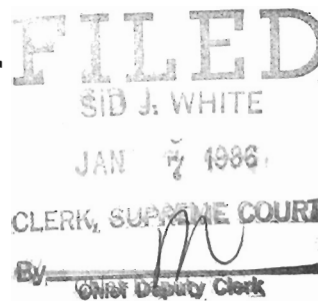


IN THE FLORIDA SUPREME COURT



STATE OF FLORIDA,

Petitioner,

v.

JOHNNIE B. STUBBS,

Respondent.

CASE NO. 67,313

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA, :
 :
 Petitioner, :
 :
 v. : CASE NO. 67,313
 :
 JOHNNIE B. STUBBS, :
 :
 Respondent. :
 _____ :

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. Attached hereto as Appendix A is the copy of the opinion, Stubbs v. State, 470 So.2d 768 (Fla. 1st DCA 1985). Attached hereto as Appendix B is a copy of the brief in the appeal following respondent's resentencing, First District No. BJ-48.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts, with the following additional developments. On August 9, 1985, pursuant to the District Court's mandate, respondent was again sentenced to 30 months in state prison, having again elected to be sentenced under the guidelines. Respondent again took an appeal to the First District, which is currently pending under Case No. BJ-48. The undersigned has found no merit to respondent's pending appeal (Appendix B).

III SUMMARY OF ARGUMENT

Respondent will argue in this brief that this Case is moot as to respondent because he has been resentenced pursuant to the decision which is currently pending review. Respondent will concede that a portion of the First District's holding in the instant case has been overruled by a later case.

However, this Court may wish to address the other holding, that a sentence which is in excess of the recommended guidelines sentence may be attacked on appeal without the necessity of an objection to the departure sentence being voiced before the sentencing judge. Respondent believes that such review is authorized by prior cases from this Court, and is necessary as a part of the guidelines system.

IV ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD AFFIRM THE FIRST DISTRICT'S HOLDING THAT DEPARTURE SENTENCES NEED NOT BE OBJECTED TO WHEN IMPOSED.

Preliminarily, respondent would point out that this cause is moot, at least to respondent, since respondent has been re-sentenced to 30 months in state prison, and since the undersigned has found no meritorious method to attack this sentence. Respondent would concede that the holding of the First District in this case, related to the retroactive application of the amendment to the guidelines, is now controlled by the intervening decision of this Court in State v. Jackson, No. 65,857 (Fla. October 17, 1985), in which rehearing was recently denied.

The holding of the First District in this case related to the ability of respondent to raise a departure sentence on appeal without a contemporaneous objection having been made at sentencing, may be addressed by this Court, since it is certainly capable of repetition, in light of the plethora of guidelines departures.

Both Dailey v. State, 471 So.2d 1317 (Fla. 1st DCA 1985), review pending, No. 67,381, and Whitfield v. State, 471 So.2d 633 (Fla. 1st DCA 1985), review pending, No. 67,320, oral argument set for February 11, 1986, are irrelevant to this issue. Those cases deal with the question of whether scoresheet errors may be raised for the first time on appeal, not with the question

of whether a departure sentence may be attacked on appeal.

Petitioner has cited no case in which an appellate court has refused to address an attack upon a departure sentence, where no objection was made at sentencing. This is because no such case exists. All of the courts are in agreement that a departure sentence may be attacked on appeal on appeal, primarily because the Legislature and this Court have created the right to do so by virtue of Sections 921.001(5) and 924.06(1)(e), Florida Statutes, and by Fla.R.App.P. 9.140(b)(1)(E). See also Key v. State, 452 So.2d 1147 (Fla. 5th DCA), review denied, 459 So.2d 1041 (Fla. 1984); Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984); Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984); Ramsey v. State, 462 So.2d 875 (Fla. 2d DCA 1985); Levack v. State, 468 So.2d 261 (Fla. 2d DCA 1985); and Bradley v. State, 468 So.2d 378 (Fla. 1st DCA 1985).

This Court should reaffirm its view that State v. Rhoden, 448 So.2d 1013 (Fla. 1984), Walker v. State, 462 So.2d 452 (Fla. 1985) and State v. Snow, 462 So.2d 455 (Fla. 1985) collectively do not require an objection to be made at sentencing. The common theme of these cases is that there is no need to object where the sentencing court fails to perform a required procedural duty.

The entire guidelines scheme is based upon an elaborate system of procedural requirements, designed to equalize sentencing practices. It was recognized from the beginning that some sort of appellate review was necessary to evaluate departure sentences. The right to appeal was built in to the guide-


lines. The requirement of written reasons for departure was built into the guidelines to facilitate appellate review. State v. Jackson, supra, slip opinion at 3, quoting from and approving, Justice Barkett's opinion in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985). See also footnote 2, slip opinion at 4 of State v. Jackson, in which this Court analogized departure review to review of death cases and to review of juveniles sentenced as adults. Just as there is no requirement for a defendant to object when he receives a death sentence, and just as there is no requirement for a juvenile to object when he receives an adult sentence, there should be no requirement for a defendant to object when he receives a departure sentence. Just as in Rhoden, the error can be corrected by a simple remand to the sentencing judge.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent asks this Court to approve the First District's holding that a departure sentence is subject to appellate review, regardless of whether there was an objection raised before the sentencing judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Respondent on the Merits has been furnished by hand delivery to Assistant Attorney General Andrea Hillyer, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to respondent, JOHNNIE B. STUBBS, #222122, Post Office Box 777, Lake City, Florida 32056 on this 7 day of January, 1986.


P. DOUGLAS BRINKMEYER