

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

TERRY L. HOLSEY,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D04-3138

Opinion filed August 19, 2005.

An appeal from the Circuit Court for Alachua County.
Judge Larry G. Turner.

Charles J. Crist, Jr., Attorney General, and Daniel A. David, Assistant Attorney General,
Tallahassee, for Appellant.

Nancy A. Daniels, Public Defender, and Archie F. Gardner, Jr., Assistant Public Defender,
Tallahassee, for Appellee.

PER CURIAM.

The state challenges the downward departure sentence imposed following Terry Levon Holsey's entry of an open no contest plea to charges of sale of cocaine and possession of cocaine. The offenses were committed during an undercover drug sting operation; the buyer was an undercover officer. The trial judge gave five grounds for a downward departure

sentence. Because we agree with the State that all five grounds given to support the downward departure were improper, we reverse.

The fact that Holsey suffers from addiction to controlled substances is, as the trial judge recognized, specifically excluded as a statutory basis for downward departure. § 921.0026(3), Fla. Stat. (2003). The finding that Holsey was only an accomplice and a relatively minor participant is not supported by competent substantial evidence in the record. That the undercover officer was an initiator, willing participant, aggressor, or provoker of the incident is not a proper ground in this case for downward departure pursuant to section 921.0026(2)(f), Florida Statutes. State v. Grant, 29 Fla. L. Weekly D2722 (Fla. 2d DCA Dec. 3, 2004). Regarding downward departure based on prison overcrowding and strained DOC budget, the State correctly notes that no evidence was introduced regarding these factors and the trial judge did not take judicial notice of any type of report or other information to support the reason. Finally, if the State can validly be deemed a victim for purposes of the statutory ground for downward departure, there was no evidence of the “victim’s” need for restitution or that a downward departure sentence was necessary in order for restitution to be made. Kirby v. State, 863 So.2d 238 (Fla. 2003).

REVERSED and REMANDED.

BARFIELD and LEWIS, JJ. concur; WOLF, J., dissents with written opinion.

WOLF, J., Dissenting.

The trial court gave five reasons for the downward departure sentence and specifically stated,

Each of the listed reasons for a downward departure sentence is separate and independent. The Court specifically finds that each reason alone is a sufficient basis for a downward departure sentence. If any one listed reason is rejected as being insufficient as a ground for a downward departure sentence, the Court finds that any one of the other listed reasons is sufficient for a downward departure.

While I agree with the majority that four of the reasons would not support a downward departure, I must dissent as to reason four, which reads as follows:

The Court recognizes that the Department of Corrections is overcrowded; that the budget is strained. The Court finds that it is a better use of the Department of Corrections' budget, given this defendant's twelve years without serious crime, to utilize the Department's money and resources on treatment and rehabilitation rather than on incarceration and punishment. Given his minor involvement and small amount of drugs involved, it is a more appropriate sentence to try to assist him in overcoming his addiction. We know that treatment works; not for all, but for some. The defendant is thirty-nine years of age, an age where some people finally get the message. The sentence of one year and one day in the Department of Corrections is sufficient punishment under the circumstances of this case. Further crowding of the prison system with this defendant is not an appropriate use of the Department of Corrections' limited resources.

The only reason given by the majority for rejecting this reason regarding prison overcrowding was that "the state correctly notes that no evidence was introduced regarding these factors and the trial judge did not take judicial notice of any type of report or other information to support the reason."

Prison overcrowding was only a minor portion of the reason stated by the trial court. The judge's reasoning was not that this particular downward departure would cure a specific prison overcrowding problem, but in light of all the other factors enumerated in reason four, including age, past record, and seriousness of this offense, the Department's strained resources could be put to better use.

While specific proof is required of certain factors, we should not assume that our trial judges are ostriches with their heads stuck in the sand who are unaware of what is going on around them. Circuit judges sitting on the criminal bench should be able to weigh the relative circumstances of an individual case before the court versus the hundreds of other cases they handle each year. We should also expect that they have a general knowledge of the substantial amount of state resources utilized by our prison system.

I would affirm.