

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,457

THE STATE OF FLORIDA,

Petitioner,

-VS-

TIMOTHY VAN HORN,

Respondent.

FILED

SID A. WHITE

NOV 21 1989

CLERK, SUPREME COURT

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DISCRETIONARY REVIEW, CONFLICT JURISDICTION
FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal in Third District

(T) - Transcript of Proceedings in Third District

STATEMENT OF THE CASE AND FACTS

The defendant/respondent accepts the state's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The defendant submits the decision of the Third District should be affirmed where the trial judge abused his discretion in departing from the recommended guidelines range and in sentencing the defendant to 17 years as the reasons given for departure are the same reasons previously considered and not used.

The defendant further submits the three reasons given by the judge in support of the departure are not clear and convincing. The record fails to establish an escalating pattern of criminal conduct from crimes against property to violent crimes against persons. The fact that the victims were 82 and 69 year old females did not render them particularly vulnerable so as to support a departure sentence. The fact that the defendant brought the weapon into the house does not justify a departure for a heightened degree of premeditation where this was an inherent component of the crimes of burglary with a battery and aggravated battery. Consequently, the sentence must be reversed and the case remanded for resentencing within the recommended guidelines range of 5½-7 years.

ARGUMENT

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINES RANGE AND SENTENCING HIM TO 17 YEARS IN PRISON WHERE THE REASONS GIVEN FOR THE DEPARTURE WERE THE SAME REASONS PREVIOUSLY NOT USED, AND WHERE THE REASONS WERE NOT SUFFICIENT UNDER FLORIDA LAW.

A. IMPROPER DEPARTURE FROM GUIDELINES

In its initial brief, the state argues that when a trial court, due to an incorrectly calculated scoresheet, inadvertently sentences a defendant in excess of the guidelines without providing reasons for the departure, the trial court may, upon remand for resentencing with a correctly calculated scoresheet, impose a departure sentence with written reasons. The Third District, relying upon Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988), held that such a departure upon resentencing was impermissible.

The defendant acknowledges that this Court's decision in Roberts v. State, 547 So.2d 129 (Fla. 1989), disapproves the decision of Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988), relied upon by the Third District in this case. However, the defendant submits the trial judge improperly departed from the guidelines range in this case upon resentencing because the reasons relied upon by the judge were the same reasons articulated by the state during the original sentencing and which were, at that time, not deemed by the judge to be sufficient reason to depart. Thus, it is improper for the trial judge to conclude that the very same previously insufficient reasons are now suddenly transformed into sufficient justification to

depart. The judge's action was an abuse of discretion and the case must be returned to the circuit court for resentencing within the guidelines.

B. REASONS FOR DEPARTURE WERE IMPROPER

The defendant also submits that the reasons given by the trial judge for departure are insufficient. Although this issue was not raised by the defendant (who represented himself) before the Third District, it is well established that once this Court has jurisdiction in order to resolve a legal issue in conflict, this Court may consider any other issue affecting the case properly raised and argued in this Court. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Savoie v. State, 422 So.2d 308, 310 (Fla. 1982); Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Negron v. State, 306 So.2d 104, 107 (Fla. 1974).

The recommended sentence under the correctly computed guidelines scoresheet at the resentencing on December 19, 1988, was 5½-7 years imprisonment.' (R: 14) The trial judge departed from the recommended range and imposed a 12 year sentence on the burglary count, and a 5 year sentence each on the attempted

¹ Although the guidelines scoresheet in the appellate record lists a point total of 144 points with a recommended sentence of 7-9 years, this scoresheet was incorrectly computed. (R: 14) As can easily be seen on the face of the scoresheet, the prosecutor put down 25 points for severe victim injury, section V, whereas the maximum points for severe victim injury as listed on the scoresheet is 15 points. (R: 14) This reduces the point total to 134 points, which is the same point total as originally calculated for the burglary scoresheet, category 5, at the original sentencing, with a recommended sentence of 5½-7 years. The state does not dispute this calculation and announced to the court at the resentencing that the recommended sentence was 5t-7 years. (T: 4)

sexual battery and two aggravated battery counts, to run concurrent with each other and consecutive to the 12 year sentence on the burglary, for a total of 17 years imprisonment.

(R: 9-13) The court's written reasons for departure are as follows:

1. Defendant has exhibited an escalating pattern of criminal behavior which has become violent in nature.

2. The victims in this case were particularly vulnerable, being women of advanced years, 82 and 69, and the Court does not depart for this reason based on gender alone.

3. The Court finds that the weapon used in the assault in this case was brought with the Defendant adding a heightened degree of premeditation.

The Court would depart for any of the above reasons independent of the others.

Reason #1: The first reason was that the defendant has exhibited an escalating pattern of criminal behavior which has become violent in nature. The court found the defendant's history from disturbing the peace, to burglary in 1979, to burglary of a dwelling with threats in 1983, to this case which was burglary of a dwelling with assault, aggravated battery and attempted sexual battery constituted an escalating pattern of criminal activity. (T: 8-11, 23)

A defendant's escalating course of criminal conduct from crimes against property to violent crimes against persons may be a clear and convincing reason for departure from the guidelines, when supported by the facts. Keys v. State, 500 So.2d 134 (Fla. 1986). However, such an escalation is not demonstrated when the

record shows that the same or an equivalent offense is repeatedly committed. Chenard v. State, 510 So.2d 363, 364 (Fla. 3d DCA 1987). In this case, the record shows the defendant has committed several burglaries of occupied dwellings and assaulted the occupants, but this involves basically the same type of offense and cannot properly be called escalating conduct from nonviolent crimes against property to violent crimes against persons. Consequently, this reason for departure is invalid.

Reason #2: The second reason is that the victims in this case were particularly vulnerable, being women of 82 and 69 years of age. As a general rule, a victim's age and vulnerability are not proper reasons to depart from the recommended guidelines sentence. Grant v. State, 547 So.2d 952 (Fla. 3d DCA 1989) (fact that victim was 57 years old and sleeping prior to attack does not establish vulnerability to support departure): Wheeler v. State, 525 So.2d 1008 (Fla. 3d DCA 1988) (fact that victim was 14 year old insufficient to support departure); Johnson v. State, 517 So.2d 792 (Fla. 3d DCA 1988) (fact that murder victim was 55-60 years old and under influence of alcohol improper reason for departure): LeFresne v. State, 526 So.2d 176 (Fla. 2d DCA 1988) (fact that sexual battery victim was 87 year old female who lived alone and was unusually vulnerable was invalid reason to depart): Harmon v. State, 506 So.2d 500 (Fla. 1st DCA 1987) (fact that robbery victims were 57 and 62 years old not valid reason for departure): Williams v. State, 492 So.2d 1308 (Fla. 1986) (fact that defendant stabbed victim while she was sleeping and therefore more vulnerable is not reason to depart).

The only exceptions to this are when there is evidence to show that the victim's degree of suffering from physical or psychological injury is increased by age and frailty or helplessness, Wemett v. State, 547 So.2d 955, 956 (Fla. 1st DCA 1989); Byrd v. State, 516 So.2d 107 (Fla. 4th DCA 1987); Knowlton v. State, 466 So.2d 278, 280 (Fla. 4th DCA 1985); Moore v. State, 468 So.2d 1081 (Fla. 3d DCA 1985), or when there is evidence the defendant stood in a position of trust with the victim. Byrd v. State, supra at 108; Manuel v. State, 542 So.2d 1368 (Fla. 2d DCA 1989) (fact that defendant falsely represented himself as police officer placed him in position of trust with victim, coupled with advanced age of victim, supported departure). In the present case, the record fails to support any such extended combination of factors or breach of position of trust. Consequently, this reason for departure is likewise invalid.

Reason #3: The third reason was that the weapon used in this case was brought with the defendant adding a heightened degree of premeditation. This reason merely uses an inherent component of the offense charged, which is an entirely impermissible reason for departure under Florida law. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986) ("A court cannot use an inherent component of the crime in question to justify departure."); State v. Fletcher, 530 So.2d 296 (Fla. 1988); Harris v. State, 533 So.2d 1187 (Fla. 2d DCA 1988). This Court has stated that the phrase "inherent component of the crime" includes factors or characteristics which necessarily precede or

follow the criminal act itself, even though not included as a statutory element of the offense. State v. Fletcher, supra at 297.

In the present case, the weapon brought into the house by the defendant was a cranberry juice bottle which he used to hit the victims. (T: 9, 24) The defendant was convicted of aggravated battery which includes as an element that the defendant used a deadly weapon. §784.045, Fla. Stat. (1983). (R: 7: Appendix A to State's Initial Brief) The defendant was also convicted of burglary of an occupied dwelling with a battery which also includes as an element that the defendant intended to commit a battery upon the victim. §810.02, Fla. Stat. (1983). (R: 7: Appendix A to State's Initial Brief) Thus, both the bringing of the bottle into the house and the premeditation or intent to commit an offense in the house using the bottle are inherent components of the crimes and may not justify a departure sentence. Hansbrough v. State, 509 So.2d 1081, 1088 (Fla. 1987) (premeditation and use of a dangerous weapon are inherent components of any armed robbery and will not support departure); State v. Fletcher, 530 So.2d 296, 297 (Fla. 1988) (planning and premeditation are inherent components of trafficking and conspiracy to traffic and will not support departure): State v. Cote, 487 So.2d 1039 (Fla. 1986) (fear and psychological trauma are inherent components of aggravated assault and will not support departure): Williams v. State, 544 So.2d 1125, 1126 (Fla. 3d DCA 1989) (premeditation and lack of legal justification are inherent components of armed robbery and

invalid reason for departure): Gaynor v. State, 505 So.2d 467, 469 (Fla. 2d DCA 1987) (entry into occupied dwelling is essential element of burglary and cannot be used for departure).

Thus, it can be seen that all three reasons given by the trial court for departure are invalid and the case must be reversed for resentencing within the recommended guidelines range of 5½-7 years. Shull v. Dugger, 515 So.2d 748 (Fla. 1987). Moreover, even if one or two of these reasons are found by this Court to be valid reasons, the case must still be reversed for resentencing because the state has not demonstrated beyond a reasonable doubt that the absence of the invalid reasons for departure would not affect the court's sentence. Albritton v. State, 476 So.2d 158 (Fla. 1985)² And even though the trial court stated in its departure order that it would depart for any of the above reasons independent of the others, it is well established that such a statement by the trial court that it would depart for any of the reasons given is not enough to satisfy the state's burden. Griffis v. State, 509 So.2d 1104, 1105 (Fla. 1987). Consequently, the case must be reversed for resentencing.

² The Albritton standard of review applies here because the defendant was convicted for crimes committed in March 1984, prior to the effective date of July 1, 1987, of Chapter 87-110. Laws of Florida, which amended §921.001(5), Fla. Stat. (1985), to provide that one valid reason for departure mandates affirmance. State v. McGriff, 537 So.2d 107 (Fla. 1989).

CONCLUSION

Based upon the foregoing, the defendant requests this Court to reverse the sentence in his case and to remand the case to the circuit court with directions to resentence the defendant within the recommended guidelines range of 5½-7 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, 401 NW 2nd Avenue, Miami, Florida 33128, this 20th day of November 1989.

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