

IN THE SUPREME COURT OF FLORIDA

CARVEL HOLLOMAN,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 71,296

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Preliminary Statement	1
Statement of the Case and Facts	2-3
Summary of Argument	4
Argument	5-7

PETITIONER MUST BE RESENTENCED WITHIN THE
RECOMMENDED GUIDELINES RANGE WITHOUT AFFORDING
THE TRIAL JUDGE AN OPPORTUNITY TO COME UP WITH
REASONS FOR DEPARTURE NOT PREVIOUSLY STATED IN
ITS SENTENCING ORDER.

Conclusion	8
Certificate of Service	8

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Carter v. State</u> , 485 So.2d 1292 (Fla. 4th DCA), rev.den. 494 So.2d 1149 (Fla. 1986)	6
<u>Foister v. State</u> 510 So.2d 371 (Fla. 1st DCA 1987)	6
<u>Holloman v. State</u> , 12 F.L.W. 2113 (Fla. 4th DCA Sept. 2, 1987)	3
<u>Lorenzo v. State</u> , 483 So.2d 790 (Fla. 4th DCA 1986)	5
<u>Morganti v. State</u> , 510 So.2d 1182 (Fla. 4th DCA 1987)	3,4,5
<u>Reid v. State</u> , 488 So.2d 913 (Fla. 1986)	5
<u>Royal v. State</u> , 485 So.2d 1292 (Fla. 2d DCA 1987)	6
<u>Shull v. Dugger</u> , 515 So.2d 748 (Fla. 1987)	4,5,6,7
<u>Spivey v. State</u> , 512 So.2d 322 (Fla. 3d DCA 1987)	7
<u>Whitehead v. State</u> , 498 So.2d 863 (Fla. 1986)	2,4
<u>Williams v. State</u> , 492 So.2d 1308 (Fla. 1986)	6

PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. He will be referred to as petitioner in this brief.

The record on appeal is bound in three volumes which are consecutively numbered. All references to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses. All references to the appendix attached to this brief will be by "A" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner, CARVEL HOLLOMAN, was convicted of attempted first degree murder with a weapon of Kenneth Newsome and robbery with a weapon of Kenneth Newsome. The trial court determined to sentence petitioner as a habitual offender before any sentencing guideline scoresheet was prepared or discussed (R-284). The court then said that if the habitual offender sentence was not correct then the guidelines scoresheet would have to be in the record to show where the appellant would fall (R-294). The guidelines recommended range called for 17 to 22 years (R-383). At the bottom of the sentencing guidelines scoresheet the trial court put its written reasons for departure "the subject is a menace to society and needs to be incarcerated for life." (R-383) (A-7). The court departed and imposed a sentence of life imprisonment.

On appeal to the District Court of Appeal, Fourth District, the court initially reversed on the authority of Whitehead v. State, 498 So.2d 863 (Fla. 1986), and remanded for resentencing within the guidelines recommended range of 17 to 22 years (A-1).

The state then requested rehearing because the trial judge had personally written a letter to the Assistant Attorney General identifying the grounds the court would use to depart if it were given the opportunity to do so on resentencing (A-2-5). On rehearing the court again reversed on the authority of Whitehead but remanded for resentencing "so that the trial court may depart

from the recommended sentencing guidelines range if it finds valid reasons for departure" on the authority of Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987), pending discretionary review, S.Ct. 71,126. Holloman v. State, 12 F.L.W. 2113 (Fla. 4th DCA September 2, 1987).

Petitioner timely invoked the discretionary review jurisdiction of this Court and this Court accepted jurisdiction in an order dated January 15, 1988. This brief on the merits follows.

SUMMARY OF ARGUMENT

At petitioner's original sentencing the only reasons for departure were that appellant was a habitual felony offender, was a menace to society and needed to be incarcerated for life. On appeal the District Court of Appeal, Fourth District, found all the reasons for departure to be invalid and reversed on the authority of Whitehead v. State, supra. On rehearing the district court further allowed that the trial court could again depart from the sentencing guidelines if it finds valid reasons for departure on authority of the district court's own decision in Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987).

In Shull v. Dugger, 515 So.2d 748 (Fla. 1987), this Court required that the remand for resentencing be within the guidelines recommended range after all the reasons initially stated by the trial judge in support of departure are found to be invalid on appeal. The rule of Shull v. Dugger applied in the instant case requires resentencing within the guidelines recommended range of 17 to 22 years.

ARGUMENT

PETITIONER MUST BE RESENTENCED WITHIN THE RECOMMENDED GUIDELINES RANGE WITHOUT AFFORDING THE TRIAL JUDGE AN OPPORTUNITY TO COME UP WITH REASONS FOR DEPARTURE NOT PREVIOUSLY STATED IN ITS SENTENCING ORDER.

At the original sentencing hearing, the main reason for departure was that petitioner was a habitual felony offender. The trial court's additional written reason that the petitioner was a "menace to society" was clearly an invalid reason for departure, Lorenzo v. State, 483 So.2d 790 (Fla. 4th DCA 1986), Reid v. State, 488 So.2d 913 (Fla. 1986), which even the state did not argue was valid. Petitioner requested a reversal and a remand for resentencing within the guidelines recommended range.

However, the district court allowed for another departure or resentencing of petitioner on authority of Morganti. In that case the Fourth District Court of Appeal reasoned that notwithstanding the fact that the only reasons for the guidelines departure at the original sentencing hearing were improper, on resentencing the trial court could come up with new reasons for departure because at the time of the original sentencing there was case law supporting the contention that a departure was proper because the defendant was a habitual felony offender proper.

Morganti, was disapproved in Shull v. Dugger, 515 So.2d 748 (Fla. 1987). The decision in Morganti is at odds with other decisions that when all the reasons stated by the trial court in

support of departure are found to be invalid, resentencing following remand must be within the presumptive guideline sentence. Shull v. Dugger, supra, Williams v. State, 492 So.2d 1308 (Fla. 1986), Foister v. State, 510 So.2d 371 (Fla. 1st DCA 1987), Royal v. State, 508 So.2d 1313 (Fla. 2d DCA 1987), Carter v. State, 485 So.2d 1292 (Fla. 4th DCA), rev. den. 494 So.2d 1149 (Fla. 1986).

In Shull v. Dugger, this Court stated why resentencing within the recommended guidelines range is required after all reasons for departure have been found invalid on appeal:

We see no reason for making an exception to the general rule requiring resentencing within the guidelines merely because the illegal departure was based upon only one invalid reason rather than several. We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

515 So.2d at 750.

It is clear here that the trial judge will again attempt to justify the original sentence and intends to again depart on resentencing, should such a departure now be allowed. (See trial judge's letter to Attorney General, A-3-4). It is only because of the trial judge's expressed disagreement with the district court's decision that the state sought rehearing or sought to

oppose this Court's exercise of discretionary review jurisdiction in this case. The policy reasons described in Shull v. Dugger, and the trial court's stated intent to depart on resentencing support petitioner's position in this cause that repeated efforts to resentence him to a valid departure sentence should fail on the first appeal. The law favors finality. To allow the trial court to come up with new reasons for departure on resentencing tends to turn cases into "yo-yo's" which can bounce up and down between the trial courts and the appellate courts. In Spivey v. State, 512 So.2d 322 (Fla. 3d DCA 1987), the case was remanded for a third resentencing with a requirement that the case be reassigned since the trial judge's strongly expressed views and attempts to impose a departure sentence for invalid reasons demonstrated his disqualification. Even if this Court were to allow a possible departure upon resentencing in this case, the case should be reassigned to another judge for this trial judge's interest as an advocate against petitioner in the district court on rehearing, as well as his expressed views in his letter to the Attorney General demonstrate that it would be advisable to preserve the appearance of justice by having petitioner resented before another judge. See Spivey v. State, supra.

Wherefore, application of the rule of Shull v. Dugger, requires reversal of the district court's decision allowing a departure on resentencing.

CONCLUSION

Based upon the foregoing argument and authorities cited herein, petitioner prays this Court will quash the decision of the district court and order the petitioner's case remanded for resentencing within the guidelines recommended range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to DIANE LEEDS, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 3rd day of February, 1988.

Margaret Good
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