IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-v-

CASE NO. 67,244

TONY LEE MOORE,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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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. Any other references will be specifically designated.

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 respondent 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 Probation was revoked (R 17, 18, 112, 119).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 twenty-six points, placing him in the category of any non-state 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. Moore v. State, 469 So.2d 951 (Fla.1st DCA 1985).

Notice of intent to seek discretionary review in this court was timely filed on June 25, 1985 and jurisdiction was accepted by order dated November 5, 1985.

SUMMARY OF ARGUMENT

Petitioner recognizes that recent decisions of this court are diametrically opposed to the position taken in this brief. However, it is respectfully submitted that the court has given an overly literal interpretation of the words "written requirement." The court reporter has always been relied upon to furnish an accurate account of what is said in the courtroom and the trial judge regularly relies upon such a transcript as a written indicia of various findings and rulings. Wainwright v. Witt, ____U.S._____, 83 L.Ed.2d 841 (1985).

Locating the written reasons for a trial judge's departure in the record certainly does not require an appellate to "cull the underlying record in an effort to locate findings. . . which would support the order." Boynton, 473 So.2d, at 707. When the court reporter is ordered to type the comments of the trial judge with respect to a departure from the sentencing guidelines, this is adequate and furnishes a basis for a meaningful appellate review.

ARGUMENT

ISSUE

A TRIAL JUDGE IN DEPARTING FROM THE SENTENCING GUIDELINES SHOULD NOT BE REQUIRED TO CONTEMPORANEOUSLY FILE WRITTEN REASONS FOR DEPARTURE AS REQUIRED BY THIS COURT IN State v. Oden, 10 F.L.W. 590 (Fla., Oct. 31, 1985).

It appears that all parties agree that the decision of the lower court sub judice is in direct conflict on the same point of law with the decisions in 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); and Fleming v. State, 456 So.2d 1300 (Fla.2d DCA 1984). Respondent agrees. See jurisdictional brief of respondent, p. 5.

The undersigned counsel represented the State of Florida in State v. Jackson, 10 F.L.W. 564 (Fla., October 17, 1985), and is acutely aware of the subsequent decisions of this court in State v. Oden, supra, and State v. Boynton, Case No. 66,971 (Fla. Nov. 7, 1985). It would appear that except for the intervention of a blinding flash of light that petitioner is doomed to go down in crushing defeat in the instant case.

But notwithstanding the impossible odds petitioner submits with all due respect that this court and the lower court in Jackson v. State, 454 So.2d 691 (Fla.1st DCA 1984), has given an overly strict literal interpretation of the words "written

requirement." In Wainwright v. Witt, ___U.S.____, 83 L.Ed.2d 841 (1985), the Court remarked as follows:

> 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 a trial judge to merely make extemporaneous statements of findings from the bench.
>
> Our conclusion is strengthened by a review of available alternatives. We decline to require the 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 make-work.

Id. 855, 856. It is respectfully submitted that to require a trial judge to write out his reasons for departure or dictate them separately to his secretary and have the secretary then type such reasons can easily be regarded as "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 emphasizes that this would not require an appellate court to "cull the underlying record in an effort to locate findings. . . which would support the order." Boynton, 473 So.2d at 707. Is it really too much of an effort to look at the index of a record on appeal, locate the sentencing hearing, turn to near the end thereof and find the reasons for departure dictated into the record by the trial judge? Even in Boynton v. State, the court indicated that the trial judge could dictate his reasons for departure to a court reporter but that this must be done in a clear,

concise and formal manner without colloquy or dialogue. This court is invited to review the reasons for departure dictated into the record by the trial judge in the instant case (R 26, lines 2-8). The court reporter was ordered to type his comments with reference to the sentencing guidelines and make it a part of the record. It is submitted that this is adequate and furnishes a basis for meaningful appellate review. It is also true that in Boynton v. State, the court held that when the trial judge's reasons were dictated to the court reporter and then transcribed, they must be reviewed and acknowledged by the judge's signature and attached to the scoresheet. This is interesting because in Coates v. State, 458 So.2d 1219 (Fla. 1st DCA 1984), the court held that there is no requirement that the trial judge sign his name to the written reasons for departure.

Lastly, the reasons for departure dictated by conscientious trial judges are not "tossed out orally in a dialogue at a hectic sentencing hearing" as stated in Boynton v. State, 473 So.2d, at 707. It is respectfully submitted that this language is totally incompatible with the conscientious efforts of trial judges to comply with the rules of this court.

CONCLUSION

Rather than holding the trial judges in this jurisdiction under the iron fist of an overly strict literal construction of Rule 3.701(b)(6) and 3.701(d)(11), Florida Rules of Criminal Procedure, this court should recede from State v. Oden, State v. Boynton, State v. Jackson, quash the decision of the court below in the instant case, and hold that the dictation of reasons for departure in a clear, concise, and formal manner to the court reporter with directions to transcribe same and make a part of the record on appeal meets the writing requirement of the guideline rules.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petitioner's Brief on the Merits to Ms. Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32320, by hand-delivery, this ~~21st~~ 25th day of November, 1985.

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Assistant Attorney General

of Counsel