procedural ramifications envisioned by the state (Respondent's Brief - 6) would never pertain if the rule remained clear, that departures based on criminal conduct must first result in a conviction. Here the record was supplemented in the lower court to demonstrate petitioner's acquittal of the murder and arson charges without objection from the state. That petitioner's guideline departure sentence was imposed before his acquittal is immaterial to correct resolution of the legal principles involved. Had petitioner subsequently been convicted of the underlying offenses instead of acquitted his claim that a conviction must first be obtained would be invalid, as moot. Certainly, that is the situation in Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988), pending this Court's review in Case No. 72,047, where the state has pointed out that Mr. Young did get convictions for the departure reasons after the violation of probation sentence. No sentencing reversal would be required

there as the same departure sentence would be valid upon resentencing. A reversal in Young's circumstances would serve no useful purpose and is not required if the defendant were subsequently convicted. Cf. Kocsis v. State, 467 So.2d 384 (Fla. 5th DCA 1985) and Burney v. State, 402 So.2d 38 (Fla. 2d DCA 1981). But not so here. Petitioner remains acquitted and the departure sentence based on acquitted facts is therefore fundamentally unfair.

CONCLUSION

Based on the foregoing reasons and authorities cited and for the reasons advanced in petitioner's Initial Brief, petitioner requests this Court to quash the decision of the District Court of Appeal below and to order that petitioner be resentenced within the guidelines recommended range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOHN TIEDEMANN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 26th day of October, 1988.

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