No Reg Case 6/17

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO.: 66,846

DAVID E. HARRIS,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

David E. Harris, the criminal defendant and appellant in Harris v. State, 465 So.2d 545 (Fla. 1st DCA 1985), will be referred to herein as Respondent. State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

The symbol "R" followed by the appropriate page number(s) will be used in this brief for citations to the record.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information filed March 31, 1983, in the circuit court of the Fourteenth Judicial Circuit, Bay County, Florida, with one count of grand theft. (R 1).

Respondent entered a plea of guilty before Circuit Judge N. Russell Bauer, on April 15, 1983. (R 5). Respondent was placed on probation for a period of one year. (R 5). On February 6, 1984, a hearing was held wherein Respondent's probation was revoked. (R 12). Respondent was found guilty of grand theft and sentenced to five years in state prison. (R 14,17). At sentencing, the trial court stated in open court:

> THE COURT: Mr. Harris, you are now before the Court attended by your attorney, Ms. Pam Sutton in Case Number 83-286. The Court is aware that you've previously been placed on probation in said case for the offense of grand theft and that probation has been subsequently revoked after a finding that you've violated the conditions of that probation.
>
> The Court is also in receipt of sentencing guidelines scoresheet which indicated any non-prison sanction. I assume that the defendant wishes to be sentenced under sentencing guidelines?
>
> MS. SUTTON: Yes, sir.
>
> THE COURT: The guidelines recommended any non-prison sanction, non-state prison sanctions are not applicable inasmuch as this is a violation of probation. The

> defendant in violating conditions of probation the Court considers that factor sufficient to aggravate the sentence beyond sentencing guidelines and will not follow the recommended guidelines sentencing of any non-prison sanction.
>
> His election to be sentenced under sentencing guidelines will be noted for the record and does not waive any rights.
>
> Do you have any valid reason to show why sentence should not be imposed upon your client, Ms. Sutton?
>
> MS. SUTTON: No, sir.

(R 54,55).

On February 19, 1985, the First District Court of Appeal affirmed the trial court's departure from the guidelines recommended range but vacated and remanded for resentencing because the trial court failed to reduce his reasons for departing into a writing. The First District Court of Appeal also certifed conflict with decisions of the other district courts of appeal, on the issue of the need for written reasons for departing from the sentencing guidelines as opposed to the oral pronouncement of reasons for departure to be transcribed by the court reporter for inclusion in the record on appeal.

Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida was filed on April 8, 1985. This Court entered an order granting jurisdiction on August 19, 1985.

SUMMARY OF ARGUMENT

The First District Court of Appeal has erroneously construed the language of Section 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 upheld that transcription by a court reporter of the trial court's oral articulation of reasons for departure provides a sufficient and necessary basis for appellate review.

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. 65,957, State v. Hernandez, F.S.C. Case No. 66,875; State v. Schmidt, F.S.C. Case No. 67,122; and State v. Boynton, F.S.C. Case No. 66,971.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT'S FAILURE TO INCLUDE A SEPARATE WRITTEN STATEMENT OF THE REASONS FOR DEPARTURE FROM THE RECOMMENDED SENTENCING GUIDELINES RANGE IS PER SE REVERSIBLE ERROR WHERE THE TRIAL COURT HAS ORALLY EXPLAINED SUCH REASONS FOR DEPARTURE AT THE TIME OF SENTENCING, AND SAID REASONS ARE TRANSCRIBED AND MADE A PART OF THE APPELLATE RECORD.

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

The Fourth District Court of Appeal originally held in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984) that a separate writing was not required, but has since receded from that opinion in an en banc proceeding. See Boynton v. State,

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[1] Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984); Klapp v. State, 456 So.2d 970 (Fla. 2d DCA 1984); Fleming v. State, 456 So.2d 1300 (Fla. 2d DCA 1984); Grady v. State, 457 So.2d 544 (Fla. 2d DCA 1984); Webster v. State, 461 So.2d 465 (Fla. 2d DCA 1985).

[2] Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985); State v. Overton, 464 So.2d 607 (Fla. 3d DCA 1985).

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

10 F.L.W. 795 (Fla. 4th DCA March 27, 1985).

Thus the First District is not only in conflict with three other appellate courts, but has also apparently overlooked the clear dictates of Section 924.333, Florida Statutes (1983)[4] which expressly provides that it shall not be presumed that an error injuriously affected the substantial rights of an appellant.

It is the duty of the district court to examine the record carefully and determine whether an alleged error is injurious in a given case. See State v. Wilson, 276 So.2d 45 (Fla. 1973). However, as stated by the court below in the similar case of Schmidt v. State, 10 F.L.W. 1252 (Fla. 1st DCA May 21, 1985), the First District has exhibited a refusal to examine each case where the technical violations of the guidelines procedure constitutes harmful or harmless error:

> However, we would much prefer strict adherence to the purely mechanical features of the guidelines sentencing process, since the alternative is the needless amassing of yet another body of law if we should be required, on a case-by-case basis, to decide when compliance with various steps in the

---

[4]Section 924.33 Florida Statutes (1983) provides: No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

> process might be irrelevant and when material to the outcome, and therefore reversible error.

Id. at 1252.

The First District has retreated from its responsibilities which, interestingly enough, were espoused by Judge Wentworth in another unrelated case: Williams v. State, 468 So.2d 335, 337 (Fla. 1st DCA 1985) stating:

> Other recent treatment of the harmless error doctrine in different contexts indicates agreement by our Court with the analysis of the doctrine in U.S. v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), reflecting concern "that when courts fashion rules whose violations mandate automatic reversals, they "retreat [] from their responsibilities, becoming instead "impregnable citadels of technicality."'" 76 L.Ed.2d at 106.

Here, the First District has fashioned a rule of automatic reversal in every case where departure reasons are not written separately from the transcribed notes of the orally articulated reasons. The First District has become an "impregnable citadel of technicality" as regards to the writing requirement of the sentencing guidelines.

Section 921.001(6) Florida Statutes (1983), states that "The sentencing guidelines shall provide that any sentence imposed outside the recommended 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 the similar case of Harvey v. State, supra, the Fourth District initially refused to reverse a 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 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 Florida Rules of Criminal Procedure 3.701. The Second District followed Harvey with Smith v. State, supra, 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 failure to include written reasons was not error because the reasons were clearly articulated at the sentencing hearing, the transcript of which was in the record. The Fifth District agreed with Harvey in Burke, supra, in which Judge Dauksch explained:

> Subsection (d)(11) of Criminal Rule 3.701 requires that the trial court accompany any sentence 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 a 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 Fla.R.Crim.P. 3.701. Harvey v. State, 450 So.2d 925 (Fla. 4th DCA 1984); Cf. Kaye v. State, 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976). Id. at 1246.

Similarly, in State v. Williams, 463 So.2d 525(Fla. 3d DCA 1985) the court 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 Fla.R.Crim.P. 3.701(d)(11) literally and holds to the view that a written statement must be filed contemporaneously with 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 file transcript will fulfill the requirement of a written statement. . .

Id. at 526,527n.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, the often over-worked trial judge to write out or dictate to his or her secretary a separate order of written reasons for departure, even though the same court 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. Even Judge Joanos, in his specially concurring opinion in Jackson, agreed that:

> Under some circumstances the failure to provide a contemporaneous written statement could be harmless error where an oral statement is promptly reduced to writing in a manner so as not to prejudice in any way an appellant's right of review. I, therefore, dissent from the majority's disagreement of the Harvey case.

Id. at 693.

The First District erred when it interpreted the rule to require a separate written document and ignored a basic tenant of statutory construction, to-wit: words are not to be interpreted in a strained, literal manner. Section 1.01(4),

Florida Statutes (1983) provides that:

> The word "writing" include hand-writing, 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.

This common sense interpretation of the word "writing" comports with what United States Supreme Court held in Wainwright v. Witt, ___U.S.___, 83 L.Ed.841 (1945), wherein a capital defendant had complained that the trial court erred in failing to make written findings. Justice Rehnquist opined that:

> Anyone familiar with the trial court practice knows that the court reporter is relied upon to furnish an accurate account of what is said in the court-room. The trial judge regularly relies upon this transcript as written indicia of various findings and rules; it is not uncommon for the trial judge to merely make extemporaneous statements of findings from the bench. Our conclusion is strengthened by the view of available alternatives. We decline to require any judge to write out in a separate memorandum his specific findings on each juror excuse. A trial judge's job is difficult enough without senseless make-work.

Id. at 855,856.

Petitioner urges this Court to reject the court below's elevation of form over substance and the further requirement of "senseless make work" and allow a trial judge to orally explain his clear and convincing reasons for a departure from the recommended range where the oral explanation is contemporaneously recorded by a court reporter or a transcription and is made available for appellate review.

Furthermore, the holding of the court below directly conflicts with the sentencing guidelines provision that states the trial court must provide an oral or contemporaneous explanation to the defendant on the basis of the departure at the time of sentencing. The simple wisdom of this rule and how it relates to the jurisprudential notions of fairness and the sound administration of justice is that when the trial court orally explains his reasons for departure, whether an upward or downward departure, the affected party is allowed sufficient opportunity to vent his objections and establish a record for appellate review in support of his position. Under the First District's position, a trial court may depart from the guidelines and not allow a defendant or the state an opportunity to object to the clear and convincing reasons given by simply filing a separate written statement of reasons whether they are in illegible handwriting or a typewritten dictation to satisfy the statutory requirement.

Also, under the First District's position, the only basis for appellate review of a sentencing guidelines departure, may be the unsigned, illegible, senseless make-work of a judicial scrivener, rather than an oral explanation, fully argued in open court and transcribed by a court reporter. Trial judges who face this difficult task of exercising their inherent judicial discretion at sentencing deserve better than that.

CONCLUSION

This Court should reject the holding of the court below and specifically find that there is no need for a separate written statement of reasons for departure where the trial court has orally explained his reasons for departure at the sentencing hearing, and those reasons have been transcribed by the court reporter and are part of the appellate record. This is especially true where the reason for departure given, a violation of probation has clearly been held to be a valid reason for departure and was approved by instant court. This court should quash the opinion below and affirm the original judgment and sentence of the trial court.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioner's Brief on the Merits was forwarded to Larry G. Bryant, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 4th day of September, 1985.

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