

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

RODNEY F. CAMPBELL,)
)
 Appellant/Cross-Appellee,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee/Cross-Appellant.)
 _____)

Case No. 2D09-708

Opinion filed December 1, 2010.

Appeal from the Circuit Court for Polk
County; John K. Stargel, Judge.

James Marion Moorman, Public Defender,
and John C. Fisher, Assistant Public
Defender, Bartow, for Appellant/Cross-
Appellee.

Bill McCollum, Attorney General,
Tallahassee, and Sara Macks, Assistant
Attorney General, Tampa, for
Appellee/Cross-Appellant.

KHOUZAM, Judge.

Rodney F. Campbell appeals his convictions for possession of cocaine,
possession of cannabis, and possession of drug paraphernalia. The State cross-
appeals Campbell's downward departure sentence for possession of cocaine. We

affirm Campbell's convictions without discussion, but we reverse his downward departure sentence and remand for resentencing.

The lowest permissible sentence for Campbell under the Criminal Punishment Code was 28.05 months in prison. At sentencing, Campbell sought a nonprison sentence because of his son and a sick uncle in hospice. The trial court imposed a downward departure sentence of eighteen months in prison, followed by eighteen months of community control, followed by twelve months of probation. When the State objected to the downward departure sentence, the court replied that "based on the evidence and everything set forth that this will be [] equitable for him to have 18 months in State Prison and then [] community control, followed by 12 months probation." The court did not file any written reasons for the downward departure sentence.

The decision to depart from the minimum sentence mandated by the Criminal Punishment Code is a two-part process. State v. Tyrrell, 807 So. 2d 122, 125 (Fla. 5th DCA 2002). First, the trial court must decide whether it can depart by determining if there is a valid legal ground and adequate factual support for that ground. Id. That decision will be affirmed on appeal if the valid legal ground provided by the trial court is supported by competent substantial evidence. Id. Next, the trial court must determine whether departure is the best sentencing option for the defendant. Id. This decision is reviewed under an abuse of discretion standard. Id. "An appellate court will uphold a departure sentence if any reason given by the trial judge is a valid reason for departure." Id.

We find that the trial court failed to provide a valid legal ground for the downward departure sentence. To the extent that the trial court considered Campbell's family situation as a reason for downward departure, "Florida courts have consistently held that family support concerns are not valid reasons for downward departure." State v. Walker, 923 So. 2d 1262, 1265 (Fla. 1st DCA 2006). See Rafferty v. State, 799 So. 2d 243, 248 (Fla. 2d DCA 2001) (concluding "it would not be good policy for the legislature to punish those with families to support less than those without families"). Therefore, we reverse Campbell's downward departure sentence and remand for resentencing pursuant to the Code. See Tyrrell, 807 So. 2d at 128.

Affirmed in part, reversed in part, and remanded for further proceedings.

VILLANTI, J., Concurs.

ALTENBERND, J., Concurs with opinion.

ALTENBERND, Judge, Concurring.

I concur in this opinion. It is the law, but I am not entirely convinced it is good policy. The State wants Mr. Campbell to serve 28.05 months in prison for these drug offenses. The trial court sentenced him to eighteen months in prison, followed by eighteen months' community control, followed by twelve months' probation. The State correctly argues that this forty-eight month sanction is a downward departure sentence that is unsupported by evidence establishing a valid legal ground for such a departure and that the State is entitled to have Mr. Campbell serve the 28.05 month term in prison as the "longer" sentence. All in all, I suspect that the trial court's "shorter" forty-eight month sentence would be a far more effective sanction than twenty-eight months in

prison. Because Mr. Campbell has fully served his current term of imprisonment, he will presumably be removed from his community control and returned to prison.

Although Mr. Campbell's attorney made little attempt to present evidence to permit a downward departure sentence in this case, it appears that Mr. Campbell's actions a number of years earlier strongly affected his scoresheet. He has approximately sixty felony convictions that apparently arise from a credit card scheme he committed for a short period of time as an employee at some type of business. While the facts are not well developed, it appears likely that he was convicted of forgery, uttering a forged instrument, and some form of theft each time he misused a credit card. If each credit card transaction had been treated as one felony rather than two or three, the sentence he received in this case would not be a downward departure and his scoresheet may have permitted a non-state prison sanction.

Under current law, I express no opinion about whether Mr. Campbell's attorney could have proven a legal basis for a downward departure, but none was proven at the sentencing hearing. It seems unusual to me that the credit card scheme he committed as a young man creates as many points on his scoresheet as if he had committed a lewd and lascivious battery on one occasion and a home-invasion robbery on another. See § 921.0022, Fla. Stat. (2008).