

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
PAUL VANBEBBER,
Respondent.

Case No. SC01-2558

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Petitioner adopts the statement of the case and facts as set forth in its initial brief.

ARGUMENT

ISSUE

WHETHER THE STATUTORY GUIDELINES MITIGATOR OF §921.0026(2)(J), FLA. STAT. (2000) IS APPLICABLE TO DUI MANSLAUGHTER CASES.

The standard of review is de novo. Petitioner adopts and reasserts its argument as set forth in its initial brief.

Respondent argues that this Court's decision in State v. Sachs, 526 So.2d 48, 51 (Fla. 1988), allows the trial court to depart downward based upon "remorse" standing alone. While this Court's decision in Sachs, *id.*, states "actual remorse also may constitute a valid reason for a downward departure, that decision was rendered in 1988, and in 1993 the legislature enacted section 921.0016 which sets forth a variety of mitigating factors for a downward departure sentence. As the Second District pointed out in State v. Whiting, 711 So.2d 1212, 1213-14 (Fla. 2d DCA 1998):

...Whether remorse alone is sufficient to sustain a downward departure, however, depends on how *Sachs* is interpreted with respect to that particular factor. For instance in *State v. Howell*, 572 So.2d 1009 (Fla. 1st DCA 1991), and *State v. Lacey*, 553 So.2d 778 (Fla. 4th DCA 1989), have interpreted *Sachs* as holding that remorse can provide a basis for a downward departure only in connection with other factors. That

interpretation is bolstered by section 921.0016(4), Florida Statutes (1995), which sets forth a variety of mitigating factors for a downward departure, but references remorse only one time and only in connection with other factors. See 921.0016(4)(j)¹. Section 921.0016 was enacted, in its entirety, in 1993, subsequent to *Sachs*, *Howell*, and *Lacey*. See Ch. 93-406, s 13, Laws of Fla. *Sachs*, however, is susceptible of an interpretation contrary to *Howell* and *Lacey*, in that *Sachs* does say remorse standing alone is a sufficient mitigating factor; although, remorse in that case was accompanied by other valid mitigating factors. Prior to *Sachs*, remorse alone was an insufficient basis for a downward departure. (Citations omitted).

Petitioner submits that although the list of statutory mitigating factors is not exclusive (§921.0026(2), Fla. Stat. (1999) "Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to...") the legislature has seen fit to require that remorse be considered not alone but in conjunction with other factors "that the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse"), and this Court has seen fit to adopt as part of the Rules of Criminal Procedure as a mitigating factor the same required combination of factors. See Amendments To Florida Rules of Criminal Procedure RE: Sentencing Guidelines, 628 So.2d 1084, 1091-92, 1096 (Fla. 1993); IN RE: Adoption of Florida Rules of Criminal Procedure 3.704 and 3.992

¹ Now section 921.0026(2)(j)

To Implement the Florida Criminal Punishment Code, 721 So.2d 265, 269-70, 273 (Fla. 1998). Therefore any doubt as to whether remorse standing alone can be grounds for a downward departure has been resolved by both the Florida legislature and by the Florida Supreme Court in adopting the criminal rules of procedure. Additionally, certain district courts of appeal have also adopted this legal reasoning that remorse standing alone is an insufficient reason to depart. State v. Baksh, 758 So.2d 1222, 1226 (Fla. 4th DCA 2000) ("To support a departure based on this reason, all three elements must be shown: that the offense was committed in an unsophisticated manner, that it was an isolated incident, and that the defendant has shown remorse. See *State v. Falocco*, 730 So.2d 765, 765 (Fla. 5th DCA 1999); *State v. Spioch*, 706 So.2d 32 (Fla. 5th DCA), *rev. denied*, 718 So.2d 171 (Fla. 1998)"); State v. Santomaso, 764 So.2d 735, 737 (Fla. 2d DCA 2000).

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellant respectfully requests that this Honorable Court resolve the conflict between the second District in State v. VanBebber, 2001 WL 1299449, 26 Fla. L. Weekly D2558 (Fla. 2d DCA October 26, 2001), and the Fourth District in State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998), aff'd on other grounds, 762 So.2d 507 (Fla. 2000), by adopting the reasoning of the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Joshua Faett, Esq., and Rexford Darrow, of the Law Offices of Casassa, Mangone, Miller, and Faett, 4280 E. Tamiami Trail, Suite 204, Naples, Florida 34112, this ___ day of January, 2002.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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