

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

JANUARY TERM 2011

STATE OF FLORIDA,

Appellant,

v.

CASE NO. 5D10-3433

CHARLES F. DAVIS,

Appellee.

Opinion filed June 17, 2011

Appeal from the Circuit Court
for Orange County,
John H. Adams, Sr., Judge.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Pamela J. Koller,
Assistant Attorney General, Daytona
Beach, for Appellant.

Adam B. Reiss, Orlando, for Appellee.

PER CURIAM.

The State of Florida appeals the probationary sentence imposed on Charles F. Davis, following his plea to a charge of aggravated battery with a deadly weapon. Davis scored a minimum sentence of 21.3 months in prison on his Criminal Punishment Code scoresheet. Over the State's objection, the trial court departed downward, explaining that: "Given Mr. Davis's almost complete absence of a prior record, a downward departure is appropriate in this case" This is not a valid basis for departure. *State*

v. Stephenson, 973 So. 2d 1259, 1264 (Fla. 5th DCA 2008) ("The trial court lacks discretion to grant a downward departure sentence based on factors already taken into account by the sentencing guidelines A defendant's prior criminal record, or lack thereof, is one such factor.") (internal citations omitted). As the trial judge gave no other reason for imposing a departure sentence, we reverse the sentence and remand for a new sentencing hearing.¹ See *Jackson v. State*, 36 Fla. L. Weekly S81 (Fla. 5th DCA Feb. 17, 2011).

REVERSED AND REMANDED FOR RESENTENCING.

PALMER, LAWSON, and EVANDER, JJ., concur.

¹ If Davis' plea was induced by the trial judge's promise of a probationary sentence, as the record suggests, Davis must also be allowed to withdraw his plea if no valid basis for downward departure is found on remand. See *State v. Jackson*, 55 So. 3d 682 (Fla. 5th DCA 2011).