IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

CASE NO. 66,650

MARK ODEN, WILLIAM RUNYON, and GARY BOTTO,

RESPONDENTS.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondents Oden, Botto, and Runyon (appellants-defendants below) pleaded guilty to the offenses of attempting to cause a riot, throwing deadly missiles, and burglary. In sentencing respondents, the trial court deviated from the sentencing guidelines, orally stating the reasons for such departures at the sentencing hearing. The transcripts of the sentencing hearing are a part of the record; the relevant excerpts therefrom are, as to each respondent:

ODEN

> As this Court has stated in previous sentencings, this has been a difficult series of cases, so far as trying to be totally fair and just in the disposition of the defendants. Some of the defendants were sentenced outside of the guidelines because the guidelines had

not come into effect. Others were sentenced as habitual offenders, which took the matter outside of the guidelines.

The pleas in this case and the others that decided to be disposed of today were within the guidelines. The defendants did agree to plead guilty to all charges -- Mr. Oden did -- and agreed that if the Court went outside the guidelines, it would -- the sentence would not exceed 12 years.

The Court ordered a presentence investigation, which the Court considered to be incomplete and not giving the Court the relative responsibility and part that these defendants played in the overall riot situation that took place on January 23, 1983, at the Cross City Correctional Institute.

The Court ordered additional information for the PSI, which has been submitted to the Court, which contains some inconsistencies as pointed out and read by Mr. Bishop, and recognized by the court. And the Court disregards the statements of those officers whose testimony is inconsistent with the sworn previous testimony, and does disregard them in rendering this decision.

The Court feels that the relative activity and participation and leadership in this riot is a relevant factor for this Court to consider. And it has tried to do so in this instance. The Court feels that in this case the Court should and does deviate from the guidelines, which in this case would mean a maximum sentence of three years, I believe.

* * *

The reasons for deviation are as follows:
One, the overwhelming testimony of the officers indicate that was -- that this defendant, Mark Oden was -- Mark Steven Oden was one of the chief leaders and instigators of the riot which resulted in the property damage of over $80,000, of disruption of the operation of the institute for a period of several hours, resulting -- although he's not charged, this defendant -- resulting in injury, serious injury to one individual and minor injuries to others.

That Oden did lead in instigating, inciting, and participating in this riot.

Further, that the application of the guidelines in this case present an anomalous situation. If this

> defendant had been charged only with attempting to cause a riot, the discrepancy and inconsistency and illogic of the guidelines, in particular in assessment of points for previous convictions, would call for a maximum sentence of ten years; whereas by pleading to five different offenses, the point total would cause the placing of the primary offense in a different category and results in a maximum sentence of three years. To me, this makes no sense whatsoever, and was not the intention of the legislature or the court, to create such an anomalous situation as this.

(R 266-269). The trial court sentenced Oden to two years on each count, consecutive, for a total of ten years, to run consecutive to Oden's present prison sentence.

RUNYON

> The court finds, from the preponderance and totality of the deposition testimony of the guards that were on duty that day, that the defendant, William Runyon, was in fact one of the main leaders of this disturbance and riot that cost, I think, $80,000 worth of damage and injured several people, threatened others. He was a leader, along with Mr. Oden, in the participation in the riot, and that the court should deviate from the guidelines for that ground and on the grounds announced in Mr. Oden's sentencing. The inconsistency, the anomaly of the fact that he was sentenced in this case only in attempting to cause a riot. The maximum he could have received would have been ten years; whereas, under the guidelines, for all of the four offenses, it's only four years.

(R 309). The trial court sentenced Runyon to two years on each count, consecutive, for a total of eight years, to run consecutive to Runyon's present sentence.

BOTTO

> The court now being fully informed of the circumstances surrounding the entry of your plea, and the facts and circumstances surrounding the charge, and having examined the presentence investigation report and the depositions

> of several of the Department of Corrections officers cited in that report, I find that there are some discrepancies between the sworn depositions and the statements referred to in the presentence investigation report. But that in the totality of reporting, including the depositions, the court finds that Gary Vincent Botto was in fact one of the leaders in instigating and carrying out the riot that involved over 41 inmates being charged, and incurring damages in excess of $80,000 to the State correctional institution, as well as resulting in injuries, serious injury to one officer and minor injuries to others, and the threat of injury to still others.
>
> The court finds that the defendant was in fact one of the leaders in that and finds that as one ground for deviating from the guidelines in this case.
>
> The Court further finds, as announced in the other two sentencings of Mr. Oden and Mr. Runyon, that the application of the guidelines in this case, under the circumstances here, along with the sentencing of others who were less involved than these three individuals, including Mr. Botto, would work a substantial injustice and unfairness and unreasonableness in that, among other things in this case, of Mr. Botto pled merely to the offense of attempting to cause a riot, he could have received a sentence of 15 years under the guidelines; whereas in pleading to all four offenses, under the category adjustment by that, he can receive under the guidelines only four years.
>
> For these grounds and those stated in the case of the State of Florida versus Runyon and the State of Florida versus Oden, the Court does find that it should deviate and does deviate from the guidelines in this instance.

(R 334-335). The court sentenced Botto to two years on each count, consecutive, for a total of eight years, to run consecutive with Botto's present sentence.

On appeal to the First District Court of Appeal, the First District held that it was reversible error for the trial court to depart from the guidelines without providing a contemporaneous written statement of the reasons therefor at the time each sentence was pronounced, citing to Jackson v. State,

454 So.2d 691 (Fla.1st DCA 1984). On motion for rehearing and request for certification of conflict filed by the State, the First District entered another opinion and certified conflict with Bell v. State, 459 So.2d 478 (Fla.5th DCA 1984); Webster v. State, ___ So.2d ___ (Fla.2d DCA 1984), 9 F.L.W. 2419; Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984); Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984); Burke v. State, 456 So.2d 1245 (Fla.5th DCA 1984); Klapp v. State, 456 So.2d 971 (Fla.2d DCA 1984); Smith v. State, 454 So.2d 90 (Fla.2d DCA 1984); and Harvey v. State, 480 So.2d 926 (Fla.4th DCA 1984).

On February 28, 1985, the State filed its Notice to Invoke the discretionary jurisdiction of this Court.

ISSUE

IT IS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO INCLUDE A SEPARATE WRITTEN STATEMENT OF REASONS FOR DEPARTURE FROM THE GUIDELINES WHERE THE TRIAL COURT HAS STATED SUCH REASONS FOR DEPARTURE AT THE TIME OF SENTENCING AND SUCH REASONS ARE TRANSCRIBED AND MADE A PART OF THE RECORD.

ARGUMENT

The First District's holding that the failure to include a separate written statement of reasons is reversible error is in direct conflict with the holdings of the Second District[1], Third District[2], Fourth District[3], and Fifth District[4] Courts of Appeal on this same issue. Subsequent to the First District's

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1 Smith v. State, 454 So.2d 90 (Fla.2d DCA 1984); Klapp v. State, 456 So.2d 971 (Fla.2d DCA 1984); Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984); Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984); Webster v. State, No. 84-388 (Fla.2d DCA Nov. 14, 1984), 9 F.L.W. 2419.

2 See Footnote 5, infra.

3 Harvey v. State, 450 So.2d 926 (Fla.4th DCA 1984).

4 Burke v. State, 456 So.2d 1245 (Fla.5th DCA 1984); Bell v. State, 459 So.2d 478 (Fla.5th DCA 1984).

certification of conflict in the present case, at least three additional cases have been decided which would also qualify as being in conflict with the first District's position[5].

Section 921.001(6), Fla.Stat. (1983), states 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." Fla.R.Crim.P. 3.701(d)(11), concerning departures from the guidelines, provides that "any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for departure." The Committee Note to that Rule explains:

> Reasons for departure shall be articulated at the time sentence is imposed. The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure.

In Harvey v. State, 450 So.2d 926 (Fla.4th DCA 1984) the Fourth District refused to reverse the trial court on the basis of a failure to provide a written statement of reasons for departure, since the reasons were in fact transcribed as a part of the record. In ruling, the Fourth District explained that an oral explanation in the record sufficiently provides the opportunity for meaningful appellate review for purposes of Fla.R.Crim.P. 3.701. The Second District followed Harvey in

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5 Emory v. State, Nos. 84-645, 84-646 (Fla.2d DCA Feb. 20, 1985), 10 F.L.W. 480; Tucker v. State, No. 84-561 (Fla.3rd DCA Feb. 19, 1985), 10 F.L.W. 462; State v. Overton, (Fla.3rd DCA Feb. 26, 1985), 10 F.L.W. 509.

Smith v. State, 454 So.2d 90 (Fla.2d DCA 1984), holding that the oral reasons in the transcript of the sentencing hearing are sufficient. Likewise, in Klapp v. State, 456 So.2d 970 (Fla.2d DCA 1984) it was held that the failure to include written reasons was not error because the reasons were clearly articulated at the sentencing hearing, a transcript of which was in the record. The Fifth District agreed with Harvey in Burke v. State, 456 So.2d 1245 (Fla.5th DCA 1984), in which Judge Dauksch explained:

> 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 the 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, 480 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).

At 1246. Accord, Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984); Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984); Webster v. State, No. 84-388 (Fla.2d DCA Nov. 14, 1984), 9 F.L.W. 2419; Bell v. State, 459 So.2d 478 (Fla.5th DCA 1984). Also see Tucker v. State, No. 84-561 (Fla.3rd DCA Feb. 19, 1984), 10 F.L.W. 462; Emory v. State, Nos. 84-645, 84-646 (Fla.2d DCA Feb. 20, 1985), 10 F.L.W. 480; and State v. Overton, (Fla.3rd DCA Feb. 26, 1985), 10 F.L.W. 509. And, the Third District in State v. Williams, No. 84-751 (Fla.3rd DCA Feb. 12, 1985), 10 F.L.W. 432 noted in a footnote that the Second, Fourth and Fifth Districts

> have held that a transcript of the 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. The First District reads Florida Rule of Criminal Procedure 3.701 d.11 literally and holds to the view that a written statement must be filed contemporaneously with the pronouncement of sentence. See Roux v. State, 455 So.2d 495 (Fla.1st DCA 1984); Jackson v. State, 454 So.2d 691 (Fla.1st DCA 1984). Whether the transcript, rather than the separate written order, is or is not equally amenable to appellate review, nothing less than a filed transcript will fulfill the requirement of a written statement. . . .

10 F.L.W. 432, 433 n. 2.

The First District's position on this issue is clearly an overly strict literal interpretation of the words "written statement." In Jackson v. State, 454 So.2d 691 (Fla.1st DCA 1984); Roux v. State, 455 So.2d 495 (Fla.1st DCA 1984) and the instant case the First District has interpreted the rule to require a separate, contemporaneous written statement of reasons for departure. The First District would require the beleaguered and often overworked trial judge to write out or dictate to his secretary a separate order of written reasons for departure[6]. "A trial judge's job is difficult enough without senseless make-work." Wainwright v. Witt, ___ U.S. ___, 36 Cr.L 3116

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6 It is interesting that the First District noted in Coates v. State, 458 So.2d 1219 (Fla.1st DCA 1984) that there is no requirement that the trial judge sign his name to the written reasons for departure.

(1-21-85).To require the trial judge to write out his reasons or dictate them separately to his secretary and have the secretary then type such reasons, 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. The First District erred when it interpreted the rule to require a separate written document; according to a basic tenet of statutory construction, words are not to be interpreted in a strained, literal manner. Section 1.01(4), Fla.Stat. (1983), provides that

> 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.

As such, the word "writing" contained in Section 921.001(6) certainly encompasses an explanation by the trial judge, transcribed by an official court reporter, and filed in the official court record.

CONCLUSION

For the reasons stated hereinabove, the First District's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been forwarded to Michael Allen, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 26th day of March 1985.

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