IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

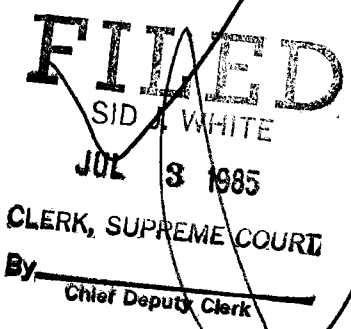
Petitioner,

-v-

CASE NO. 67,244

TONY LEE MOORE,

Resondent.



PETITIONER'S JURISDICTIONAL BRIEF

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol
Tallahassee, Florida 32301-8048
(904) 488-0290

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PRELIMINARY STATEMENT

References to the record filed in the lower court, consecutively paginated, will be made by the symbol "R" followed by appropriate page number. References to the appendix submittd with this brief will be made by the symbol "A" followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

Following a plea of guilty to the offense of burglary of a structure, respondent was placed on probation for a period of five years (R 9-13, 105-107). On December 8, 1983, an affidavit of violation of probation and corresponding warrant were filed, alleging that appellant violated six conditions of his probation. A probation revocation hearing was held on December 21, 1983. At the hearing, respondent admitted the allegations in the affidavit of probation violation with respect to battery on a law-enforcement officer and resisting arrest charges. All other allegations of violation were denied (R 16). The trial court found that respondent violated condition five of the probation order based upon his guilty pleas to the charges of battery on a law enforcement officer and resisting arrest with violence. Probation was revoked (R 17-18, 112, 119). Respondent elected to be sentenced under the guidelines and his trial counsel informed the court that respondent's score under the guidelines was 26 points, placing him in the category of any nonstate prison sanction (R 23-24, 114, 147-148). The trial court sentenced respondent to a term of five years with credit for 79 days (R 25, 115-118), and orally stated on the record as follows:

> Having elected sentencing guidelines, the court specifically will not follow the sentencing guidelines inasmuch as a violation of probation has occurred in this case and the court considers that the subsequent arrest and pleas of guilty entered by you in

> Walton County are sufficient reasons to aggravate your sentence beyond the sentencing guidelines.

(R 26).

The question presented to the lower court was stated as follows:

> WHETHER THE COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES WITHOUT CONTEMPORANEOUSLY FILING WRITTEN REASONS FOR DEPARTURE.

(R 26). The trial court directed the court reporter to type his comments with respect to the sentencing guidelines and make it a part of the record (R 26).

The lower court reversed and remanded because of the trial judge's failure to reduce to writing his reasons for departure from the guidelines (A 1).

Notice of Intent to Seek Discretionary Review was timely filed in this court on June 25, 1985.

SUMMARY OF ARGUMENT

The sole basis for reversal by the lower court was the fact that the trial judge's reason for departure from the sentencing guidelines was not reduced to writing. In Klapp v. State, 456 So.2d 970 (Fla.2d DCA 1984), the court held that a trial judge's failure to include written reasons for departing from the guidelines is not error where the reasons are clearly articulated at the sentencing hearing and said hearing is in the record.

In Burke v. State, 456 So.2d 1245 (Fla.5th DCA 1984), discretionary review pending, Case No. 66,091, the court acknowledged that the trial judge did not provide a written statement. However, the court reasoned that where the trial judge's reasons are transcribed and are part of the record on appeal, this sufficiently provides the opportunity for meaningful appellate review. See also Brady v. State, 457 So.2d 544, 546 (Fla.2d DCA 1984).

ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE LOWER COURT IS IN DIRECT CONFLICT ON THE SAME POINT OF LAW WITH THE DECISIONS IN THE FOLLOWING CASES: Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984); Smith v. State, 454 So.2d 90 (Fla.2d DCA 1984); Klapp v. State, 456 So.2d 970 (Fla.2d DCA 1984); Burke v. State, 456 So.2d 1245 (Fla.5th DCA 1984); Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984).

In the lower court respondent understandably did not challenge the trial judge's reason for departure from the recommended guidelines sentence because of the violation of the terms of his probation. This was admitted by respondent at his probation revocation hearing (R 16). Neither did respondent contend that the trial judge's reason for departure was either unclear or unconvincing. The sole basis for reversal by the lower court was the fact that the trial judge's reason was not reduced to writing.

Prior to imposition of sentence, the trial judge advised respondent of his reason for going outside the guidelines, i.e., violation of probation (R 23). Then, after advising respondent following imposition of sentence of his right to appeal and right to assistance of counsel in taking the appeal, the trial judge again stated his reason for departure from the recommended sentence in the guidelines (R 26, lines 2-8) and directed the

court reporter to type his comments with reference to the sentencing guidelines and make it a part of the record.

The specific basis for reversal as stated by the lower court: "The trial court failed to reduce to writing its reasons for departure from the guidelines." (A 1). This precise issue is presently pending before this court in State v. Jackson, Case No. 65,857.

In the case of Smith v. State, 454 So.2d 90 (Fla.2d DCA 1984), the Second District in addressing this issue remarked as follows:

> Appellant first argues that the court's written reasons for departing from the guidelines, required by Florida Rule of Criminal Procedure 3.701(d)(11), are unintelligible. This argument is of no moment. We believe the oral reasons which appear in the transcript of the sentencing hearing are sufficient for purposes of the rule. See Harvey v. State, 450 So.2d 926 (Fla.4th DCA 1984).

Id. at 91.

In Klapp v. State, 456 So.2d 970 (Fla.2d DCA 1984), the Second District again had occasion to address the issue, remarking as follows:

> The trial judge's failure to include written reasons for departing from the guidelines is not error because the reasons were clearly articulated at appellant's sentencing hearing, a transcript of which is in the record.

Id. at 971.

In the case of Burke v. State, 456 So.2d 1245 (Fla.5th DCA 1984), discretionary review pending, Case No. 66,091, the Fifth District in treatig this issue remarked as follows:

> 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 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla.1976).

Id. at 1246.

Again, in Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984), the Second District addressed the issue as follows:

> Second, defendant argues that the trial court erred in not entering a written order delineating the reasons why it departed from the guidelines. We urge trial courts to include written reasons with the sentencing order. Rule 3.701(d)(11). Nevertheless, we have previously rejected defendant's argument where, as here, the trial court sets forth clear and convincing reasons in the transcript of the sentencing hearing. Smith. Accord, Harvey v. State, 450 So.2d 926 (Fla.4th DCA 1984). Contra, Jackson v. State,

> 454 So.2d 691 (Fla.1st DCA 1984); and Roux v. State, 455 So.2d 495 (Fla.1st DCA 1984).

Id.. at 1301.

Finally, in Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984), the Second District again rejected the contention that a trial judge's failure to reduce to writing his reasons for departure constitute reversible error:

> In our case, no written reasons for departure from the guidelines appear in the record. However, the trial judge clearly stated the reasons in the record. This is sufficient. See Smith v. State, 454 So.2d 90 (Fla.2d DCA 1984); Harvey v. State, 450 So.2d 926 (Fla.4th DCA 1984). We do, however, caution and encourage judges to record in writing their reasons for departure from the guidelines.

Id. at 546.

CONCLUSION

Because direct conflict is obvious and the precise issue is presently pending before this court in at least two cases, this court should accept jurisdiction in the instant case and dispense with the filing of briefs on the merits as the instant case will be covered by the decision of this court in either State v. Jackson, supra, and/or Burke v. State, supra.

Respectfully submitted,

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol
Tallahassee, Florida 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petitioner's Jurisdictional Brief to Ms. Paula Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by hand-delivery, this 3rd day of July, 1985.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel