IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. DANIEL BOYNTON, Respondent.	CASE NO. 66,971 4DCA NO. 84-40

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
Appendix	District Court's Opinion

STATEMENT OF THE CASE AND FACTS

Respondent was convicted of burglary with an assault on October 19, 1983, (R. 312). At sentencing, the trial judge departed from the sentencing guidelines, stating his reasons for departure at the sentencing hearing. The Transcript of the sentencing hearing is a part of the record; the relevant portion follows:

> THE COURT: All right.
>
> Mr. Boynton, the Court has reviewed the presentence investigation in this case and is of the opinion that the Court should exceed the guidelines as recommended in the sentencing guideline sheet for the following reasons:
>
> First, as noted by the -- Miss Broome, the guidelines sheet does not call for the Court to consider the sentence which was imposed in, or the -- in the crime in which was involved in Case Number 83-1547 CF in this Court.
>
> That crime in that case, you were convicted of the crime of burglary of a dwelling.
>
> In addition to that, the Court has reviewed the presentence investigation and while the guidelines do not call for the Court to consider juvenile record, which is over three years old, the Court is impressed by the fact that, really, from October 5th of 1970 you have continuously been involved in one type of criminal activity or another up through the present time, but specifically the items that concern the Court most are as follows:
>
> That on 8/15/76 you were arrested for burglary to commit assault and attempted sexual battery and burglary of a residence.

That arrest eventually resulted in a judicial disposition on 9/15/76 when you were sent to the Florida School for Boys where you remained until April 4th of 1977.

You were evidently released on April 4th of 1977. Within about six weeks, on May 26th of 1977, you were again arrested on three counts of burglary, two counts of battery, aggravated battery, attempted sexual battery.

That arrest resulted in your being committed to the Florida School for Boys on a second occasion on 9/8/ of '77.

You were evidently arrested on June 20th, 1977 for battery and committed to the Florida School for Boys on that offense. You remained then in the Florida School for Boys until May 19th of 1978, at which time you were released.

Within less than two months, on July 24th, 1978, you were again arrested in West Palm Beach and charged with the offenses of burglary of a dwelling, battery, actually two offenses of burglary of dwelling and two counts of battery.

You were not convicted on the two battery counts. You were convicted on the first count of burglary of dwelling in Case Number 78-1962 CF. That was Count three of it, burglary of a dwelling. You were convicted of that offense on November 15th, 1979, and sentenced to six years in the Department of Corrections.

Then on December 4th of 1980, you were convicted on the -- of the lesser included offense in Count 1 of attempted burglary and sentenced on February 5th, 1981 to five years in the Department of Corrections, that to run consecutive to the sentence which had previously been announced.

You were then paroled from the Department of Corrections on June 15th, 1982, again, within approximately six weeks,

on August 20th, of 1982, you were arrested in Bay Shore, Suffolk County, New York, and charged with one count of rape, one count of robbery and a count of burglary. That count or that -- those charged were dismissed in New York.

All right, what impresses the Court is that you were incarcerated for a period of five months on those charges and not released from the New York incarceration until February of 1983 and from the presentence investigation, it appears you were released on February 18th of 1983 from the incarceration in New York.

Then, within approximately three weeks, you were arrested again in West Palm Beach and charged with burglary of a residence, grand theft and sexual battery and there are now three cases pending against you, two of which you have been convicted of, the one in front of Judge Born and the one in this Court, and there is another case still pending, so what impresses me about that is the continuous and constant criminal activity when you are not incarcerated.

During that entire period, I don't think there was any period of two months where you were not incarcerated that you were not involved in serious criminal activity.

In addition to that, in every burglary that you have been charged with, you've also been charged with an assault or battery, so that not only have the burglaries been of dwellings, they have all involved an assault or battery upon a human being within that building and in addition to these matters, as Miss Broome has pointed out to the Court, there is no category for first-degree felony punishable by life, and contrary to the Public Defender's position, I do believe that that is something the Court can consider in imposing the sentence, so for all of those reasons, Mr. Boynton, the Court feels that it is justified in -- in fact, compelled to exceed the guidelines, the recommended guidelines sentence in

> this case, which is six years, and the Court then imposes a sentence in this case of 12 years in the Department of Corrections, that sentence to run consecutive to the sentence which has been imposed in this Case Number 83-1547 by Judge Born, and at this time then remands you back to the custody of the sheriff to await trial in the case which is still pending before the Court, which is, I believe, 83-1549 CF, is that correct?
>
> THE CLERK: That's correct.
>
> (R. 291-295) (emphasis added)

On appeal to the Fourth District Court of Appeal, the Fourth District affirmed the judgement, but reversed the sentence, holding that it was reversible error for the trial court to depart from the guidelines without providing a separate written statement of the reasons for departure, citing Roux v. State, 455 So.2d 495 (Fla. 1st DCA 1984), and Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984). The Fourth District, in receding from its holding in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), did acknowledge conflict with other district courts and certified the following question:

> DOES AN ORAL PRONOUNCEMENT IN THE RECORD OF THE REASONS FOR DEPARTING FROM A PRESUMPTIVE SENTENCE COMPLY WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.701(d)(11) REQUIRING THAT "ANY SENTENCE OUTSIDE OF THE GUIDELINES MUST BE ACCOMPANIED BY A WRITTEN STATEMENT DELINEATING THE REASONS FOR THE DEPARTURE", AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.701(b)(6) REQUIRING THAT "DEPARTURES FROM THE PRESUMTIVE SENTENCES ESTABLISHED IN THE GUIDELINES SHALL BE ARTICULATED IN WRITING"?
>
> (See Appendix)

On April 26, 1985, the State filed its Notice to Invoke the discretionary jurisdiction of this Court.

POINT INVOLVED

WHETHER 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?

SUMMARY OF THE ISSUE

The Fourth District Court's interpretation of the words "written statement" is overly strict as the underlying policy behind Rule 3.701(b)(6) is to provide the opportunity for meaningful review. Transcription of the sentencing hearing accomplishes this purpose, and therefore there is no reason sufficient for the district court to reverse itself on this issue.

ARGUMENT

POINT INVOLVED

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.

The Fourth District's holding that the failure to include a separate written state of reasons for departure is reversible error, is inconsistent with its previous holding in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984), and is in direct conflict with holdings of the Second, Third, and Fifth District Courts.[1]

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,

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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, 461 So.2d 965 (Fla. 2d DCA 1984); Emory v. State, 10 F.L.W. 480 (Fla. 2d DCA February 20, 1985); Tucker v. State, 10 F.L.W. 462 (Fla. 3rd DCA February 19, 1985); State v. Overton, 10 F.L.W. 509 (Fla. 3rd DCA February 26, 1985); Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984); Bell v. State, 459 So.2d 478 (Fla. 5th DCA 1984).

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, supra, the Fourth District had held that failure to provide a separate written statement of reasons for departure was not error, since the reasons were in fact transcribed as a part of the record. The position taken by the Fourth District at that time was that an oral explanation in the record sufficiently provides the opportunity for meaningful appellate review for purposes of Fla.R.Crim.P. 3.701.

Other districts have subsequently followed Harvey. The Second District in Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984), held 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, 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).

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 November 14, 1984), 9 F.L.W. 2419; Bell v. State, 459 So.2d 478 (Fla. 5th DCA 1984). See also Tucker v. State, No. 84-561 (Fla. 3rd DCA February 19, 1985), 10 F.L.W. 462; Emory v. State, Nos. 84-645, 84-646 (Fla. 2d DCA February 20, 1985), 10 F.L.W. 480; and State v. Overton, (Fla. 3rd DCA February 26, 1985), 10 F.L.W. 509. And, the Third District in State v. Williams, No. 84-751 (Fla. 3rd DCA February 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.

Thus a body of law has emerged from the Harvey decision. Now the Fourth District seeks to reverse itself, citing as reasons:

(1) The possibility that "reasons for departure" plucked from the record by an appellate court might not have been the reasons chosen, and;

(2) An absence of written findings forces the appellate courts to delve through sometimes lengthy colloquies to search for the trial courts' reasons, and;

(3) Precise and considered reasons would be more likely to occur in a written statement, than at a "hectic" sentencing hearing.

Petitioner submits that principles of stare decisis dictate that a decision of an appellate court should not be overruled, absent a compelling reason. See, Morrison v. Thoelke, 155 So.2d 889, 905 (Fla. 2nd DCA 1963). Petitioner further submits that none of the above-quoted reasons are sufficient to offset the resulting lack of consistency engendered by the

district court's decision in the instant case. If the reasons plucked from the record are not those reasons chosen by the trial court, the trial court is still free to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal. See, Fla.R.Crim.P., Rule 3.800(b); Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984).

The Fourth District's second reason for requiring a separate writing is that absence of a separate writing forces the appellate court to delve through the transcript. The Fourth District relied on the following quote from R.B.S. v. Capri, 384 So.2d 692, 696-697 (Fla. 3rd DCA 1980):

> It is not the function of an appellate court to cull the underlying record in an effort to locate findings and underlying reasons which would support the order. The statute should be complied with in the future.

Petitioner submits that the above case is not on point with the instant case, as R.B.S. involved the detention of a child and a denial of bail. The Third District noted that in such a proceeding:

> The right to an effective appeal from an adverse bail order includes the right to know what one is appealing from. (citation omitted).
>
> . . .
>
> The purpose of the requirement that the trial court clearly and categorically state reasons for denying bail is so a reviewing court may be fully advised regarding the basis for the trial court's action. (Citation omitted).
>
> (emphasis added)

Id. The instant record clearly states the reasons for departure, and Petitioner asserts that Mr. Boynton's sentence was enhanced because of his continuous criminal conduct and the fact that this conduct usually included violent behavior (R. 291-295). Thus the specific facts in the case at bar show that no lengthy search was necessary to find the trial court's reason for departure. Moreover, the district court's concern for the time and expense necessary to cull the record is unfounded in the basic principles of appellate law. As this Court has said:

> On appeal it is the burden of the appellant to show error, or abuse of discretion, and he must make it appear from the record.
>
> In Re Lieber's Estate, 103 So.2d 192, 196 (Fla. 1958);

See also, Bould v. Touchette, 349 So.2d 1181, 1184 (Fla. 1977); Florida Medical Center v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983); State v. Sweetwater, 112 So.2d 852, 854 (Fla. 1959); Greene v. Hoiriis, 103 So.2d 226, 228 (Fla. 3rd DCA 1958). Thus the State submits that one appealing from a departure has the duty to point to those portions of the sentencing hearing transcript that he takes issue with. To say that an appellate court should not cull the record to locate reasons for a departure, is contrary to the principle that:

> It is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals.

Altchiler v. State, Department of Professional Regulation, 442 So.2d 349, 350 (Fla. 1st DCA 1983); see also, Bates v. Brady, 126 So.2d 750, 751 (Fla. 1st DCA 1961).

The district court's third reason for the instant decision is speculative at best. Petitioner submits that there is no way to foretell whether a separate written statement is more likely to produce considered reasons than are produced at the sentencing hearing. The Fourth 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. "A trial judge's job is difficult enough without senseless make-work." Wainwright v. Witt, 83 L.Ed.2d 841 (1985). 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. Petitioner submits that a trial judge's schedule is inherently hectic and it is equally likely that reasons for departure remembered from the hearing will not be precisely those chosen.

The Fourth 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.

By way of analogy, the habitual offender statute, §775.084(3)(d), Fla. Stat. (1981) requires that the trial court make findings of fact that show on their face that an extended term is necessary to protect the public from the defendant's further criminal conduct. Both the Florida Supreme Court and the Fourth District have held that these findings need not be in writing so long as they are reported in the transcript of the sentencing hearing. Eutsey v. State, 383 So.2d 219 (Fla. 1980); King v. State, 369 So.2d 1031 (Fla. 4th DCA 1979); Grey v. State, 362 So.2d 425 (Fla. 4th DCA 1978). As long as the findings as required by Rule 3.701, clear and convincing reasons, are fully supported and articulated in the record, then a separate writing should not be required. See: McClain v. State, 356 So.2d 1256 (Fla. 2d DCA 1978).

The same rationale has been applied to the capital sentencing statute §921.141(3), Fla. Stat. (1981) which states that "the court . . . shall set forth in writing its findings upon which the sentence of death is based . . ." The Florida

Supreme 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 statute. Thompson v. State, 328 So.2d 1 (Fla. 1976).

The Fourth District, in the instant opinion, recognized the Thompson holding but cited Cave v. State, 445 So.2d 341, 342 (Fla. 1984) as an example where a separate writing was necessary. However, it is significant to note that in Cave, the Appellee/State, moved to relinquish jurisdiction and to supplement the record. Petitioner asserts that this motion was requested in order to make clear the specific findings of fact requiring the death sentence, and notes that this Court acted by temporarily remanding the case to the trial court, to supplement the record. In the case at bar however, the district court has vacated and remanded the sentence. Clearly, the Fourth District's position on this issue is an overly strict, literal interpretation of the words "written statement." The obvious purpose of this legislation is to provide the opportunity for meaningful review. Thompson, supra at 4. Petitioner submits that if a defendant/appellant cannot find the specific reasons for departure in the sentencing transcript, he has the ability and the duty, under Rule 9.200(e)(f), Fla.R.App.P., to make a motion to supplement the record. If the appellate court were to then find the sentencing hearing transcript to be unclear, Petitioner submits the appropriate

remedy would then be a temporary remand, as in Cave.

Petitioner believes that instances requiring a temporary remand for issuance of a separate writing would be few and far between. In the words of those responsible for the formulation of the guidelines:

> Given the adversary process, it was assumed that the prosecuting attorney and defense counsel would have already identified the relevant circumstances supporting an argument for a sentence greater or less than the guideline sentence and would argue such factors during the sentencing hearing.

Sundberg, Plante, Braziel, Florida's Initial Experience With Sentencing Guidelines, 11 Fla. State U. L.Rev. 125, 146 (1983).

Finally, against all the arguments and reasons asserted by the Fourth District for its reversal of Harvey, must be weighed the need for consistency and uniformity in the administration of justice. See generally, Seaboard Air Line Railroad Co. v. Williams, 199 So.2d 469, 471 (Fla. 1967). In discussing the doctrine of Stare decisis, this Court has stated that, although there are occasions when the departure from precedent is necessary to remedy a continued injustice:

> In general, when a point has once been settled by judicial decision it should, in the main, be adhered to, for it forms a precedent to guide the courts in future similar cases.

In Re Serton's Estate, 154 Fla. 446, 18 So.2d 20, 22 (1944); McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So.323, 328 (1935).

CONCLUSION

For all the reasons and authorities cited herein, the Fourth District's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to Gary Caldwell, Assistant Public Defender, 224 Datura Street, West Palm Beach, Florida 33401, this 23rd day of May, 1985.

Lee Rosenthal

Of Counsel