

2014 WL 3407112 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

STATE of Florida, Plaintiff,
v.
Joseph Rocky FOWLER, Defendant.

No. F11-30411.
July 14, 2014.

*1 Section 15

Amended Sentencing Order

Miguel M. de La O, Judge.

THIS CAUSE came before the Court for the sentencing of Defendant, Joseph Rocky Fowler (“Fowler”). The Court has reviewed the (Amended) Pre-Sentence Investigation compiled by the Department of Corrections, held a Sentencing Hearing, and is fully advised in the premises.

I. BACKGROUND.

On January 15, 2014, Fowler was convicted by a jury of Burglary of an Occupied Dwelling, Burglary of an Unoccupied Dwelling, Petit Theft, and two counts of Violating a Domestic Violence Injunction. By its verdict, the jury found that Fowler entered Diana Sosa's¹ home on two occasions, stole items from the home during one of the burglaries, and violated a domestic violence injunction during each burglary. Because of Fowler's prior criminal history and the seriousness of the offenses of which he was convicted, the sentencing guidelines require this Court to sentence Fowler to no less than 61.65 months, and no more than 30 years, in State prison - unless there is a valid basis for a downward departure.

II. BASIS FOR DOWNWARD DEPARTURE.

A trial court's decision whether to depart from the guidelines is a two-part process. First, the court must determine whether it *can* depart, *i.e.*, whether there is a valid legal ground and adequate factual support for that ground in the case pending before it (step 1). Legal grounds are set forth in case law and statute, and facts supporting the ground must be proved at trial by “a preponderance of the evidence.” ...

Second, where the step 1 requirements are met, the trial court further must determine whether it *should* depart, *i.e.*, whether departure is indeed the best sentencing option for the defendant in the pending case. In making this determination (step 2), the court must weigh the totality of the circumstances in the case, including aggravating and mitigating factors. This second aspect of the decision to depart is a judgment call within the sound discretion of the court

Banks v. State, 732 So. 2d 1065, 1067-68 (Fla. 1999) (emphasis in original).

This Court can impose a sentence below the sentencing guidelines if it meets one of the specified statutory grounds, but the specified grounds are non-exclusive. *See id.* at n.2. A court can base a downward departure sentence on any non-statutory reason which is not prohibited by the Legislature and has not already been factored into the sentencing guidelines calculation. *See Rafferty v. State*, 799 So. 2d 243, 248 (Fla. 2d DCA 2001) (court must determine whether the asserted non-statutory reason for downward departure is consistent with legislative sentencing policies). Fowler asks this Court to depart from the lowest permissible sentence of 61.65 months in State prison based on two factors - one statutory, one not.²

A. VICTIM'S INVITATION TO CONTACT.

*2 Fowler argues that this Court can lawfully depart from the lowest permissible sentence pursuant to [Florida Statutes section 921.0026\(2\)\(f\)](#) (“The victim was an initiator, willing participant, aggressor, or provoker of the incident”).

There was testimony during the trial that Ms. Sosa sent Fowler text messages with pictures of her in provocative poses. However, the undisputed testimony from Ms. Sosa was that these pictures were sent *many* months prior to the incidents which resulted in the charges for which Fowler was tried and convicted. Consequently, although a court can impose a below guidelines sentence when the victim initiates or provokes an incident contact, [section 921.0026\(2\)\(f\)](#) is inapplicable here because Ms. Sosa did not initiate or provoke the contact which resulted in Fowler's conviction.

Moreover, this Court would not exercise its discretion to depart from the lowest permissible sentence for the burglary counts even if it found that Ms. Sosa had sent provocative pictures to Fowler during the relevant time period, or even if the Court found she had invited him to her home. Although such facts might explain why Fowler would have violated the domestic violence injunction, they would not justify burglarizing Ms. Sosa's home or stealing items from the home.

In short, this Court finds that the facts do not allow it to depart from the lowest permissible sentence pursuant to [section 921.0026\(2\)\(f\)](#); and the Court would not so depart even if the facts allowed it to do so pursuant to [section 921.0026\(2\)\(f\)](#).

B. VICTIM'S WISHES FOR A NON-INCARCERATIVE SENTENCE.

During trial, and at the Sentencing Hearing, Ms. Sosa made it clear that she does not want this Court to send Fowler to State prison. Ms. Sosa is a 27 year old college graduate. She is the mother of two minor children. She works full-time. She has testified twice before the Court. Each time the Court has been impressed with Ms. Sosa's forthrightness. The Court has seen few witnesses as precise in their testimony. Ms. Sosa is not intimidated by the lawyers (or the judge) when questioned. No one is able to put words in Ms. Sosa's mouth. Time and again, when she disagreed with the wording of a question, she answered precisely (and consistently with prior testimony). In short, this Court finds that Ms. Sosa is of above-average intelligence, is a mature, thoughtful individual, who is not easily manipulated or intimidated. The Court also finds her to be honest, and credits fully her testimony that she has not been threatened, coerced or pressured into asking this Court to depart from the lowest permissible sentence.

Ms. Sosa's maturity is critical to this Court's determination. Ms. Sosa is not in the same position as the victim in *State v. Bernard*, 744 So. 2d 1134, 1136 (Fla. 2d DCA 1999) (victim was child when crime was committed, and still a minor at time of sentencing). This Court gives great weight to Ms. Sosa's desires as an uncoerced victim.

To be sure, Ms. Sosa's desires are not binding on this Court. *See State v. Kasten*, 775 So. 2d 992, 992 (Fla. 3d DCA 2001) (victim's desires are “relevant” but not “determinative”). However, just as it is not bound by Ms. Sosa's wishes, this Court is not required to ignore her wishes. A survey of Florida cases reveals that no appellate court has ruled that a victim's desires can never form the basis for a downward departure under [Florida Statutes section 921.0026](#).³ Indeed, the Fourth DCA has recognized that “[t]he question of whether a victim's request for leniency can be a proper reason for a departure sentence is

an open issue” *State v. McLaren*, 763 So. 2d 1171, 1172 (Fla. 4th DCA 2000). The Second DCA was also faced with a similarly issue but avoided addressing it.

*3 Whether a victim's request for leniency could ever be a proper reason for a downward departure sentence is a difficult issue. In the context of domestic violence, the victim may have many conflicting emotions. A defendant and other family members could easily pressure the victim to request leniency. We would not wish to encourage trial courts to rely upon this reason for a downward departure sentence in a case involving domestic violence. However, because the alternative ground for departure is valid, we do not need to resolve this issue.

State v. Powell, 696 So. 2d 789, 791 (Fla. 2d DCA), approved, 703 So. 2d 444 (Fla. 1997)

In *State v. Martinez*, 103 So. 3d 1013 (Fla. 3d DCA 2012), the Third DCA implied that the victim's desires may not be sufficient to justify a downward departure sentence. *Id.* at n.3 (“The trial judge apparently based his sentence on the plea of Martinez's now-reconciled wife who stated that she did not wish him kept from his family for a lengthy period. *But see Campbell v. State*, 48 So. 3d 201 (Fla. 2d DCA 2010); *State v. Geoghagan*, 27 So. 3d 111 (Fla. 1st DCA 2009); *Wynkoop v. State*, 14 So. 3d 1166 (Fla. 4th DCA 2009); *State v. Kasten*, 775 So. 2d 992 (Fla. 3d DCA 2000).”). However, the appellate court was writing in the context of a defendant who violated probation, was classified as a Violent Felony Offender of Special Concern under the Anti-Murder Act (Florida Statutes section 948.06(8) *et seq.*), and whom the trial court found presented a danger to the community. In addition, none of the cases to which *Martinez* cites hold that a trial court cannot consider a victim's desires to justify a downward departure sentence. Rather, they hold that “family suffering” due to a defendant's incarceration is not a sufficient basis for imposing a below guidelines sentence.⁴

In *State v. Knox*, 990 So. 2d 665 (Fla. 5th DCA 2008), the Fifth DCA reversed a trial court's decision to grant a downward departure based on, *inter alia*, the victim's desires for the defendant to receive a probationary sentence. The defendant had stabbed the victim four times in the back while she held their 5 year-old son. *Id.* at 667. As a result of the particularly violent nature of the defendant's actions, the appellate court found that the downward departure was inappropriate.

*4 In evaluating a non-statutory mitigator, a court must determine whether the asserted reason for a downward departure is consistent with legislative sentencing policies. Given the particularly violent nature of the defendant's act against his ex-girlfriend, we do not believe that the victim's request for leniency should be a basis for a downward departure sentence.

Id. at 669. *Knox* did not hold that a victim's request for leniency can never justify a downward departure sentence; rather, the court held that such a departure was unjustified in light of the particular facts of the case.

Even in *Bernard*, where the Second DCA reversed a downward departure sentence which was solely based on a minor victim's expressed desires, the court remanded the case to the trial court and stated: “If, after further proceedings, the trial court finds that sufficient evidence supports a downward departure, it may again impose a departure sentence.” 744 So. 2d at 1136.

Consequently, this Court concludes it can consider the victim's desires in imposing a sentence below the guidelines. The Court, after considering all relevant aggravating and mitigating facts, imposes a below guidelines sentence based on the stated desires of Ms. Sosa. However, despite Ms. Sosa's stated desires, the Court will not impose a wholly non-incarcerative sentence due to Fowler's significant criminal history.

III. SENTENCE.

The Court imposes the following sentences, all to run concurrent to each other.

A. COUNT VI: BURGLARY OF AN OCCUPIED DWELLING.

The Court sentences Fowler to 36 months in State prison, to be followed by two (2) years of Community Control, to be followed by 10 years of Probation. Fowler shall receive credit for all time he has served (including time spent on house arrest). The Court will early terminate Fowler's probation after five years *if* (1) he has had no violations of probation, and (2) Diana Sosa does not oppose early termination at that time.

The special conditions of Fowler's Community Control and Probation are:

- 1. Stay Away from Diana Sosa.** Fowler is to have no contact with Diana Sosa directly or indirectly, except as otherwise specified. The only indirect contact he may have with Ms. Sosa is to make arrangements for lawful, authorized visitation with his children.
- 2. GPS Monitoring.** While on Community Control, Fowler shall wear a GPS monitoring device, and is allowed to leave his home only if required to travel to visit his children, to work, to go to school, to attend church, and for medical purposes.

B. COUNT VIII: BURGLARY OF AN UNOCCUPIED DWELLING.

The Court sentences Fowler to 36 months in State prison, to be followed by two (2) years of Community Control, to be followed by 10 years of Probation. Fowler shall receive credit for all time he has served (including time spent on house arrest). The Court will early terminate Fowler's probation after five years *if* (1) he has had no violations of probation, and (2) Diana Sosa does not oppose early termination at that time.

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C. COUNT VII: VIOLATING A DOMESTIC VIOLENCE INJUNCTION.

*5 The Court sentences Fowler to the time he has already served in jail.

D. COUNT IX: VIOLATING A DOMESTIC VIOLENCE INJUNCTION.

The Court sentences Fowler to the time he has already served in jail.

E. COUNT X: PETIT THEFT.

The Court sentences Fowler to the time he has already served in jail.

DONE and ORDERED in Miami-Dade County, Florida this 14th day of July, 2014, *nunc pro tunc* to July 2, 2014.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

- 1 Ms. Sosa is Fowler's ex-girlfriend with whom he has two minor children.
- 2 Fowler's written motion also asserts his family situation warrants a downward departure (*i.e.*, that he has two daughters who need their father, and Fowler's mother is a disabled retired crime scene investigator). These grounds were not discussed at the Sentencing Hearing, likely because they are not valid grounds for this Court imposing a below guidelines sentence. *See State v. Thompkins*, 113 So. 3d 95, 99 (Fla. 5th DCA 2013) (“myriad of cases [] have consistently held that family support concerns, ... are not valid grounds to depart from the guidelines.”); *State v. Henderson*, 108 So. 3d 1137, 1141 (Fla. 5th DCA 2013) (“The fact that a defendant has a minor child requiring care and support has previously been rejected as grounds for downward departure.”); *State v. Knox*, 990 So. 2d 665, 669 (Fla. 5th DCA 2008) (“the fact that a defendant has a minor child has previously been rejected as grounds for downward departure.”); *Rafferty v. State*, 799 So. 2d 243, 248 (Fla. 2d DCA 2001) (concluding “it would not be good public policy for the legislature to punish those with families to support less than those without families”).
- 3 One case does hold that a “victim's request” is “invalid as a matter of law” to impose a departure sentence. *See State v. Ussery*, 543 So. 2d 457 (Fla. 5th DCA 1989). However, it was not applying Florida Statutes section 921.0026. Rather, *Ussery* addressed a predecessor statute which was enacted after the offense date. The decision was grounded in “Article X, section 9 of the Florida Constitution, where a provision of a newly enacted criminal statute would ameliorate or mitigate a punishment or penalty, the statutory provisions may not apply retroactively to affect a judgment or sentence.” *Id.*
- 4 *Campbell*, 48 So. 3d 202 (“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.57D’”); *Geoghagan*, 27 So. 3d at 114 (“the trial court found appellee is married, has a child, and is employed. However, ‘Florida courts have consistently held that family support concerns are not valid reasons for downward departure.’ ”); *Wynkoop*, 14 So. 3d at 1172 (defendant's wife, who was also mother of victim of vehicular homicide, asked trial court not to impose prison sentence because she would suffer financially and emotionally; court ruled that “granting a downward departure based on family suffering is not currently permissible”); *Kasten*, 775 So. 2d at 992 (addressing need for restitution as a basis for downward departure; court ruled that the victim's desires for restitution are relevant but not determinative as to this statutory factor). In *State v. Berry*, 976 So. 2d 645 (Fla. 3d DCA 2008), the Third DCA directed the parties to review *Kasten* regarding whether “a victim's consent can, in and of itself, constitute a valid downward departure reason.” *Id.* Because in *Kasten* the appellate court said the victim's desires are relevant, but not determinative, *Berry* cannot be read to bar the victim's desires as a basis for downward departure.

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