IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
ROBERT GENE DAVIS,
Respondent.

CASE NO. 66,081

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner relies on the preliminary statement contained in its initial brief.

STATEMENT OF THE CASE

Petitioner relies on the statement of the case found in its initial brief.

STATEMENT OF THE FACTS

Petitioner relies on the statement of the facts found in its initial brief.

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES?

POINT II

(By Respondent)

WHETHER THE TRIAL COURT MET THE REQUIREMENTS OF FLA.R.CRIM.P. 3.701(d)(11) WHEN ITS REASONS FOR DEPARTURE WERE TRANSCRIBED?

POINT III

(By Respondent)

WHETHER IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE?

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM THE SENTENCING GUIDELINES.

Petitioner would rely on its argument regarding this point found in its initial brief, as well as the following additional argument.

The State maintains the correctness of the trial court's departure from the sentencing guidelines based upon its finding of physical distress and emotional trauma to the victim and Respondent's prior record and inability to become rehabilitated.

The Fourth District Court of Appeal properly found that great physical distress and emotional trauma was a proper basis for departing from the sentencing guidelines (PA at p.2). See also, Williams v. State, 9 F.L.W. 1862 (Fla. 5th DCA August 30, 1984); Green v. State, 9 F.L.W. 1909 (Fla. 2d DCA September 5, 1984); Williams v. State, 9 F.L.W. 1826 (Fla. 1st DCA August 23, 1984).

In addition to the case cited in the State's initial brief, the First District Court of Appeal has recently reiterated that a failure of a defendant to become rehabilitated is a proper basis for departing from the sentencing Guidelines. Mincey v. State, 9 F.L.W. 2341 (Fla. 1st DCA November 9, 1984).

The Second District Court of Appeal has again upheld prior convictions as a basis for departure from the guidelines. McCuiston v. State, 9 F.L.W. 2561 (Fla. 2d DCA December 7, 1984).

Without conceding that the other reasons stated by the trial court were improper, Petitioner asserts that the two reasons discussed above were clear and convincing reasons sufficient to uphold the trial court's departure from the sentencing guidelines.

POINT II

(By Respondent)

THE TRIAL COURT MET THE REQUIREMENTS OF FLA.R.CRIM.P. 3.701(d)(11) WHEN ITS REASONS FOR DEPARTURE WERE TRANSCRIBED.

Respondent argues that it is not sufficient to meet the requirements of Fla.R.Crim.P. 3.701(d)(11) that a trial court's verbal statements be transcribed by a court reporter and made part of the record on appeal. Petitioner maintains, as do three district courts of appeal, that transcription is a sufficient substitute for a written order for the purposes of the rule. See e.g., Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984); Brady v. State, 9 F.L.W. 2119 (Fla. 2d DCA October 5, 1984); Rutlin v. State, 455 So.2d 1347 (Fla. 5th DCA 1984). Only the First District Court of Appeal has stated, in dicta, that the reasons must be in a written order. Roux v. State, 455 So.2d 495 (Fla. 1st DCA 1984); Jackson v. State, 9 F.L.W. 1713 (Fla. 1st DCA August 6, 1984).

Respondent erroneously states that the Fourth District Court of Appeal did not have the benefit of the Supreme Court of Florida's opinion in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), when the court rendered its opinion in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984). This contention is clearly belied by the fact that the opinion in Rhoden was issued on April 5, 1984, and the opinion in Harvey was issued on June 13, 1984, some nine weeks later.

It is apparent that the Harvey court correctly differentiated the reasoning in Rhoden, which dealt with imposing adult sanctions on a juvenile, from sentencing an adult outside the sentencing guidelines. Respondent further refers to a statement made by Judge Sharp in his concurring opinion in Keeley v. State,* that a judge's oral statements at sentencing may be rambling and poorly expressed. Although that statement may be true, it is also true that written statements can be rambling and poorly expressed. Thus, Judge Sharp's reasoning is not a legitimate reason for requiring written statements.

The Fourth District Court of Appeal's holding in Harvey, supra, is analogous to the holding that the reasons for a trial court's finding under the habitual offender statute, §775.084(3)(d), Fla. Stat, 1983), that an offender should be sentenced to an extended period of time need not be in writing so long as the reasons are reported in the transcript. Eutsey v. State, 383 So.2d 219 (Fla. 1980). The same reasoning has been applied to the capital sentencing statute, §921.141(3), Fla. Stat. (1983), which states that "the court . . . shall set forth in writing its findings upon which the sentence of death is based . . ." This court has held that where the trial court dictated into the record its findings, such dictation, when transcribed, became a finding of fact in writing as required by the state. Thompson v. State, 328 So.2d 1 (Fla. 1976). The court has met this standard in the case at bar. In fact, the court specified that its statements should be transcribed by the court reporter (R 382).

*9 F.L.W. 2190 (Fla. 5th DCA October 11, 1984)

Petitioner would further point out that the check list of reasons for departing from the sentencing guidelines (R 438-440), which was adopted by the court, is sufficient to meet the writing requirement.

POINT III

(By Respondent)

IF THERE IS ONE CLEAR AND CONVINCING REASON FOR AGGRAVATING A GUIDELINES SENTENCE, THEN ANY OTHER STATED REASON IS MERELY SURPLUSAGE.

Respondent analogizes the present situation, where one or more reasons for departure from the sentencing guidelines may not be upheld by an appellate court, to capital sentencing where a mitigating factor is present and an aggravating circumstance is reversed. Petitioner asserts that the two situations are not analogous, since mitigating factors are not cited as a basis for departing from the sentencing guidelines and imposing a greater sentence. Nor is the instant situation analogous to a probation violation cause where only technical violations are left standing. In capital cases, this Court has upheld the death penalty when one of several aggravating circumstances has been reversed, but there are no mitigating factors present. See e.g., Troedel v. State, 9 F.L.W. 511 (Fla. December 6, 1984). If this procedure is proper in capital cases, it should certainly be proper for sentencing guidelines departure cases.

There is no need for a remand for resentencing when one clear and convincing reason for departing from the sentencing guidelines remains intact after appellate review.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that the Judgment and Sentence of the trial court be AFFIRMED, and the decision of the Fourth District Court of Appeal to remand the case for resentencing be QUASHED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished, by courier/mail, to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 2nd day of January, 1985.

Joan Fowler Rossin
Of Counsel