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IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

HERMAN JOHNSON, JR.,

Respondent.

CASE NO. 66,551

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS(cont'd)

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority in the trial court and the appellee in the First District Court of Appeal, will be referred to as "Petitioner" or "the State." Herman Johnson, Jr., the criminal defendant in the trial court and the appellant in the First District Court of Appeal, will be referred to as "Respondent."

The record on appeal consists of three volumes consecutively paginated and contains various transcripts and docket instruments. References thereto will be designated by "R" followed by the appropriate page number and enclosed in parentheses.

STATEMENT OF THE CASE AND FACTS

By information filed October 22, 1982, Respondent was charged with the September 5, 1982, armed robbery of an IGA food store (R 1). On September 26, 1983, Respondent entered a plea of nolo contendere to the charge (R 66-67; 189-190) and subsequently elected to be sentenced under the sentencing guidelines. (R 72).

A sentencing hearing was held on October 21, 1983. (R 118-137). At the hearing, Respondent was sentenced both for the armed robbery in the instant case and for another armed robbery to which he had entered a plea of guilty.[1] (R 118-137). In sentencing the Respondent in each case, the trial court departed from the recommended guidelines sentence, stating the following reasons, which the court explicitly held were equally applicable to each of the two offenses for which Respondent was being sentenced. (R 134-135):

> This sentence is outside the sentencing guidelines for the following reasons . . .
>
> [T]his robbery was out of the ordinary in that three people, not including yourself and co-defendants were placed in extreme danger by your using a firearm. I recognize that this is simply the elements of the robbery. The amount of money that was taken was substantial. It was found and recovered and returned to the victims but you not only placed the life of yourself and your co-defendant in danger but those of innocent parties, that being the

1. The sentence imposed for this latter offense is the subject of a companion case presently pending before this Court in case number 66,552.

> manager and two store employees of the victim, Winn Dixie.
>
> I think the utter disregard for the property rights of others, the utter disregard for the welfare and safety of not only of yourselves but of those other people and use of the firearm in this case are facts and circumstances which compel me to aggravate your sentence beyond sentencing guidelines.

(R 127-129). The trial court adjudicated Respondent guilty as charged for the instant offense and sentenced him to a life term with a three-year mandatory minimum and credit for 411 days served to run concurrently with the identical sentence imposed with regard to the other armed robbery offense. (R 75-78; 127, 134, 136).

Upon sentencing the Respondent, the court stated:

> The court reporter will transcribe the comments by the court as to aggravating circumstances and those shall become the court order in said case.

(R 133).

Respondent filed a timely notice of appeal on November 14, 1983. (R 79). On appeal to the First District Court of Appeal, the Respondent raised three issues: Whether his election to be sentenced under the guidelines was a violation of the prohibition against ex post facto laws because his election effectively waived any eligibility for parole; whether the trial court's reasons for departure from the guidelines were clear and convincing; and whether the trial court had erred in failing to reduce its reasons for departure to writing.

On December 21, 1984, the First District Court issued a

per curiam affirmance. On January 4, 1985, the Respondent filed a Motion for Rehearing, Clarification, and Request to Certify Question. In that motion, the Respondent noted that in a companion case (involving the Respondent's other armed robbery conviction) issued the same day as the court's per curiam affirmance in this case, the First District Court had vacated Respondent's sentence and remanded the cause for resentencing because the trial court had erred in not reducing its reasons for departure to writing. Johnson v. State, 462 So.2d 49 (Fla. 1st DCA 1984). Arguing that the two opinions as they then stood could not be reconciled, the Respondent sought to have his sentence in the instant cause remanded for a reduction into writing of the reasons for departure. The State responded by joining in this motion and requesting the certification of the question of whether a trial court must reduce to writing reasons for departure it has orally pronounced on the record.

On January 29, 1985, the First District withdrew its December 21, 1984, opinion and denied all requests for certification. In a new opinion issued January 29, 1985, the court found the trial court's failure to provide a written statement of reasons for departing from the presumptive guideline sentence to be reversible error, vacated the sentence, and remanded the cause for resentencing. (attached).

On February 12, 1985, the State filed its Notice of Intent to Seek Discretionary Review. The following day, the

Respondent filed his Notice of Intent to Seek Discretionary Review/Cross-Notice of Intent to Seek Discretionary Review. This Court accepted jurisdiction of this cause on June 10, 1985.

SUMMARY OF ARGUMENT

The First District Court of Appeal has erroneously construed the language of § 921.001(6) and Fla.R.Crim.P. 3.701 (the sentencing guidelines provisions) in a strained and overly literal manner, to require a separate written statement of reasons for departure. The Second, Third and Fifth District Courts of Appeal have consistently rejected such construction and have held that transcription by a court reporter of the trial court's oral articulation of reasons for departure is the "functional equivalent" of the separate written statement required by the First District because it provides as sufficient a basis for appellate review as that separate written statement. It is because of this practical rationale that the State urges this Court to adopt the view of the majority of Florida's appellate courts on this issue.

This issue is presently before this Court in the following cases: State v. Oden, F.S.C. Case No. 66,650; State v. Jackson, F.S.C. Case No. 65,857; State v. Hernandez, F.S.C. Case No. 66,875; State v. Boynton, F.S.C. Case No. 66,976; and State v. Schmidt, F.S.C. Case No. 67,122.

ISSUE

THE DISTRICT COURT ERRED IN HOLDING THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DEPARTING FROM THE GUIDELINES WITHOUT REDUCING THE REASONS FOR DEPARTURE TO WRITING.

The instant case is yet another in a long line of cases in which the First District Court of Appeal has held that the failure of a trial court to reduce to writing its orally pronounced reasons for departure is reversible error. See Reichman v. State, 10 F.L.W. 1481 (Fla. 1st DCA June 13, 1985); Holder v. State, 10 F.L.W. 1371 (Fla. 1st DCA June 6, 1985); Schmidt v. State, 10 F.L.W. 1252 (Fla. 1st DCA May 21, 1985); Wright v. State, 467 So.2d 322 (Fla. 1st DCA 1985); Hernandez v. State, 465 So.2d 577 (Fla. 1st DCA 1985); Harris v. State, 465 So.2d 545 (Fla. 1st DCA 1985); Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984); Millett v. State, 460 So.2d 489 (Fla. 1st DCA 1984); Walker v. State, 458 So.2d 396 (Fla. 1st DCA 1984); Roux v. State, 455 So.2d 495 (Fla. 1st DCA 1984); Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984). Indeed, the First District's precise interpretation of the requirement of a written statement as set forth in Fla.R.Crim.P. 3.701(d)(11) was first enunciated in Jackson v. State, supra, where, in a footnote, the court expressly construed Rule 3.701(d)(11) to require a "contemporaneous written statement (rather than an oral statement to be transcribed later) to be made at the time of sentence." Jackson at 692, note 2. (Emphasis supplied).

No other district court of appeal shares such an impractical and hypertechnical interpretation of Rule 3.701(d)(11). Even the Fourth District, which recently receded from its holding in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), to now hold in Boynton v. State, 10 F.L.W. 795 (Fla. 4th DCA March 27, 1985), that more than an oral pronouncement at sentencing of the court's reasons for departure is necessary to meet the requirement of 3.701(d)(11), has not construed the rule as narrowly as the First District. Contrary to the First, the Fourth District has held in Boynton that the dictation of reasons for departure to a court reporter or a secretary to be subsequently transcribed and then submitted to the trial court for review and acknowledgment suffices as a "written statement" of reasons for departure. Boynton, 10 F.L.W. at 796.

The majority position on this issue, however, and the one the State now urges this Court to adopt, is the view held by the Second, Third, and Fifth District Courts of Appeal. Those courts have consistently refused to place form over substance by reversing for lack of written reasons when the trial court's oral statement of reasons for departure are, as here, transcribed in the record. See Browning v. State, 465 So.2d State v. Overton, 464 So.2d 607 (Fla. 3d DCA 1985); Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985); Frazier v. State, 464 So.2d 458 (Fla. 2d DCA 1985); Emory v. State, 462 So.2d 1242 (Fla. 2d DCA 1985); Lyons v. State, 462 So.2d 883 (Fla. 2d DCA 1985); Ramsey v. State, 462 So.2d 875 (Fla. 2d DCA 1985);

Webster v. State, 461 So.2d 965 (Fla. 2d DCA 1985); Bell v. State, 459 So.2d 478 (Fla. 5th DCA 1984); Brady v. State, 457 So.2d 544 (Fla. 2d DCA 1984); Fleming v. State, 456 So.2d 1300 (Fla. 3d DCA 1984); Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984); Hackney v. State, 456 So.2d 1209 (Fla. 5th DCA 1984); Klapp v. State, 456 So.2d 970 (Fla. 2d DCA 1984); Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984).

The rationale behind this majority holding is an obvious and practical one: there is no need to reverse a cause for resentencing simply because the trial judge did not contemporaneously reduce to writing his reasons for departure when the court's oral pronouncement of the reasons for departure was dictated into the record and transcribed, thereby preserving those reasons for purposes of appellate review. This was clearly the reasoning behind the Fifth District's holding in Burke v. State, supra, where the court stated:

> Subsection d.11 of criminal rule 3.701 requires that the trial court accompany any sentence outside of the guidelines with a "written statement delineating the reasons for departure." In the instant case the trial court did not provide a written statement. The court did, however, dictate its reasons for departure into the record. Those reasons are transcribed and are part of the record on appeal. Like the Fourth District Court of Appeal, we believe that oral explanation in the record sufficiently provides the opportunity for meaningful appellate review for purposes of Florida Rule of Criminal Procedure 3.701. Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984); Cf. Cave v. State, 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976).

Id. at 1246.

Accord, Fleming v. State, supra; Brady v. State, supra; Webster v. State, supra; Bell v. State, supra. Also see Tucker v. State, supra; Emory v. State, supra, and State v. Overton, supra. Thus, in essence, it is the position of the Second, Third, and Fifth District Courts of Appeal that, as aptly stated by the Third District in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985) in a footnote, a transcript of a trial court's oral statement of reasons for departure is "the functional equivalent of the written statement of reasons because it is equally amenable to appellate review." Id. at 526, n. 2.

In this vein, it is interesting to note that in Burke, supra, the court, in reaching its decision, relied in part, upon the capital cases of Cave v. State, 445 So.2d 341 (Fla. 1984) and Thompson v. State, 328 So.2d 1 (Fla. 1976). In Cave, the defendant was found guilty of first degree murder and sentenced to death. While on appeal to this Court, the defendant moved the Court, inter alia, to vacate his death sentence and to impose a sentence of life imprisonment on the ground that the trial court failed to make written findings of fact in support of the sentence of death, pursuant to section 921.141(3) Florida Statutes (1981)[2] As a result, the defendant asserted

2. Section 921.141(3), Florida Statutes (1981) provides in pertinent part:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

that the trial court's order imposing the death sentence was null and void. In declining to vacate the sentence, the Court held:

> It must be stressed that the trial judge did dictate his findings in support of the sentence of death into the record at the time of sentencing. We have previously held that "[s]uch dictation, when transcribed, becomes a finding of fact in writing and provides the opportunity for meaningful review as required by 921.141, Florida Statutes." Thompson v. State, 328 So.2d 1 (Fla. 1976). Accordingly, we deny appellant's motion to dismiss for lack of jurisdiction to vacate the death sentence, to remand for imposition of a life sentence, and to order this matter to the Fourth District Court of Appeal for further appellate review.

Id. at 342. It should be noted that although the Cave Court did not vacate the defendant's death sentence, it did, apparently in an abundance of caution, grant the State's motion to temporarily relinquish jurisdiction to the trial court so that the record could be supplemented with the trial court's written findings. Nevertheless, the holdings in Cave and Thompson clearly stand for the proposition that even in capital cases the trial court's dictation into the record of its findings in support of a sentence of death, when transcribed, suffices as "a finding of fact in writing and provides the opportunity for meaningful review." [Emphasis supplied]. The fact that the Court in Cave simply temporarily relinquished jurisdiction for supplementation of the record is also significant inasmuch as presently in noncapital sentencing guidelines cases the First District is vacating sentences and remanding for

resentencing simply because the trial court did not reduce its orally pronounced(and subsequently transcribed)reasons for departure to writing.

The lesson to be learned by the appellate courts—and most notably by the First District—from the Cave and Thompson decisions is that appellate courts should never vacate a sentence imposed pursuant to the sentencing guidelines on the sole ground that the reasons for departure, dictated into and transcribed as a part of the record on appeal, were not reduced to writing. Moreover, if the record on appeal reflects, as in the instant case, the court's dictated reasons for purposes of appellate review, there is no need to relinquish jurisdiction for the supplementation of a separate written statement. Rather, it appears that such a temporary relinquishing of jurisdiction would only be necessary in situations where, unlike the instant case, the record on appeal, upon a thorough review by the appellate court fails to set forth for the purposes of appellate consideration any reasons for departure, either in the form of a separate written statement or by means of dictation into the record. However, the Second, Third, and Fifth Districts have, through their holdings, implicitly suggested that this latter avenue should be the exception and not the rule. Indeed, as long as the record contains at least a transcription of the court's dictated reasons for departure either as part of a transcript of a court proceeding or as a separately transcribed document, the Second, Third, Fifth (and

in certain circumstances, the Fourth) Districts have all held that such a transcription is the "functional equivalent of the written statement." See State v. Williams, supra.

Given this together with the fact that the dictation of reasons for departure into the record will virtually always suffice for purposes of appellate review, the impracticality of the First District's overly strict interpretation of the phrase "written statement" becomes even more apparent. Section 921.001(6) Florida Statutes provides that:

> The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge.

(Emphasis added). The word 'writing' as contained in section 921.001(6) is defined and is to be construed according to section 1.01(4), Florida Statutes (1983), which provides:

> The word "writing" includes handwriting, printing, typewriting, and all other methods and means of forming letters and characters upon paper, stone, wood, or other materials.

Considering this definition, it is ludicrous to hold that the printed transcription of reasons for departure appearing in the record, dictated by the trial judge and transcribed by the official court reporter, does not satisfy the writing requirement. Apparently, the First District would rather struggle to decipher the illegible handwriting of a trial judge than look at the printed transcript which contains exactly what was said by the court.

Additionally, it is an unreasonable demand on the often

precious time of a trial judge to require that he/she write out the reasons on a separate piece of paper, or dictate them separately to the secretary and have the secretary type such reasons. This type of demand is "senseless make-work" since the orally stated reasons contained in the transcript and made a part of the record should be sufficient for all purposes. "A trial judge's job is difficult enough without senseless make-work." Wainwright v. Witt, ___ U.S. ___, 83 L.Ed.2d 841 (1985).

Thus, the reasonable and practical solution to the conflict between the courts is for this Court to hold that the district courts must first look to the transcript (provided there is no separate written statement of reasons) to determine whether clear and convincing reasons for departure were adequately set forth in the record by the trial judge. If there is no "functional equivalent to the written statement" in the record, then the appellate court should temporarily relinquish jurisdiction to the trial court for the purpose of filing written reasons for departure. This procedure would save the taxpayers' money as time would be better utilized in the appellate process; the cost of having second sentencing hearings would be non-existent; and, most importantly, already overcrowded trial dockets would not be further burdened by requiring trial courts to conduct senseless resentencing hearings.

CONCLUSION

The State urges this Court to listen to the majority of jurists in Florida and reverse the First District on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Carl McGinnis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 1st day of July, 1985.

PATRICIA CONNERS
OF COUNSEL