

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

SUZANA JORDAN BICI,

Appellant,

v.

Case No. 5D19-798

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed March 27, 2020

Appeal from the Circuit Court
for Marion County,
Willard Pope, Judge.

Robert David Malove, of The Law Office of
Robert David Malove, P.A., Ft. Lauderdale,
for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Rebecca Rock
McGuigan, Assistant Attorney General,
Daytona Beach, for Appellee.

COHEN, J.

Suzana Bici appeals the judgment and sentence imposed following her convictions of driving under the influence (“DUI”) manslaughter and DUI with serious bodily injury.¹ Bici raises two issues on appeal: the trial court erred in its denial of her motion to suppress a blood draw and its consideration of improper factors in imposing sentence. We affirm

¹ §§ 316.193(3)(c)3., 316.193(3)(c)2., Fla. Stat. (2016).

the trial court's denial of Bici's motion to suppress without comment, and thus, affirm her convictions. However, because the trial court erred in its consideration of improper factors in imposing sentence, we vacate Bici's sentence and remand for resentencing before a different judge.

On the night in question, Bici drove three of her friends to the store to purchase alcohol but failed to negotiate a curve in the road and crashed. One occupant of her vehicle died and another was seriously injured. A blood draw revealed that Bici's blood alcohol level was well beyond the legal limit at the time of the accident.

Bici pled not guilty to DUI manslaughter and DUI with serious bodily injury. Following her unsuccessful attempt to suppress her blood draw results, Bici proceeded to trial, and the jury found her guilty as charged.

Bici moved for a downward departure sentence pursuant to sections 921.0026(1)(f) and (j), Florida Statutes (2016), alleging that: (1) the occupants of the vehicle were willing participants, and (2) her offenses were committed in an unsophisticated manner and were isolated incidents for which she had shown remorse. At her sentencing hearing, Bici apologized to the victims' families, took responsibility for her actions, and stated that she was remorseful. The State objected to a downward departure sentence and presented evidence that Bici had a pending DUI charge at the time she committed the offenses at issue.²

Following both parties' arguments, the trial court addressed Bici:

COURT: [T]here are two things that have been said here today by you and on your behalf by those who are concerned for you that caused me pause. One of them is that you take full responsibility for this. Well, this happened in May of 2016.

² Bici subsequently pleaded no contest to reckless driving in that case.

Almost three years ago. Now, everything you have done in the course of this litigation are things that you're entitled to do. You pled not guilty. You filed a motion to suppress. And those are things that you're entitled to do. And I give you no fault for that. You're entitled to it. And you went to trial and asked for a not guilty. And those are all things that you are entitled to, **but it sure seems inconsistent with coming in here and telling me that you take full responsibility for all of this.** Again, I don't fault you for exercising your constitutional rights.

BICI: Yes, Your Honor.

COURT: But it's inconsistent with throwing your hands up and bellying up to the bar and saying, This is my bad. **And this has been going on for three years.** And now you're taking full responsibility when you're looking at a lowest permissible sentence, without a downward departure, of almost 15 years in prison.

(Emphasis added). The trial court denied Bici's motion for a downward departure sentence.

On appeal, Bici argues that the trial court erred in viewing the actions she took in defense of the charges against her as evidence of her lack of remorse.³ The State responds that the trial court appropriately considered whether Bici had shown remorse because she moved to mitigate her sentence on that basis. See, e.g., Rankin v. State, 174 So. 3d 1092, 1097–98 (Fla. 4th DCA 2015) (finding that trial court did not err in considering whether defendant showed remorse when defendant moved for downward departure sentence and section 921.0026(1)(j) was only applicable basis). However, Bici's argument is not that the trial court erred in considering whether she showed remorse; rather, she argues that the trial court impermissibly equated her exercise of her constitutional rights as a lack of remorse. We agree.

³ Bici does not challenge the trial court's rejection of a downward departure sentence based on section 921.0026(1)(f), related to victims as willing participants.

It is axiomatic that a trial court may not base sentencing decisions on the fact that a defendant exercised his or her right to plead not guilty and proceed to trial. As the Florida Supreme Court noted in Holton v. State, 573 So. 2d 284, 292 (Fla. 1990):

A defendant has the right to maintain his or her innocence and have a trial by jury. Art. I, § 22, Fla. Const. The protection provided by the fifth amendment to the United States Constitution guarantees an accused the right against self-incrimination. The fact that a defendant has pled not guilty cannot be used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt.

The trial court stated that Bici's actions were inconsistent with remorse because she moved to suppress evidence, proceeded to trial, and litigated the case for three years. By doing so, the trial court used Bici's constitutionally protected actions against her in sentencing. This was not a proper consideration. See id.

It is unclear whether the trial court would have nevertheless entered a sentence within the statutory guidelines had it not considered Bici's decision to move to suppress and proceed to trial. See Kenner v. State, 208 So. 3d 271, 277–78 (Fla. 5th DCA 2016) (utilizing “would have” standard for erroneous consideration of sentencing factor). Therefore, we vacate Bici's sentence and remand for resentencing before a different judge. See Piccinini v. State, 275 So. 3d 210, 213 (Fla. 5th DCA 2019); Kenner, 208 So. 3d at 278.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ORFINGER and EISNAUGLE, JJ., concur.