IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

NATHANIEL HILL,

Respondent.

CASE NO. 67,110

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 Seventeenth Judicial Circuit, in and for Broward 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

The Respondent was convicted of robbery with a deadly weapon (R 313, 373), and the trial court then departed from the sentencing guidelines in sentencing Respondent to fifteen years in prison (R 374-375). The trial court, in departing, stated its reasons in the record, and they were so transcribed.

THE COURT: Does the State have any motion on aggravation or mitigation?

(Prosecutor) MR. POLE: No, sir, I don't.

THE COURT: Mr. Wrubel?

(Defense counsel) MR. WRUBEL: Judge, I would move to mitigate the factors of the guidelines that come out to a period of 8 years. The Court is aware of the fact that Mr. Hill has been to jail previously. What I would like to offer to the Court is to take into consideration the nature of the offense.

THE COURT: The nature of which offense?

MR. WRUBEL: This offense and how it was committed.

Obviously, there was a knife which was used. However, the victim in this case, the knife was never used in an extremely aggressive manner, it was never used to wound her. In fact, a woman appeared at the time --

THE COURT: Where is that knife? You are saying this knife was not used in an extremely aggressive fashion?

Mr. WRUBEL: I am saying she wasn't wounded by it.

THE COURT: Wasn't wounded by it?

MR. WRUBEL: Yes, sir.

THE COURT: You mean she didn't physically get cut and bleed?

MR. WRUBEL: She wasn't cut or blood.

MR. POLE: Judge, I will remind the Court

that the testimony was that the defendant put the knife to the neck of the victim.

THE COURT: Absolutely. (R 318-319).

* * * *

THE COURT: I am familiar with the Alpine Village area. I know exactly where it was. I am surprised that the young lady who was involved in this case was willing to do that which she did, making a delivery to the Alpine Village.

Well, Mr. Hill, I am satisfied that you knew what you were doing and you got involved with this. You knew the risk that you were taking for a lousy $3.51. You demonstrated to the Court that you absolutely haven't learned a thing from being locked up in the Department of Corrections.

Life on the streets is the right of every citizen. Every citizen to have that right has the responsibility of obeying the law.

I want to read something to you. I hope you heard it this morning, if not, I am going to read it to you again:

"I remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them.

"For two centuries we have agreed to a constitution and to live by the law. No one of us has the right to violate the rules that we all share."

It appears as though that never sunk in with you, sir.

In my opinion, you are a clear and present danger to those persons who seek to assert the privilege and accept the responsibilities of living in an unstructured environment.

I am satisfied, sir, that you are quite like the child who sees the cookie jar, takes the cookie and worries about the punishment later.

You have seized upon an opportunity to

> commit an act of armed aggression against a person who was not strong enough to defend herself. I am satisfied that if you had not been interrupted by the person who wanted to have her car moved from that, that green automobile, wanting to get out of there, the likelihood is great that you would have inflicted some form of violence, form of physical violence upon the lady, Miss Gessler, who was making the delivery when you took her back to the car.
>
> You are lucky the State didn't charge you with kidnapping as well as robbery.
>
> I feel that there is a good and sufficient basis for departing from sentencing guidelines in this case and for the reasons herein expressed. The Court does hereby depart from those guidelines and sentences you to the Department of Corrections for a period of 15 years and the Court does hereby reserve jurisdiction for one-third of the sentence so you cannot obtain parole without the previous consent of this Court for a period of 5 years from the date hereof. (R 323-326).

A separate written statement by the trial court, of its reason for departure, was not made. On appeal to the Fourth District Court of Appeal, Respondent contended that the trial court improperly departed by failing to state its reasons in a written statement. The appellate court affirmed Respondent's conviction, but vacated his sentence and remanded pursuant to its decision in Boynton v. State, 10 FLW 795 (Fla. 4th DCA March 27, 1985)(see Appendix). (The decision in Boynton, supra, is presently pending before this Court). The Petitioner filed a motion for rehearing, asking the District Court to stay the issuance of mandate in the instant case until State v. Boynton, Fla.S.Ct. No. 66,971, was resolved by this Court. The Court denied Petitioner's motion on May 22, 1985, and, accordingly, the Petitioner filed a notice to invoke this Court's discretionary jurisdiction on June 7, 1985. The Mandate was issued on June 7, 1985, but on June 24, 1985 this Court granted

Petitioner's motion to stay proceedings, and subsequent thereto, on August 15, 1985, the District Court recalled Mandate.

POINT INVOLVED

WHETHER IT IS 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 ARGUMENT

The Fourth District Court's interpretation in Boynton, supra, 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 was no reason sufficient for the district court to reverse itself in Boynton, supra, on this issue.

ARGUMENT

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 in the case sub judice, affirming the Respondent's conviction but vacating his sentence and remanding for resentencing "with directions that any resentencing be in accord with the sentencing guidelines or that separate written findings be entered if the sentence deviates from the guidelines" - pursuant to its decision in Boynton, supra[1] - (see Appendix) is in direct conflict with holdings of the Second, Third, and Fifth District Courts.[2]

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 Committe Note to that Rule explains:

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1 In Boynton, supra, the Fourth District Court receded from its prior holding in Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984).

2 Smith v. State, 454 So.2d 90 (Fla. 2nd DCA 1984); Klapp v. State, 456 So. 2nd 970 (Fla. 2nd DCA 1984); Fleming v. State, 456 So.2d 1300 (Fla. 2nd DCA 1984); Brady v. State, 457 So.2d 544 (Fla. 2nd DCA 1984); Webster v. State, 461 So.2d 965 (Fla. 2nd DCA 1984); Emory v. State, 10 FLW 480 (Fla. 2nd DCA February 20, 1985); Tucker v. State, 10 FLW 462 (Fla. 3rd DCA February 19, 1985); State v. Overton, 10 FLW 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); Boehmer v. State, 10 FLW 1663 (Fla. 5th DCA 1985).

> 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, supra. The Second District in Smith v. State, 454 So.2d 90 (Fla. 2nd 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. 2nd 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 purpose 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. 2nd DCA 1984); Brady v. State, 457 So.2d 544 (Fla. 2nd DCA 1984); Webster v. State, No. 84-388 (Fla. 2nd DCA November 14, 1984), 9 FLW 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 FLW 462; Emory v. State, Nos. 84-645, 84-646 (Fla. 2nd DCA February 20, 1985), 10 FLW 480; and State v. Overton, (Fla. 3rd DCA February 26, 1985), 10 FLW 509. And, the Third District in State v. Williams, No. 84-751 (Fla. 3rd DCA February 12, 1985), 10 FLW 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 FLW 432, 433 n. 2.

Thus, a body of law has emerged from the Harvey, supra, decision. But, now, the Fourth District, pursuant to Boynton, supra, has receded from its prior Harvey, supra, decision, citing as reasons:

(1) The possibility that "reasons for departure" plucked from the record by an appellate court might not have been the reason 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 will now proceed to discuss the impropriety of the Boynton, supra, decision, which is directly controlling in the case sub judice. Petitioner maintains that, pursuant to Harvey, supra, transcribed reasons are clearly sufficient to fulfill the writing requirement.

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 in Boynton, supra, are sufficient to offset the resulting lack of consistency engendered by the district court's decision in Boynton, supra. 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).

The Fourth District's second reason in Boynton, supra, 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 was not on point with Boynton, supra, 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 states 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. Hill's sentence was enhanced because of his continuous criminal conduct and the fact that this conduct usually included violent behavior (R 316-326). 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 in Boynton, supra, 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 in Boynton, supra, 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 in Boynton, supra, 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. 2nd 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 trial judge in the case sub judice acknowledged that holding, and applied it to his guidelines departure:

> THE COURT: I thought I expressed it on

> the record and in view of the fact that the Florida Supreme Court has said that a judge can dictate into the record his findings as to why he departs from the advisory sentence of a jury in a death penalty case and that statement when transcribed takes the place of the written order. I think that all I have to have here is the court reporter transcribe that which I said as justification for the aggravation and that will constitute the written order. (R 335-336).

The Fourth District, in Boynton, supra, 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, supra, 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 judidical 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 and correct copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by courier to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street, West Palm Beach, Florida 33401, this 1st day of October, 1985.

Of Counsel