IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-2241

STATE OF FLORIDA,
Petitioner,
-vs-

JAMES CLARK,
Respondent.

On petition for discretionary jurisdiction from
the Fourth District Court of Appeal
4D99-2673

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the appeal to the District Court of Appeal, Fourth District.

In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal. The symbol "SR" will denote Supplemental Record on Appeal. The symbol "T" will denote the transcript. The symbol "IB" will denote Petitioner's Initial Brief to the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal, subject to the additions and clarifications set forth in the argument portion of this brief, which are necessary to resolve the legal issues presented upon appeal.

SUMMARY ARGUMENT

ISSUE I

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE STATE FAILED TO PRESERVE ITS OBJECTION FOR APPEAL WHERE IT DID NOT OBJECT AT THE TRIAL LEVEL ON THE SAME GROUNDS IT ARGUED ON APPEAL.

ISSUE II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE STATE FAILED TO CARRY ITS BURDEN ON APPEAL OF SHOWING THAT EACH OF THE REASONS GIVEN FOR DEPARTURE WAS INVALID.

ARGUMENT

ISSUE I

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE STATE FAILED TO PRESERVE ITS OBJECTION FOR APPEAL WHERE IT DID NOT OBJECT AT THE TRIAL LEVEL ON THE SAME GROUNDS IT ARGUED ON APPEAL.

A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b). Fla. R. App. P. 9.140(d). In the case at bar, before the trial court imposed the sentence, the trial court asked, “Is there any legal reason why sentence can’t be imposed?” (T 6), and the prosecution responded, “The State would be objecting to the downward departure. You have this warrant

and there is not enough for the Court to make an adequate downward departure at this time" (T 7).

After the trial court gave its first reason for departure that the previous downward departure sentence was negotiated between the State of Florida and the defendant, the prosecution stated, "the State's position with the prior downward departure, it was agreed to by the victim so that the

victim wouldn't have to go through a trial. . . .The Court has to make a determination how the negotiated downward departure plays a part in this sentence" (T 7-8).

The trial court further listed four additional reasons for a downward departure sentence, asked it there was anything further, and the prosecution remained silent (T 7-10).

Upon appeal to the Fourth District Court of Appeal, Petitioner, the State of Florida, argued that the only statutory legal mitigating circumstance was defendant's age and that the other reasons given for departure were not statutorily recognized and were unwarranted (IB 7). However, the Fourth

District Court of Appeal held that "[t]o the extent the State argues a different legal argument than it relied upon at trial, the State's argument is not preserved for review." State v. Clark, 770 So. 2d 237 (Fla. 4th DCA 2000)(citing Tillman v. State, 471 So. 2d 32 (Fla. 1985)). The Fourth District noted its disagreement with the holding of the Second District in State v. Barnes, 753 So. 2d 605 (Fla. 2d DCA 2000), where the Barnes court held that "[t]he State does not have to advise the trial court specifically that the reason for the departure is invalid." 753 So. 2d at 607.

The Clark court further held that even on the merits, the State failed in its burden to show that the reasons given for downward departure in this case were invalid. So, assuming, arguendo that the State did preserve its appellate rights by objecting generally at the beginning of the sentencing hearing, the Fourth District nonetheless held it was not shown that the trial court erred in departing downwards nor in its reasons given.

Conversely, in Barnes, the trial court lacked *any* evidence to support

the downward departure. The record was unclear as to what the trial court used for a reason to depart, and the only reason alluded to on the record was Barnes' need for drug treatment. However, in its written finding, the trial court marked the reason for departure was that the defendant required specialized treatment for a mental disorder unrelated to substance abuse or for a physical disability for which the defendant is amenable for treatment. As such, the Second District held that regardless of which typed of treatment the trial court considered, the departure was in error because the record contained *no evidence at all* regarding a mental disorder or physical disability, and a defendant's need for drug treatment is no longer a valid

departure basis. Barnes, 753 So. 2d at 606-07.

A trial court must be given an opportunity and notice when a party makes an objection, so that the trial court is aware of the grounds for the objection and what relief is sought. See State v. Ford, 739 So. 2d 629, 630 (Fla. 3d DCA 1999)(Cope, J., dissenting). Otherwise, a general objection does not preserve the issue for appellate review. See Tillman v. State, 471

So. 2d , 35 (Fla. 1985)("[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved"); see also State v. Baccari, 730 So. 2d 806 (Fla. 4th DCA 1999)(state failed to object to at least two of the four reasons for departure; thus alleged error can not be raised on appeal); State v. Henriquez, 717 So. 2d 1087 (Fla. 3d DCA 1998)(where State did not object or advise the trial court that downward departure reasons were necessary, the point is not properly preserved for appellate review).

In conclusion, the Fourth District Court of Appeal did not err in

finding that Petitioner did not preserve this issue properly for appellate review where the State did not give a specific reason for its objection.

ISSUE II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE STATE FAILED TO CARRY ITS BURDEN ON APPEAL OF SHOWING THAT EACH OF THE

REASONS GIVEN FOR DEPARTURE WAS INVALID.

A sentence that departs downward from the sentencing guidelines must be supported by competent, substantial evidence. Barnes, 753 So. 2d at 607(error where the trial court lacked *any* evidence to support the downward departure)(citing State v. Bostick, 715 So. 2d 298, 299 (Fla. 4th DCA 1998)). Competent, substantial evidence is tantamount to legally sufficient evidence. Banks v. State, 732 So. 2d 1065, 1067 (Fla. 1999).

In the case at bar, even Petitioner acknowledges that one of the reasons given by the trial court is a statutory legal mitigating reason: Respondent's age (IB 7). In its oral pronouncement of the sentence, the trial court listed the following reasons for its departure: previous downward departure negotiated between the State of Florida and the defendant (T 7); the defendant successfully completed a five year probation term for four years and three months (T 8); the strong recommendation for mitigation given by defendant's probation officer, including defendant's record of employment,

payment of costs in full, no contact with victim or her family (T 8-9); the

defendant's age (T 8, 10); and that the facts alleged in the charging document were not the facts alleged by the victim (T 10). Although in the written reasons, the reasons of the previous downward departure negotiated between the State of Florida and the defendant and the facts were not as alleged were not listed (R 16).

A previous downward departure negotiated plea between the State of Florida and the defendant is a valid reason to depart downward on a probation violation sentence. Franquiz v. State, 682 So. 2d 536, 537 (Fla. 1996); State v. Devine, 512 So. 2d 1163, 1164 (Fla. 4th DCA), rev. denied, 519 So. 2d 988 (Fla. 1987). Another valid reason to depart downward under the 1992 sentencing laws is the age of the defendant at the time of the crime. s.924.141(6)(g), Fla. Stat. (1992).

Only one departure reason needs to withstand appellate scrutiny for the departure to be upheld. State v. Clark, 745 So. 2d 1116, 1117 (Fla. 4th DCA 1999) Kipping v. State, 702 So. 2d 578 (Fla. 2d DCA 1997)(if any one of the reasons given is valid, sentence must be affirmed).

Once there are valid reasons to depart, the decision to depart is a

"judgment call" within the sound discretion of the court and should be sustained on review, absent an abuse of discretion. Banks v. State, 732 So. 2d 1065, 1068 (Fla. 1999).

As such, the Fourth District Court of Appeal did not err in holding that the State failed to show that all the reasons given by the trial court were invalid.

CONCLUSION

The Fourth District's opinion in this case should be affirmed. At sentencing, Petitioner failed to object with enough specificity in order to preserve its issue for appellate review. Additionally, Petitioner fails to show that the trial court's reasons given for departure are all invalid and that the Fourth District abused its discretion in upholding the trial court's decision.

WHEREFORE, based on the foregoing, this Honorable Court should either affirm the Fourth District's decision on the second point, without finding conflict with the Second District's decision in Barnes; or affirm the Fourth District's holding in Clark and quash Barnes to the extent it conflicts with Clark.

Respectfully Submitted this 19th day of January, 2001.
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BY:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of this answer brief was furnished by United States mail to Barbara A. Zappi, Assistant Attorney General, 110 SE 6th St., 9th Flr., Ft. Lauderdale, FL 33301, this 19th day of January, 2001.

____
Jo Ann Barone Kotzen, Esq.

CERTIFICATE OF FOND AND TYPE SIZE

I HEREBY CERTIFY THAT this brief is formatted to print in Times New Roman, 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Jo Ann Barone Kotzen, Esq.