IN THE SUPREME COURT OF FLORIDA

BRENDA FOX,

Petitioner,

vs.

DISTRICT COURT OF APPEAL, FOURTH DISTRICT,

Respondent.

CASE NO. 73,697

RESPONSE OF PETITIONER

The petitioner, BRENDA FOX, by undersigned counsel hereby files this response as provided in this Court's order of March 21, 1989, to the response to order to show cause.

The respondent has asserted that the State of Florida may timely file a notice of appeal more than 15 days from the imposition of a sentence that departs from the sentencing guidelines.

The petitioner has shown in her petition, and respondent acknowledges, that the notice of appeal was not filed within 15 days of the imposition of the sentence, Petitioner further showed conflict between the several district courts of appeal on the question of law raised, i.e. whether a notice of appeal invokes jurisdiction of the reviewing court when filed untimely from the imposition of the sentence but timely from the entry of the written order delineating reasons for the departure sentence.

In response to the respondent's argument, petitioner will show that a notice of appeal to be timely must be filed within the time allowed from the imposition of the sentence, and that a notice that is not timely filed from imposition of the sentence is ineffective to invoke appellate jurisdiction. Such a notice cannot be made jurisdictionally effective by measuring the time for filing from a separate written order justifying the departure sentence.

1, The rules and statutes governing the filing of notices of appeal, pertinent to this issue, may be reviewed by reference to the following. Rule 9.140(c)(1)(J), Florida Rules of Appellate Procedure, provides for an appeal by the state from an order

imposing "a sentence outside the range recommended by the guidelines authorized by Section 921.001, Florida Statutes (1983), and Florida Rule of Criminal Procedure 3.701."

The order to be reviewed is the sentence.

Section 921.001(5) provides, in pertinent part:

> The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to Chapter 924.

2. The statutory authority for the state to appeal a sentence outside the range recommended by the guidelines are the statutory provisions of Section 921.001(5) and Section 924.07(1), Florida Statutes. Section 924.07(1)(i) provides that the state may appeal from "A sentence imposed outside tne range recommended by the guidelines authorized by s. 921.001." The legislature has specifically provided in these sections that the state may appeal from a sentence imposed outside the range recommended by the guidelines.

The requirement that a sentence imposed outside the range recommended by the guidelines be explained in writing is contained in a separate subsection of Chapter 921.001. The imposition of the sentence is a distinct act from the separately provided requirement that the sentence be accompanied by a written explanation. The imposition of the sentence is the final act actually affecting a party. This is made clear by Section 921.161(1), Florida Statutes (1987), which provides, inter alia, that a sentence of imprisonment "shall not begin to run before the date it is imposed, ..."

3. Each of the statutory and rule provisions give finality to the imposition of the sentence, because it is the imposition of the sentence which marks the beginning of the term of imprisonment.

4. The requirement of a written explanation for a sentence imposed outside the guidelines does not mark the beginning of the sentence itself. By traditional terms of finality for the

purpose of notices of appeal, the imposition of the sentence is the final and only act necessary to mark the beginning of the term of imprisonment.

5, It is petitioner's position that the actual imposition of sentence governs the timeliness of appeals under Rule 9.140 for both a defendant and for the state. The wording of the rule varies somewhat in that a defendant's commencement is from rendition of a final judgment and entry of a written order imposing sentence while a state appeal is commenced from rendition of the order to be reviewed. See Rule 9.140(b)(2) and (c)(2), Rules of Appellate Procedure.

6. This divergence in wording between entry of a written order imposing sentence and rendition of the order to be reviewed in Rule 9.140 relating to commencement is not intended to create a distinction between the timeliness requirements of defendants and state appeals. The Committee Notes to the 1977 revision set forth in the commentary to Subsection (c)(2) that the section governing state appeals "parallels (b)(2) regarding appeals by defendants except that a maximum of 15 days is allowed for filing the notice."

The Committee Note to (c)(1) also sets forth, in listing the matters which may be appealed by the state, in the final sentence of that paragraph of the Committee Notes that, except for an appeal for an order dismissing an indictment or information or count thereof, that the remaining portions of the rule listing the matters that the state may appeal generally "track the balance of State appellate rights in Section 924.07, Florida Statutes (1975)."

The Court should interpret the addition of the right to appeal a sentence imposed outside the range recommended by the guidelines as authorized by Section 921.001, Florida Statutes (1983), as also tracking the statutory provisions of Chapter 921 and of Section 924.07, Florida Statutes. To do so would lead to the inevitable conclusion that the starting point for the time to commence any sentencing guideline appeal begins at the imposition of the sentence.

7. A sentence in a criminal case is defined in Rule 3.700 (a) and Rule 3.700(b), Rules of Criminal Procedure. These portions of Rule 3.700 provide that the term "sentence" means the pronouncement by the Court of the penalty imposed upon a defendant for an offense he has been adjudged guilty of committing. Subsection (b) of the rule provides as follows:

> (b) Every sentence or other final disposition of the case shall be pronounced in open court. The final disposition of every case shall be entered in the minutes in courts in which minutes are kept, and shall be docketed in courts which do not maintain minutes.

This is in marked contrast to the definition of judgment in Rule 3.650 and Rule 3.670, Rules of Criminal Procedure. Rule 3.650 defines judgment as the adjudication that the defendant is guilty or not guilty. However judgments are required to be rendered under Rule 3.670. There is no requirement that sentences be rendered. Therefore the interpretation of the Rule of Appellate Procedure regarding commencement of appeal from a sentence has no meaning with reference to rendition, which is a term applied to judgments rather than sentences.

The sentence in this case was not rendered because the Clerk's Office in tne Seventeenth Judicial Circuit does not render sentences. (see Appendix to Petition for Writ of Prohibition - page 1). The sentence is imposed on the date it is orally pronounced, and in this case was imposed July 18, 1988. It was never rendered, and is not required to be rendered. Only judgments of conviction are required by Rule of Criminal Procedure 3.670 to be rendered.

Therefore, the time for Commencement of an appeal from a sentence cannot be measured by "rendition" of the sentence. Accordingly, the definition of rendition in Rule 9.020(g), Rules of Appellate Procedure, has no application to the determination of when the state must commence its appeal.

The Court is urged to interpret the Rules of Appellate Procedure, specifically Rule 9.140 regarding commencement of defendants' or state appeals in a like and consistent manner when the appeal is from the imposition of a sentence outside the range

recommended by the sentencing guidelines. To do otherwise would make impossible the determination of the timeliness of appeals from sentences because sentences are not rendered and are not required to be rendered. There is no clerk's filing stamp by which to measure rendition.

8. The assertion by respondent that the sentence was not contemplated to be final until the court had signed the separate order, stating why the sentence was or was not a departure, is inconsistent with the record. The trial court sentenced the petitioner to prison on July 18, 1988. This clearly showed the sentence to be a final order because the petitioner was placed into the custody of the Department of Corrections for a definite term of imprisonment of seven years. This is the finality required by law for imposition of sentence. This was the finality mandated by the rules for the measuring of the time to commence a sentence appeal. The time period for measuring an appeal cannot be bent earlier or later than the actual date of sentence imposition.

CONCLUSION

Therefore, petitioner urges the Court to find, consistent with the reasoning above and in State v. Ealy, 533 So.2d 1173 (Fla. 2d DCA 1988), that the notice of review in the case at bar was untimely and that the district court of appeal is without jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOAN **FOWLER,** Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 14th day of April, 1989.

Louis G. Carres

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