

IN THE SUPREME COURT OF FLORIDA

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DONALD LEE SMITH,
Petitioner,

v.

CASE NO. 72,008

STATE OF FLORIDA,
Respondent.

BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE FLORIDA SUPREME COURT

DONALD LEE SMITH, :
 :
 Petitioner, :
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 v. : CASE NO. 72,008
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 _____/

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner 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. A one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T". Attached hereto as an appendix is the opinion of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

By information filed October 2, 1984, petitioner was charged with second degree murder (R 5). On December 8, 1984, petitioner appeared with counsel and entered a negotiated plea of guilty to the charge in exchange for a 24 year sentence, which was in excess of the recommended guidelines sentence (R 14; T 1-3). The prosecutor stated that the guidelines sentence would be 12-17 years (T 4). The court accepted the plea (T 4-12).

Petitioner was adjudicated guilty and sentenced to 24 years in state prison, with credit for 100 days served (R 15-19; T 13). On January 3, 1987, petitioner filed a pro se motion for reduction of sentence (R 20-21). On January 17, 1985, petitioner filed a pro se notice of appeal (R 25). On February 5, 1985, the court denied petitioner's motion for reduction of sentence (R 26). On February 4, 1986, the appeal was dismissed (R 29).

On May 13, 1987, the lower tribunal granted petitioner a belated appeal and ordered that the Public Defender of the Second Judicial Circuit represent him (R 39).

In that appeal, petitioner argued that his sentence was illegal because no sentencing guidelines scoresheet had been prepared, and because there was no written statement of reasons for departure from what the prosecutor represented would be the presumptive range. The lower tribunal disagreed, but certified the question (Appendix).

On February 25, 1988, a timely notice of discretionary review was filed.

SUMMARY OF ARGUMENT

Petitioner will argue in this brief that his 24 year prison sentence is illegal, since it was imposed without the filing of a sentencing guidelines scoresheet and without written reasons for departure. There are at least two other cases pending before this Court on the same issue. This Court's prior decisions in the guidelines arena indicate its desire that the requirements of the guidelines rule be strictly construed.

ARGUMENT

THE LOWER COURT ERRED IN SENTENCING PETITIONER WITHOUT A SENTENCING GUIDELINES SCORESHEET AND WITHOUT WRITTEN REASONS FOR THE APPARENT DEPARTURE

There is no sentencing guidelines scoresheet in this record. One is absolutely required. Fla.R.Crim.P. 3.701 (d)(1). The prosecutor stated that the recommended range would be 12-17 years (T 4); the judge was apparently aware of that fact and aware that he was entering a departure sentence. Yet, no written reasons for departure appear in this record, as required by Fla.R.Crim.P. 3.701(d)(11) and State v. Jackson, 478 So.2d 1054 (Fla. 1985).

Petitioner acknowledges that the law, at least in some district courts of appeal, appears to allow a negotiated sentence to be entered, without a scoresheet and without written reasons for departure, notwithstanding the plain meaning of the rules cited above. See, e.g., Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986), review granted, case no. 69,606; and Quarterman v. State, 506 So.2d 50 (Fla. 2nd DCA 1987), review granted, case no. 70,567.

However, petitioner contends that certain prior decisions from this Court require strict compliance with the guidelines rule. First, in State v. Whitfield, 487 So.2d 1045 (Fla. 1986), this court held that scoresheet errors apparent from the face of the record may be attacked for the first time on direct appeal, on the theory that if the scoresheet is incorrect, the defendant has received a de facto departure sentence not

justified by written reasons. It defies logic to require accurate scoresheets on the one hand, but then to turn around and say that scoresheets are really not necessary.

Next, in Casteel v. State, 498 So.2d 1249, 1252 (Fla. 1986), this Court held:

An appellate court must look only to the reasons for departure enumerated by the trial court and must not succumb to the temptation to formulate its own reasons to justify the departure sentence. Although a review of the record may reveal clear and convincing reasons for departure which were not expressly cited by the trial court, such reasons should not be considered.

How is an appellate court supposed to examine a departure sentence if no written reasons are given?

Finally in Williams v. State, 500 So.2d 501, 503 (Fla. 1986), this Court held:

A trial court cannot impose an illegal sentence pursuant to a plea bargain. ... A defendant cannot by agreement confer on the court the authority to impose an illegal sentence. If a departure is not supported by clear and convincing reasons, the mere fact that a defendant agrees to it does not make it a legal sentence.

Here, the judge had no scoresheet to consider, even though it is the ultimate responsibility for one lies with him. Likewise, the judge set forth no reasons, written or otherwise, to justify the 24 year sentence. Petitioner's sentence is patently illegal. This Court must follow its prior cases, as well as the strict language of the guidelines rule, and reverse petitioner's sentence.

CONCLUSION

Based upon the foregoing, petitioner requests that this Court reverse his sentence and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #A-050033, B Dorm 928, P.O. Box 158, Lowell, Florida, 32663, this 9 day of March, 1988.


P. DOUGLAS BRINKMEYER