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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,806

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERTO L. BETANCOURT,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is a criminal prosecution for robbery. The State appeals from a decision by the Third District Court of Appeal requiring the trial court, after innocently sentencing the defendant in excess of the guidelines without reason, to resentence the defendant within the guidelines.[1]

STATEMENT OF THE CASE AND FACTS

The defendant, **ROBERTO** L. **BETANCOURT,** was convicted of armed robbery with a deadly weapon. (A. 1). He was sentenced as a youthful offender to a split sentence of four years incarceration followed by two years of community control. (A. 1). There is no indication that the trial court considered the sentence as a departure from the sentencing guidelines and no reasons for departure were given. (A. 1-2).

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[1] The following abbreviations will be used throughout this brief were needed:

(R.) Clerk's Record on Appeal

(T.) Transcript of Proceedings

(ST.)& (SR.) Supplemental Transcript or Record

(A.) Appendix

On appeal to the Third District Court of Appeal, the defendant challenged his sentence on the ground that it exceeded the maximum permitted under the sentencing guidelines (i.e. 3.5 - 4.5 years incarceration). In its opinion the Third District agreed with the defendant that when a combination sentence of incarceration and community control exceeds the guidelines sentence it must be treated as a departure and written reasons must be provided. (A. 1-2).

As its remedy the court directed the trial judge to resentence the defendant within the guidelines. (A. 3). Relying on Harrison v. State, 523 So.2d 726, 727 (Fla. 3d DCA 1988), the court held that such an instruction was required. Id. However, the Third District expressly stated the following:

> We acknowledge that our rule conflicts with that followed in the Second and Fifth Districts. *See Dyer v. State, 13 F.L.W. at 2613* (trial judge who originally thought he or she was entering a guideline sentence can, on remand, be allowed to depart and provide written reasons); *Waldron v. State, 529 So.2d 772, 774 (Fla. 2d DCA 1988)(en banc)(same).*

(A. 3).

On February 15, 1989, the State filed a motion to stay the issuance of a mandate pending review of this cause by

this Court. On March 6, 1989, the Third District granted the State's motion.

On February 28, 1989, the State timely filed its Notice to Invoke Discretionary Jurisdiction and subsequently filed its petition. On August 4, 1989, this Court issued its Order Accepting Jurisdiction and Dispensing with Oral Argument. This brief follows.

POINT ON APPEAL

WHETHER A TRIAL JUDGE WHO ERRONEOUSLY SENTENCES A DEFENDANT IN EXCESS OF THE APPROPRIATE GUIDELINES SENTENCE WITHOUT WRITTEN REASONS UNDER THE BELIEF THAT THE SENTENCE IS WITHIN THE GUIDELINES MAY, ON REMAND, ENTER REASONS FOR DEPARTURE?

SUMMARY OF THE ARGUMENT

The only issue raised on this appeal is whether a trial judge who mistakenly, thinking that he is sentencing within the guidelines, sentences a defendant above the guidelines sentence without entering reasons should be allowed to enter grounds for departure on remand. For several reasons he should. Although the trial judge may have though the initial sentence adequate for the crime based on the facts of the case he may not consider the reduced guidelines sentence adequate and should be allowed to apply any legally applicable reasons for departure. Such a rule will not lead to an endless cycle of resentencing since, upon entering grounds for departure, if said grounds are found improper the trial judge will then be limited to resentencing within the guidelines. Moreover, since the nature of the error is tantamount to a clerical error and its fault is shared by both the trial judge and trial counsel who did not alert the judge at sentencing, the parties should be put in the position they where in prior to the error and the trial judge should be given all of the options he had prior to sentencing.

ARGUMENT

A TRIAL JUDGE SHOULD NOT BE CONSTRAINED TO RESENTENCE THE DEFENDANT WITHIN THE GUIDELINES UPON REMAND FROM A DETERMINATION THAT HIS INITIAL SENTENCE, UNBEKNOWNST TO THE TRIAL JUDGE, MISTAKENLY EXCEEDED THE MAXIMUM GUIDELINES SENTENCE.

The key question raised below relevant to this appeal is whether a trial judge who erroneously sentences a defendant to a period of incarceration in excess of the guidelines sentence without providing written departure reasons may, on remand for resentencing, provide grounds for departure. Three districts have answered this question in the affirmative.[2] The Third District alone has said that the trial judge must resentence within the guidelines. The Third District's opinion misapplies this Court's ruling in Shull v. Dugger, 515 So.2d 748 (Fla. 1987), and its holding must be reversed.

This Court has not been silent on this particular question but has in fact addressed it indirectly on more than one occasion. In State v. Whitfield, 487 So.2d 1045 (Fla. 1986), this Court decided whether a defendant was required to

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[2] Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988); Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988); Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988).

make a contemporaneous objection to preserve review of the trial court's failure to provide written reasons for an unintentional upward departure sentence. In computing the sentencing guidelines scoresheet, the State erroneously added points which where not applicable to the crime in question. Id. at **1045-1046**. Neither defense counsel nor the trial court noted the error. Id.

As part of its argument to this Court the State noted that the comments of the trial judge at sentencing indicated that there were proper grounds for departure had the trial judge wished to depart. Whitfield, **487** So.2d at **1047**. Therefore, the State urged that the sentence be affirmed and the delay of remand and resentencing be avoided. Id. This Court declined to do so and stated:

> We decline to speculate on the trial judge's action on remand and, in any event, respondent is entitled to appellate review of the mandatory findings written in support of any departure.

Whitfield, **487** So.2d at **1047**.

Clearly, Whitfield reserved to the trial judge the right of determining whether to depart on remand from the erroneous sentence.

In an even clearer statement of this proposition this Court again revisited the issue a few months later. In Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985), the First District Court reversed the trial judge's denial of defendant's post-conviction motion to resentence and correct a guidelines scoresheet which contained a computational error. Id. at 844. The District Court specifically authorized the trial judge to enter departure reasons on remand. This Court in State v. Chaplin, 490 So.2d 52 (Fla. 1986), specifically noted its approval for the result reached by the district court below and explicitly noted in a footnote:

> We agree with the district court that respondent is entitled to have his guidelines scoresheet correctly calculated and, similarly, that the trial court should be given an opportunity to consider whether departure from the guidelines should be ordered.

Chaplin, 490 So.2d at 53 (footnote 1)(citations omitted). (emphasis added).

This language clearly recognizes the right of the trial court to consider, once it discover's that the guideline's sentence was not what it thought it would be, whether to submit grounds for departure.

This Court's subsequent ruling in Shull v. State, 515 So.2d 748 (Fla. 1987), is in no way inconsistent with the above rationale. In Shull the First District Court reversed a departure sentence based on an improper reason. The State moved to stay the district court's mandate pending review and the defendant petitioned for writ of habeas corpus.

The State chiefly argued that the petitioner was not entitled to release prior to resentencing since the trial court might be able to justify the departure sentence by submitting a new reason. Shull, at 749. This Court rejected that argument. One of the chief concerns expressed in Shull was with the potential for an endless cycle of improper reasons generated by judges trying to justify their departure sentences. Id. at 750. This Court reasoned that this result would not only unreasonably delay the execution of justice to the detriment of the defendant but would also swamp appellate resources. Id. Instead the trial judge must articulate all of his reasons for departure in the original order and if the resulting sentence is reversed the defendant must be resentenced within the guidelines. Id.

The key distinction between Shull and the case at bar is that in Shull the court knew it was giving a departure sentence and had its initial reason rejected by the appellate court. At bar, as in Whitfield and Chaplin above, the trial

judge through innocent error thought he was sentencing the defendant within the guidelines and therefore gave no grounds for departure. This does not mean that there where no grounds for departure but only that the erroneous sentence was sufficiently severe to satisfy the trial judge that he need not depart. Upon discovering that the correct guidelines sentence is actually lower than at first believed the trial judge might properly no longer consider the sentence adequate and should be able to apply any and all applicable grounds for departure.

This Court's concern in Shull with the possibility of repeated appeals is also not inconsistent with the decision sought by the State in the present case. Although the trial judge will be allowed to enter reasons for departure on remand, once these reasons are entered, if they are found improper the rule in Shull would require resentencing within the guidelines. Instead of repeated resentencing the trial judge is at most given one more opportunity to enter a proper sentence. Such a result allows for the proper execution of justice and encourages all parties to disclose any sentencing error at the initial sentencing hearing since there is nothing to be gained by staying silent and then raising the issue on appeal.

It must be recognized that allowing the trial judge on remand to enunciate reasons for departure for the first time does not punish the defendant as a result of the initial error. Firstly, trial counsel could have notified the court that it was inadvertently assigning a departure sentence. Failing to do so the mistake is not just the trial judge's fault also that of defense counsel. Secondly, by allowing the trial judge to reevaluate the adequacy of the correct guidelines sentence and to determine whether the previously unenunciated departure reasons should be applied the Court is merely effectuating the equitable result of placing the defendant "in the position he would have been in absent the sentencing error." Smith v. State, 536 So.2d 1021, 1022 (Fla. 1988).

Since none of the sentencing concerns addressed by this Court in Shull are in conflict with the rationale applied in Whitfield and Chaplin and since sound equitable reasons urge the petitioned result this court should reverse the Third District Court decision below and order that the case be remanded for resentencing with grounds for departure if such exist.

CONCLUSION

Based on the foregoing arguments and citation of authority the decision of the Third District Court should be reversed with instructions to allow the trial judge to enter reasons for departure.

Respectfully submitted,

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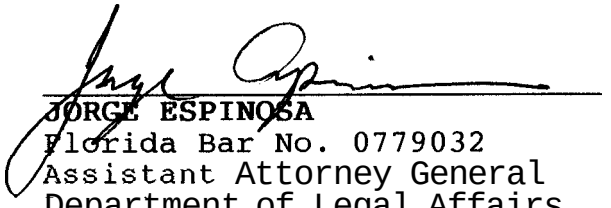

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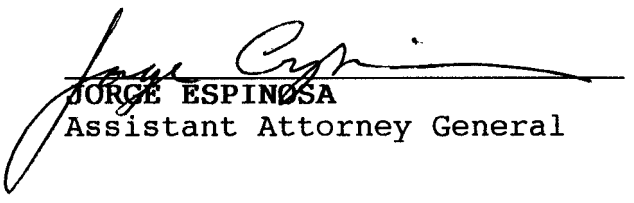
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true and correct copy of the foregoing **BRIEF** OF **PETITIONER ON THE MERITS** was furnished by mail to **HENRY H. HARNAGE,** Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 10th day of July, 1989.



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