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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

PAUL JOSEPH COTE,

Respondent.

CASE NO. 67,166

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 Opinions.

Petitioner most respectfully acknowledges this Court's very recent decision in State v. Jackson, 10 FLW 564 (Fla. Oct. 17, 1985), which was issued subsequent to the drafting of this Brief.

STATEMENT OF THE CASE AND FACTS

The Respondent pled guilty to charges of armed burglary and aggravated assault which occurred prior to the effective date of the revised sentencing guidelines. (R 41). The trial court departed from the guidelines and sentenced Respondent to four years of incarceration. (R 40, 42-43). The trial court, in departing, stated its reasons for departure in the record, and they were so transcribed:

> He pled open to burglary of a dwelling with assault, which is punishable by life in prison. I am going to adjudicate him guilty of that particular charge. With respect to Count II, the aggravated assault, which is punishable by five years in prison. I am going to adjudicate him guilty of that particular charge. Now, with respect to sentencing here, the only thing I would give the defendant benefit for is the fact he admitted his guilt here as opposed to putting the State through the task of going through a trial and the expense that would be encountered. On the other hand, the defendant did not come forward for a period of time to confess his guilt, and he does appear to have some remorse about what happened. The defendant does exhibit some remorse. That does not undo what he has done. That is always in the sentencing judge's mind as to whether the defendant realizes what he did was wrong, whether he feels sorry for it as opposed to saying, "I don't give a damn about it". I will give him credit for that.
>
> On the other hand, what took place here obviously, you know, I could just place myself in the victim's situation, where it is ten o'clock at night. She is sitting home with the baby.
>
> Apparently, the defense attorney thought it would be in his client's best interest, knowing if the jury listened to the facts, they would return a verdict of guilty. But I can place myself in a situation of

a wife sitting at home with her infant, and all of a sudden, at ten o'clock at night, someone is breaking through a glass door with a pole in his hand, and glass is breaking all over the place. The baby is crying. They run into her bedroom. She screams, and he is saying he is going to kill her husband. This is like a scene out of a movie. We never expect something like that to be factual and happen to us, but unfortunately, it happened to this lady. I can empathize with her and her baby and the traumatic psychological and emotional experience this would have to them. If the husband had been home at the time, if he were home, probably he could have prevented this or curbed it before it got carried away. He is equally upset, you know, he exhibits love and concern for his wife and child. He is quite upset about what happened. So those are the facts you have to bear in mind.

The defendant doesn't have a history of committing crimes of this nature. I mean, you cannot punish somebody because he is a hermit. Not everybody is gregarious and outgoing. He doesn't have a criminal history at all?

MS. SOLOMON: That's correct.

THE COURT: Okay. So, those are the factors that have been brought to the Court. Bear in mind that I have to bear in mind, he falls in a grade of apparently three years incarceration. The defendant is asking for mitigating factor to have it mitigated down in view of the alleged psychological emotional problems of the defendant, coupled with the fact he does not have any prior criminal history. Well, the amount of criminal history is always taken into consideration to determine what grade the criminal falls in, so that is not a factor. The State is coming in and asking for the sentence to be aggravated in view of the long term and emotional psychological circumstances to this victim of this crime.

> Okay. I'm going to sentence the defendant to a period of incarceration in the Florida State Prison of four years. I am going to adjudicate him guilty as I said in Count I, and Count II. I feel that sentence is the appropriate sentence. I could sentence you anywhere from three years up to life in prison, but on the other hand I am taking into account that you admitted this and the fact that you have no prior criminal history.
>
> With respect to you folks saying 100 years would not be enough, let me say, this four years is a hell of a long time to spend in jail. Four years is a long time. That is four times 365 days. That is a long time. He will get some credit for time served. Whether he is in there four years or 100 years, if there is going to be any benefit derived by him, I think it can be accomplished in four years. With respect to the defendant's mother and friends here, listen: You are the ones that suffer the most. The relatives of the defendant are the ones that suffer the most. I feel sorry for you, and my heart goes out to you, but we have to punish him for this conduct that he exhibited here. I just hope that this is a one time aberration from his normal behavior, and I pray to God it is.
>
> As the community service counselor indicated, she does not feel this is the right setting for your son, prison isn't the right setting for anybody. As the victim's husband pointed out, some people can handle it better than other people. Everybody gets used to their particular environment, no matter what it is, whether it be jail or any other type of environment. He has be be punished for slighting the law, causing this particular injury to the victim. That is my sentence. (R 32-35).

A separate written statement by the trial court, of its reasons 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 found that the reasons given for departure were proper, but remanded the case for a written statement pursuant to its decision in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985)(Exhibit A). (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 June 5, 1985, and, accordingly, the Petitioner filed a notice to invoke this Court's discretionary jurisdiction on June 10, 1985. Petitioner filed in this Court a Motion for Stay Pending Review, which was denied on June 26, 1985.

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,

> Our recent decision in Boynton v. State, 10 F.L.W. 795 (Fla. 4th DCA Mar. 27, 1985), however, requires us to remand the case to the trial judge so that he may provide a written statement delineating his reasons for departure. In the event the trial judge elects not to provide a written statement, appellant must be resentenced under the guidelines in effect when he committed the crimes (December 16, 1983), and not under the amended guidelines which became effective on July 1, 1984. See Miller v. State, 10 FLW 989 (Fla. 4th DCA Apr. 17, 1985).
>
> Accordingly, we reverse and remand this cause to the trial court with directions to either provide a written statement delineating the reasons for departure, or to resentence appellant.[1] (See Appendix).

is in direct conflict with holdings of the Second, Third, and Fifth District Courts.[2]

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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, 463 So.2d 1242 (Fla. 2nd DCA 1985); Tucker v. State, 464 So.2d 211 (Fla. 3rd DCA 1985); State v. Overton, 464 So.2d 607 (Fla. 3rd DCA 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, 472 So.2d 555 (Fla. 5th DCA 1985).

Section 921.001(6), Fla. Stat. (1983), states that "the sentencing guidelines shall provide that any sentence 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, 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, 461 So.2d 965 (Fla. 2nd DCA 1984); Bell v. State, 459 So.2d 478 (Fla. 5th DCA 1984). See also Tucker v. State, 464 So.2d 211 (Fla. 3rd DCA 1985); Emory v. State, 463 So.2d 1242 (Fla. 2nd DCA 1985); and State v. Overton, 464 So.2d 607 (Fla. 3rd DCA 1985). And, the Third District in State v. Williams, 463 So.2d 525 (Fla. 3rd DCA 1985) 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 state-

ment . . . .

436 So.2nd at 526, 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. Cote's sentence was enhanced because of psychological trauma to the victim (R 32-35). 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 determination 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 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 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 and correct copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by courier to ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, Public Defender's Office, 224 Datura Street, West Palm Beach, Florida 33401, this 22nd day of October, 1985.

Of Counsel