

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,209

JOSEPH D'ANGELO

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY JURISDICTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is acceptable to Respondent as an accurate portrayal of the facts and evidence adduced below.

SUMMARY OF ARGUMENT

The lower court held valid the trial court's sentencing departure reason that the crime was committed in a well organized and professional manner. This Court has left unsettled the propriety of such a reason in Downing v. State, infra.

Respondent urges this Court to approve the departure reason herein as the factors in support thereof have not been considered in calculating the guidelines score. The record on appeal is sufficient to support the departure in this case.

ARGUMENT

POINT I

THE COMMISSION OF THE CRIMES OF TRAFFICKING AND CONSPIRACY TO TRAFFIC IN COCAINE IN A WELL ORGANIZED AND PROFESSIONAL MANNER IS A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES.

Petitioner was convicted by a jury of trafficking and conspiracy to traffic in excess of 400 grams of cocaine. (R 218). As noted in his brief on the merits, the Fourth District upheld as valid one of the trial court's three reasons for departure from the sentencing guidelines, to-wit: "that the crime was committed in a well organized and professional manner." D'Angelo v. State, 541 So.2d 706 (Fla. 4th DCA 1989). Petitioner now argues that the departure reason at issue is not a valid basis to depart from the recommended guidelines sentence as the record is devoid of sufficient evidence to support such a basis. If Petitioner is contending that there was no evidence adduced at trial from which the judge could base his conclusions, the undersigned submits that such an argument is precluded from review since the record on appeal did not include a transcript of the trial proceedings. Balzam v. Cohen, 427 So.2d 329 (Fla. 3d DCA 1983). An appealing defendant has the burden of filing a sufficient record to demonstrate that the dispositiveness of issues on appeal was affirmatively shown by the record and he cannot expect to receive a favorable ruling if he does not carry

that burden. Cauley v. State, 44 So.2d 964 (Fla. 1st DCA 1983). Sub judice, Petitioner has failed to carry his burden and requests this Honorable Court to rely on his naked assertions that "there is nothing in the record that would enable the State to prove beyond a reasonable doubt that petitioner committed the crimes for which he was convicted in a well organized, professional manner." I.B. at 8. This Court should not be persuaded thereby, but rather, should rely on the trial court's conclusions of fact and afford them the presumption of correctness they are due.

If Petitioner is arguing that the factors discussed at the sentencing hearing do not amount to a well organized crime or professional manner, Respondent submits otherwise. A broker initiated the contact and set up the transaction between Petitioner, co-defendants, and the undercover detectives (R 5-6). All four defendants played a specific role or had a specific job. (R 6). Co-defendant Betancur was the source; co-defendant Ardizzola acted as the counter-surveillance man or lookout; co-defendant Phillipelli was the broker, "as far as the location and amount and when the deal was supposed to go down." (R 6,12,26-27). Petitioner provided the location, as his shoe repair shop is where the transaction occurred. (R 12). Of course, he also made the actual delivery and finalized the deal. (R 13). Nothing was left to chance; all parties performed a separate job to ensure the transaction went smoothly. (R 12-13,26-27). These circumstances clearly prove beyond a reasonable doubt that the

professional and well organized manner in which the crimes were committed could be a valid reason for departure in this case.

Notwithstanding the foregoing, Petitioner also argues that such a departure reason is invalid as a matter of law. In support thereof, he relies heavily on this Court's decision in State v. Fletcher, 530 So.2d 296 (Fla. 1988), which held that "calculated planning and premeditation" was not a valid basis for departure from the recommended guidelines sentence for drug trafficking and conspiracy to traffic convictions as such factors are inherent components of the crimes. Fletcher at 297. At first glance, one could conclude that Fletcher forecloses any further argument on the validity of the instant departure reason. However, subsequent to Fletcher, this court specifically left unsettled whether professional manner and well organization could be a valid reason for departure. Downing v. State, 536 So.2d 189 (Fla. 1989). Moreover, a majority of the district courts have since continued to uphold such a reason as a valid basis for departure. Hernandez v. State, 540 So.2d 881 (Fla. 4th DCA 1989)¹; Krebs v. State, 534 So.2d. 1236 (Fla. 5th DCA 1988); Rodrique v. State, 533 So.2d 931 (Fla. 1st DCA 1988).

In Fletcher, this Court specifically agreed with the Fourth District that "all large drug trafficking cases, not to

¹ Hernandez has also been accepted for review by this Court and was scheduled for oral argument on January 9, 1989. Hernandez v. State, Case No. 74,210. Respondent would note that Justices MacDonald and Grimes dissented in the order accepting jurisdiction in Hernandez.

mention those involving a conspiracy, would 'inherently' involve calculated premeditation and planning." Id. at 297. The State submits that "calculated premeditation and planning" is significantly distinguishable from the professional manner in which a crime is committed. The premeditation and planning in Fletcher involved "months of plotting and scheming," Id. at 297, whereas, in the case at bar, the record demonstrates that the trial judge was primarily concerned with the sophisticated manner in which the drug transaction was executed:

"The Court herein departs from the sentencing guidelines and makes the following cogent reasons: One, it is not a simple, sloppy on-the-street transaction in a bar or on the street. Many have come before this Court in that regard involving one, two or three people, or one or two people. I have seen more sophisticated, greater plans of trafficking in cocaine. However, I would say this of these four people: In the manner in which it was involved it is sufficient within the departure from the sentencing guidelines that it was well-organized and done in a professional manner, and I so find that to be true and it's a reason for departure.

The execution was done in a professional manner. It could have been done better I would think, but it was still done in a professional manner. It was well-organized between the four of them: Who brought it, who drove, who watched, the middle man; how it was done. It appeared to be running smoothly.

The only problem was they ran into a law enforcement officer, confidential informant, or undercover police officer. Other than that it would have went very smoothly and in a professional manner. So I find that as a reason for departure." (R 26-27).

Each of the four co-defendants were given a role to play to ensure the success of the delivery of cocaine (R 228). The trial court concluded that these roles were acted out in a professional manner. Such a finding is not essential to prove a statutory element of the crime nor is it an inherent component of the crime and, therefore, a departure based thereon is not in violation of the prohibition against departing on the basis of factors already taken into account by the guidelines score. Although this Court has concluded that all large drug trafficking cases inherently involve premeditation and planning, they do not all inherently entail execution in a professional and sophisticated manner.

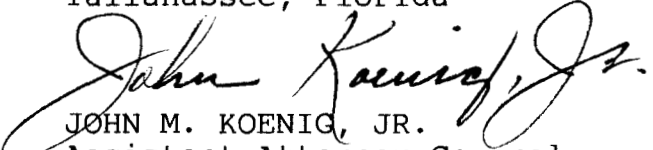
Wherefore, the question as to the propriety of such a basis for departure, left unanswered by this Court in this Court in Downing, supra, should now be answered in the affirmative, thereby allowing for a trial court to depart where it finds that the crime of drug trafficking was committed in a professional and well organized manner.

CONCLUSION

Based on the foregoing argument and cogent citations of authority, Respondent respectfully urges this Honorable Court to uphold the lower Court's approval of the department reason in this case.

Respectfully submitted,

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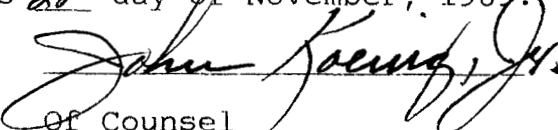


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on Merits has been furnished by United States Mail to: DANIEL S. CARUSI, ESQUIRE, 517 Southwest First Avenue, Fort Lauderdale, Florida, 33301, this 28TH day of November, 1989.



Of Counsel