IN THE DISTRICT COURT OF APPEAL

FOURTH DISTRICT

ERNESTO BEHRENS,

Appellant,

v. Case no. 4D08-3291

11/7/08

STATE OF FLORIDA,

Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

Appellee, the State of Florida, responds to this court's October 16, 2008 order:

Appellee has been asked to respond to ground twenty of the motion for post-conviction relief. Appellant contends that trial counsel was ineffective for failing to object to the upward departure because the ground given was already factored into his guidelines score. Appellant cites Damiano v. State, 944 So. 2d 516 (Fla. 4th DCA 2006).

Appellee respectfully, but strongly, submits that the holding in Damiano is incorrect. The trial courts in Damiano and this case relied on Section 921.0016(3)(r) as a basis for departure. That statute allows the option of a departure when:

> (r) The primary offense is scored at offense level 7 or higher and the defendant has been convicted of one or more offense that scored, or would have scored, at an offense level 8 or higher.

This is not a case where the trial court gave a non-statutory reason that was already factored into the guidelines (e.g., the defendant committed three misdemeanors in the past). The sentence in this case was imposed pursuant to a specific statute. That's not "double dipping." It's acting in accordance with a legislative mandate that increased punishment should be permitted when a certain combination of crimes are committed. The statute is certainly within the purview of the Legislature. The Legislature clearly has the power to exempt a certain crime or combination of crimes from the normal constraints of the guidelines. In fact, in 1998 the Legislature amended the guidelines to effectively allow an "upward departure" for *all* crimes, without any justification from the trial court. See Huewitt v. State, 963 So. 2d 314, 314 (Fla. 4th DCA 2007).

Trial counsel was not ineffective and Appellant can show no prejudice because Damiano is an incorrect statement of the law. This Court should recede from Damiano.

Even if this Court were to disagree with the above, reversal is not warranted. Damiano had not been decided when Appellant was sentenced in 2000. Appellant may argue that does not matter because Brown v. State, 763 So. 2d 1190 (Fla. 4th DCA 2000) had been decided at the time Appellant was sentenced. Damiano cited to Brown for the proposition that factors taken into account in calculating a guidelines score may not be used as a basis for

departure. However, a close reading of Brown indicates that language is *dicta*[1]. The departure in Brown was reversed because the trial court's reasons were not supported by the evidence in light of the jury's finding that the defendant was guilty of a lesser offense. Moreover, Brown did not involve the statute at issue here and subsequent to Brown this Court approved a departure based on section 921.0016(3)(r). See Maglio v. State, 918 So.2d 369, 377 (Fla. 4th DCA 2005).

Prior to Damiano it was clear that the Legislature had the power to set the level of allowable punishment for crimes. See State v. Coban, 520 So. 2d 40, 41 (Fla. 1988) (in Florida, the plenary power to prescribe the punishment for criminal offenses lies with the Legislature, not the courts). As Damiano represents an apparent subsequent change in the law, counsel could not have been ineffective for failing to raise the issue. See Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir.1994) ("We have held many times that '[r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.' ").

Even if the this Court disagrees with the above, trial counsel was not ineffective. A reasonable lawyer could conclude that the departure was allowable based on the Florida Supreme Court's holding in Coban regarding the Legislature's power to

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[1]If this Court disagrees, it should also recede from Brown.

prescribe punishment. A reasonable lawyer could also conclude that Coban controls over any ruling by a district appellate court. "The [ineffective assistance] test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether **some reasonable lawyer** at the trial could have acted, in the circumstances, as defense counsel acted …". Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). See also Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1037, 145 L.Ed.2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.") and Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001) (defendant must establish that no competent counsel would have taken the action that his counsel took).

WHEREFORE, this Court should affirm the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT

I certify that a copy hereof, prepared using 12 Courier New true type font, has been furnished on November 7, 2008 by mail to:

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Of Counsel