

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC  
CASE NO.: 2015AP900053AXXXMB  
L.T. NO.: 2014CT017392AXXXNB

DAVID SCOTT,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

Opinion filed: JUN 28 2017

Appeal from the County Court in and for Palm Beach County,  
Judge Sheree Cunningham

For Appellant: Peggy Natale, Esq.  
Office of the Public Defender  
421 3rd Street/6th Floor  
West Palm Beach, FL 33401  
mnatale@pd15.org

For Appellee: Michael Scott Del Sontro, Esq.  
Office of the State Attorney  
401 North Dixie Highway  
West Palm Beach, FL 33401  
MDelSontro@sa15.org

PER CURIAM.

AFFIRMED.

K. MARX, KROLL, and KEEVER, JJ., concur.

KROLL, J., specially concurring.

Appellant David Scott appeals his sentence for Driving under the Influence Causing or Contributing to Injury to Person or Property. Because nothing in the record clearly indicates that the trial court considered Appellant's lack of remorse when determining his actual sentence, I

agree that his sentence should be affirmed. I write separately, however, to stress that a defendant's lack of remorse is an improper sentencing consideration, and Appellant's objection to the State's argument in that regard should have been sustained.

On October 8, 2015, a jury convicted Appellant of Driving under the Influence Causing or Contributing to Injury to Person or Property. The trial court adjudicated Appellant guilty and immediately moved on to sentencing, asking the State for its recommendation. Initially, the State asked for twelve months' probation with various conditions, including a ten-year driver license revocation, arguing that Appellant's prior convictions and "severe level of impairment" render him "an extreme danger to society and recidivist by nature."

But in addressing the subject of jail time, the State then argued that, based in part on Appellant's lack of remorse, his sentence should also include 364 days in jail. When Defense counsel objected to the argument, the trial court overruled the objection and permitted the State to proceed:

[STATE]: As far as jail goes for Mr. Scott, the state feels based on Mr. Scott's prior history in addition to Mr. Scott's lack of remorse shown on the tape, shown throughout the case, and his--

[DEFENSE]: We would object to reference to lack of remorse, which is an improper sentencing consideration.

THE COURT: Objection overruled.

[STATE]: Lack of remorse, his attitude shown throughout the tape -- and the unredacted (sic) version only shows a fraction of Mr. Scott's -- his attitude that day to everyone involved in this matter -- and the severe and drastic level of impairment that Mr. Scott had and conducted himself with in the middle of the day on an -- August 9th -- Saturday morning in Publix. Mr. Scott does not deserve to be on probation; we just put those probation terms as a recommendation based on the statute. Mr. Scott -- and we would ask for 364 days in the Palm Beach County Jail based on his prior

history, his danger to society, and his complete -- terrible attitude and level of impairment in the case involved.

When the State had finished, Defense counsel was permitted to present argument in favor of mitigation, and argued for a sentence of ninety days in jail. The trial court then adjudicated Appellant guilty, ultimately sentencing him to twelve months' probation with a number of special conditions, including 210 days in jail.

"Although remorse and an admission of guilt may be grounds for mitigation of a sentence or disposition, the opposite is not true." *K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001). Florida courts have long held that a trial court may not impose a harsher sentence on a defendant for failing to show remorse. *E.g., Whitmore v. State*, 27 So. 3d 168, 171 (Fla. 4th DCA 2010); *Gilchrist v. State*, 938 So. 2d 654, 657-58 (Fla. 4th DCA 2006); *Soto v. State*, 874 So. 2d 1215, 1217 (Fla. 3d DCA 2004). The reason for this limitation is important: criminal defendants must feel free to exercise their constitutional rights to maintain innocence, remain silent, and proceed to trial by jury without fear of being punished for exercising those rights. *E.g., Green v. State*, 84 So. 3d 1169, 1171-72 (Fla. 3d DCA 2012) (citing *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990)). In cases where a defendant's lack of remorse is improperly considered, a new sentencing hearing before a different judge is generally required. *See, e.g., K.N.M.*, 793 So. 2d at 1198. However, where the record is unclear whether the trial court improperly considered a defendant's lack of remorse, and the trial court imposes a sentence significantly lower than that requested by the prosecutor, reversal is not required. *See Aliyev v. State*, 835 So. 2d 1232, 1234 (Fla. 4th DCA 2003).

Here, it is clear to me that the trial court should have sustained defense counsel's objection to the State's improper argument. As indicated above, trial courts must take great care to ensure a defendant's due process rights are protected at all stages of a criminal proceeding,

particularly when determining the sentence to be imposed following a defendant's exercise of those rights.

Nonetheless, despite the trial court's ruling, I also recognize that at no point during the imposition of Appellant's sentence did the trial court reference anything about Appellant's attitude or lack of remorse. Instead, the court focused on the "potential consequences" of Appellant's impairment that "could have resulted in a fatality of life," the level of Appellant's impairment, and his apparent problem with alcohol. Further, the court imposed a significantly lesser sentence than that sought by the State, imposing a jail sentence of 210 days—the final 60 of which can be served in a treatment facility—to the State's requested 364 days in jail.

Thus, because the trial court ultimately imposed a significantly lesser sentence than that sought by the State, and the record does not otherwise clearly demonstrate that the trial court improperly considered Appellant's lack of remorse in determining his actual sentence, I cannot conclude Appellant was punished for his alleged lack of remorse. *See Aliyev*, 835 So. 2d at 1234. Accordingly, despite the trial court's ruling on defense counsel's objection, I concur that Appellant's sentence should be affirmed.

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STATE OF FLORIDA,  
Appellee.

Appealed: November 6, 2015

DATE OF PANEL: DECEMBER 12, 2016

PANEL JUDGES: K. MARX, KROLL, KEEVER

AFFIRMED/REVERSED/OTHER: AFFIRMED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:	)
	)	With Opinion	)	With/Without Opinion	)
<u>Marx</u>	)		)		)
J.	)	J.	)	J.	)
<u>Keever</u>	)		)		)
J.	)	J.	)	J.	)
<u>Kroll</u>	)		)	<u>Kroll</u>	)
J.	)	J.	)	J.	)