IN THE
SUPREME COURT OF FLORIDA

MICHAEL REASE,

Petitioner,

VS. CASE NO. 68,069

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner Michael Rease, the defendant in the trial court and the appellant before the First District Court of Appeal, will be referred to as the "petitioner." The State of Florida, the prosecuting authority at trial and the appellee before the First District Court of Appeal, will be referred to as "the State" or "respondent."

The record on appeal consists of four volumes. References thereto will be designated by the letter "R" followed by the appropriate page number and enclosed in parentheses. Attached hereto as an appendix is a copy of the First District's decision in Rease v. State.

STATEMENT OF THE CASE AND FACTS

The respondent rejects as incomplete the petitioner's statement of the case and facts and substitutes the following statement:

By information filed September 17, 1984, petitioner was charged with one count of kidnapping, two counts of sexual battery, and one count of robbery. (R 8). Following a jury trial, held November 6 and 7, 1984 (R 223-564), petitioner was found guilty as charged of kidnapping and the two counts of sexual battery. As to the robbery charge, the jury found petitioner guilty of the lesser-included offense of assault. (R 98).

Petitioner's sentencing hearing was held November 30, 1984. (R 126-143). At the hearing, the State, utilizing the category 2 (sexual battery) scoresheet, calculated petitioner's total score at 685 points, which score called for the imposition of a life sentence. (R 123; 136). The court agreed with this scoresheet calculation (R 136), and adjudicated the petitioner guilty, sentencing him to the following: life imprisonment for the kidnapping offense, thirty years for each count of sexual battery, and sixty days for the lesser offense of assault. The court ruled that the sexual battery sentences were to run consecutively to each other as well as to the life term and that the sixty-day sentence for the assault was likewise to run consecutively to the three other terms of imprisonment.

(R 116-122, 123, 143-144). The court then retained jurisdiction over one-third of the petitioner's sexual battery sentences. (R 144).

Petitioner's pro se notice of appeal was filed on December 18, 1984. (R 147). On appeal, the petitioner made two arguments. First, petitioner argued that the trial court erred in retaining jurisdiction over one-third of petitioner's sexual battery sentences, to which the State conceded in its answer brief. Second, the petitioner contended that the trial court's imposition of the two consecutive thirty-year terms for the sexual battery offenses to run consecutively to the life sentence for the kidnapping offense was error because it constituted a departure for which no written reasons had been given.

In its opinion, filed November 22, 1985, now reported at 10 F.L.W. 2621, the First District, noting that both parties had recognized that the trial court's retention of jurisdiction was error, modified the final judgment to strike the court's retention of jurisdiction over any portion of the sentences. (A 1-2).

As to the petitioner's second point, however, the First District disagreed, stating:

> Since it is impossible for a person to serve more than a lifetime in prison, and since the sentencing guidelines recommended a sentence of life imprisonment, the court did not deviate from the recommended sentence by adding consecutive sentences on the other counts. Accordingly, we affirm appellant's sentence with the modification noted above.

Slip at 2. (A 2). The court then certified the following

question to be one of great public importance:

> Whether, when the sentencing guidelines recommend a sentence of life imprisonment, the trial court may sentence a defendant to life imprisonment plus sixty years in prison on other counts, to run consecutive to the life sentence, without stating clear and convincing reasons for departure from the guidelines.

Slip op. at 2. (A 2). Petitioner's filed his notice of discretionary review on December 18, 1985.

SUMMARY OF ARGUMENT

It is the State's position that because a life sentence followed by a term-of-years sentence imposed pursuant to the sentencing guidelines can never exceed the maximum recommended guidelines sentence of life imprisonment, the First District was correct in concluding sub judice that the trial court, in sentencing petitioner to life imprisonment plus sixty years, did not deviate from the recommended guidelines sentence, and, thus, was not required to set forth reasons for departure.

ARGUMENT

ISSUE I

(RESTATED) THE FIRST DISTRICT CORRECTLY RULED THAT WHEN THE SENTENCING GUIDELINES RECOMMEND A SENTENCE OF LIFE IMPRISONMENT, THE TRIAL COURT MAY SENTENCE A DEFENDANT TO LIFE IMPRISONMENT PLUS SIXTY YEARS IN PRISON ON OTHER COUNTS, TO RUN CONSECUTIVELY TO THE LIFE SENTENCE, WITHOUT STATING CLEAR AND CONVINCING REASONS FOR DEPARTURE.

Petitioner challenges the First District's holding that the trial court was correct in not providing written reasons for departure when it imposed the two consecutive sexual battery sentences to run consecutively to the life term imposed for the kidnapping offense. In so challenging the First District's opinion, the petitioner essentially makes three arguments. First, the petitioner contends that while the First District's view would have been correct under pre-guidelines law, the sentencing guidelines and, specifically, Florida Rule of Criminal Procedure 3.701(d)(12) have altered that view. Second, petitioner argues that the First District, in reaching its decision, failed to take into consideration the effects of section 944.30, Florida Statutes, which allows for the commutation of a life sentence where appropriate. Finally, the petitioner relies upon State v. Holmes, 360 So.2d 380 (Fla. 1978), to argue, by analogy, that the trial court exceeded the recommended guidelines sentence and, therefore, should have given written reasons for departure.

Petitioner's first contention is clearly wrong. There is nothing to indicate that the sentencing guidelines have implicitly overruled the pre-guidelines holdings of such cases as Alvarez v. State, 358 So.2d 10 (Fla. 1978) and Payne v. State, 358 So.2d 550 (Fla. 1978). In those cases, it was held that sentences of 125 years and 101 years respectively, although greater than the defendant's life expectancy, were to be considered, in essence, life sentences inasmuch as a defendant's life expectancy was irrelevant to the maximum sentence set forth for a particular offense by the Legislature. Rule 3.701(d)(12) and such cases as Draves v. State, 459 So.2d 455 (Fla. 5th DCA 1984) and Cassidy v. State, 464 So.2d 580 (Fla. 2d DCA 1985) have not changed that position.

Rule 3.701(d)(12) simply provides that:

> A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guidelines sentence unless a written reason is given.

In Draves, the defendant was sentenced to concurrent terms of five and seven years. The recommended guidelines range was five and one-half years to seven years. The defendant argued that because his concurrent sentences totaled more than seven years, the trial court erred in not providing written reasons for departure. The Fifth District disagreed, stating:

> Draves is clearly misapplying this section. The use of the term "total sentence" in Rule 3.701(d)(12) does not refer to the

> mathmatical total of two concurrent sentences, such as the sentences in the instant case, but to the actual time required to be served. The total sentence is seven years, not twelve years, and therefore does not exceed the guideline range.

Id. at 456. Faced with similar facts and the same argument, the Second District likewise held in Cassidy v. State, that "total sentence" in Rule 3.701(d)(12) did not refer to the mathmatical total of the two concurrent sentences but to the actual time required to be served. Cassidy, 464 So.2d at 581.

Petitioner in his brief is now attempting to apply this definition of "total sentence" to the facts of the instant case by arguing that the actual time petitioner will be required to serve is life plus sixty years, which petitioner contends exceeds the recommended guidelines sentence of life. However, as the First District clearly ruled, at the time a defendant is sentenced there is no known "total sentence." Neither does the sentencing court know the actual time the defendant will be required to serve. Thus, the reasoning of Cassidy and Draves has no application to facts of the instant case. Clearly, the holdings of Cassidy and Draves would be relevant sub judice, if petitioner had been sentenced to a definite term of years. Rule 3.701(d)(12) would then require written reasons for departure if the total of the two term sentences exceeded the recommended guideline range. However, sentencing a defendant, as here, to

a life sentence followed by a definite term of years can never be in excess of the recommended sentence of life imprisonment. It is absolutely impossible. Thus, the reasoning of Alvarez and Payne is still applicable.

As his second point, petitioner contends that the First District overlooked the effects of section 944.30, Florida Statutes. Under the guidelines, section 921.001(8), Florida Statutes, provides that a defendant may be released from incarceration only in three instances:

> (a) Upon expiration of his sentence
>
> (b) Upon expiration of his sentence as reduced by accumulated gain-time; or
>
> (c) As directed by an executive order granting clemency.

Neither subsection (a) nor (b) are applicable to the petitioner. Gain time is not credited against a life sentence. The only possible consideration in the instant case, therefore, is subsection (c) which apparently refers to section 944.30, Florida Statutes. That provision provides:

> Any prisoner who is sentenced to life imprisonment, who has actually served 10 years and has sustained no charge of misconduct and has a good institutional record, shall be recommended by the department for a reasonable commutation of his sentence, and if the same be granted, commuting the life sentence to a term for years, then such prisoner shall have the benefit of the ordinary commutation, as if the original sentence was for a term for years, unless it shall be otherwise ordered by the Board of Pardons.

Relying upon Judge Zehmer's dissent sub judice, the petitioner

appears to assert that because the possibility exists that petitioner's life sentence could be commuted and because, then, petitioner, despite the commutation would still have to serve his sixty-year sentence, the life sentence plus sixty years imposed sub judice was in excess of the recommended sentence and therefore required written reasons for departure. Clearly, this reasoning is not viable. Rule 3.701(d)(12) provides that the "total sentence" imposed for separate offenses must not exceed the guidelines sentence. In the instant case the recommended sentence was life imprisonment. Life imprisonment plus sixty years is still life imprisonment and, thus, does not exceed the maximum recommended range sub judice. That the possibility exists that petitioner's sentence will be commuted to a term of years pursuant to section 944.30 does not change the fact that the sentence imposed sub judice was a life sentence within the recommended sentencing guidelines range. For example, if petitioner's life sentence were commuted to ten years, he would still be required to serve an additional sixty years for a total sentence of seventy years which is still less than the recommended sentence of life imprisonment. Even assuming petitioner's life sentence were commuted to a higher number of years than ten, such as 100 years, that 100-year sentence followed by the two consecutive thirty-year terms, for a total of 160 years would still, under the reasoning of Alvarez and Payne, not exceed life. Accordingly,

because any term-of-years sentence could never exceed a life sentence pursuant to the guidelines, there was no departure in excess of the recommended guidelines sentence sub judice, and the trial court was therefore not required to set forth written reasons for departure.

As his third argument, petitioner asserts that the case of State v. Holmes, 360 So.2d 380 (Fla. 1978) is analogous to the instant case. There, the defendants were convicted of a third-degree felony and each sentenced to combined terms of imprisonment and probation in excess of the five-year statutory maximum for third-degree felonies. This Court, reasoning that the extension of probation beyond the statutory maximum would lead to unacceptable results, concluded that, a combined period of incarceration followed by probation could not exceed the statutory maximum.

Petitioner contends that the rationale of Holmes should be applied here to petitioner's sentences. However, such an application presupposes that the trial court sub judice sentenced petitioner to a term in excess of the recommended guidelines range, and, as the State has demonstrated above, such was not the case. Petitioner's sentence was clearly within the recommended guidelines range.

Finally, petitioner's requested relief from this Court, should he prevail, is for this Court to simply hold the sixty-year portion of his sentence illegal and strike it. However, although it is the State's position that the First

District's opinion should be approved by this Court, nevertheless, should this Court agree with petitioner, the State suggests that the only method by which the trial court's sentencing discretion will not be usurped is if this Court were to remand the cause to the First District with the express direction that the trial judge be given the opportunity to state his reasons for departure in writing.

Accordingly, it is the State's position that the First District did not err in affirming petitioner's sentence. However, should this Court disagree, the trial court should be given the opportunity, on remand, to provide clear and convincing reasons for departure.

CONCLUSION

Based upon the foregoing, the First District's certified question should be answered in the affirmative and the opinion of that court approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this the 27th day of January, 1986.

Patricia Conners
Patricia Conners
Of Counsel