IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	)	
	(	
Petitioner,	(	
	)	
vs.	(	CASE NO. 66,875
	)	
RANDALL HERNANDEZ,	(	
	)	
Respondent.	(	

PETITIONER'S BRIEF ON THE MERITS

Jim Smith
Attorney General

Gary L. Printy
Assistant Attorney General
The Capitol
Tallahassee, FL 32301

Counsel for Petitioner

TABLE OF CITATIONS

CASES

STATUTES

OTHER CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 66,875
RANDALL HERNANDEZ, Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

The Petitioner, State of Florida, was the prosecution in the trial court below and the Appellee in the District Court of Appeal. The Respondent, Randall Hernandez, was the defendant in the trial court below and the Appellant in the District Court of Appeal.

The following symbols will be used in this brief, followed by the appropriate page number(s):

"R" -- Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Respondent, Randall Eugene Hernandez, was under community control for uttering a forged prescription when he was arrested and his probation revoked. (R-37, 39) Respondent elected to be sentenced under the sentencing guidelines which recommended any non-state prison sanction. (R-42) The trial court sentenced Respondent to five years incarceration and gave the following explanation which was transcribed by the court reporter:

> The court having previously placed you on probation in case number 83-275 for the offense of uttering a forged instrument on October 21, 1983, and thereafter having revoked said probation for violation of the conditions as follows: condition 5, failure to remain at liberty without violating the law in that on 12-22-83 you were arrested by Cedar Grove Police Department for driving under the influence of alcohol and you were arrested that same time for using a false name of Michael Eugene Hernandez. And that you failed to remain confined in your approved residence. You were a community controllee and that was against the permission of your community control officer, Mr. Surrett. (R-90)

Respondent filed timely notice of appeal on April 13, 1984. (R-50) On March 13, 1985, the First District Court of Appeal filed an opinion which approved the departure given the violation of probation, but remanded for resentencing due to the failure of the trial court to provide a written explanation for the departure. See Appendix at page 1. The court, acting pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(vi), certified conflict with the authority sited in Oden v. State, 10 F.L.W. 37 (Fla. 1 DCA Feb. 7, 1985). See Appendix, pg. 2.

Petitioner filed timely Notice to Invoke the Discretionary Jurisdiction of this Court on April 12, 1985.

SUMMARY OF ARGUMENT

The sentencing guidelines, as enacted by the legislature, require that the trial court explain in writing any sentence which departs from the recommended range. The Second, Third, and Fifth District Courts of Appeal have held transcription by a court reporter of the trial court's oral explanation of the reasons for departure provides a sufficient and necessary basis for appellate review. The court below erred in rejecting this construction of the applicable statutory provision.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT'S FAILURE TO INCLUDE A SEPARATE WRITTEN STATEMENT OF THE REASONS FOR DEPARTURE FROM THE RECOMMENDED 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 RECORD.

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], and the 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, 10 F.L.W. 790, (Fla. 4th DCA March 27, 1985).

---

[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, 9 F.L.W. 2419 (Fla. 2d DCA November 14, 1984).

[2]Tucker v. State, 10 F.L.W. 462, (Fla. 3d DCA February 19, 1985); State v. Overton, 10 F.L.W. 509 (Fla. 3d DCA February 26, 1985).

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

Section 921.001(6), Florida Statute 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 the seminal 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 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 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 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, 450 So.2d 925 (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.

Similarily, in State v. Williams, 10 F.L.W. 432 (Fla. 3d DCA, Feb. 12, 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 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. . . .

Id, at 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 for reasons for departure. The First District would require the beleaguered, the often overworked 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, supra, 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 anyway an appellant's right of review. I, therefore, dissent from the majority's disagreement with 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" 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.

This common sense interpretation of the word "writing" comports with what the United States Supreme Court held in Wainwright v. Witt, _____ U.S. _____, 83 L.Ed.2d 841 (1985), wherein a capital defendant had complained that the trial court erred in failing to make written findings. Justice Rehnquist opined that:

> Anyone familiar with trial court practice knows that the court reporter is relied upon to furnish an accurate account of what is said in the courtroom. The trial judge regularly relies upon this transcript as written indicia of various findings and rulings; 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 a judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless makework.

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 reason for a departure from the recommended range where that 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 of 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 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 a departure at the sentencing hearing, and those reasons have been transcribed by the court reporter and are part of the appellate record. This Court should quash the opinion below and affirm the original judgment and sentence of the trial court.

Respectfully submitted

Jim Smith
Attorney General

By Gary L. Printy
Gary L. Printy
Assistant Attorney General

The Capitol
Tallahassee, FL 32301
(904) 488-0600

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to Virginia Daire, Assistant Public Defender at P. O. Box 671, Tallahassee, Florida this 7th day of May, 1985.

Gary L. Printy
Gary L. Printy
Assistant Attorney General