No Request Case

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,806

THE STATE OF FLORIDA,

Petitioner,

-vs-

ROBERTO L. BETANCOURT,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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TION

The petitioner, the State of Florida, was the appellant in the Third District Court of Appeal and the plaintiff in the trial court. The respondent, Roberto L. Betancourt, was the appellee in the Third District Court of Appeal and the defendant in the trial court. The symbols "R." and "T." will be used to refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The respondent accepts generally the state's statement of the case and facts with the following for a more complete presentation of what occurred below:

On the day of the sentencing the trial judge was aware that the maximum sentence allowed by the sentencing guidelines was four and one-half years. (R. 35; T. 159).

QUESTION PRESENTED

WHETHER THE TRIAL COURT'S MISTAKE AS TO WHAT WAS THE LAW AT THE TIME OF SENTENCING SHOULD BE **A** BASIS FOR SUBJECTING THE DEFENDANT TO POTENTIAL DEPARTURE FROM THE GUIDELINES AT A TIME **OF** RESENTENCING?

SUMMARY OF ARGUMENT

Contrary to the state's speculation that the court believed the sentence "was within the guidelines", the trial court was aware of the maximum allowable by the sentencing guidelines but failed to follow the operative law on the day of the sentencing, December 15, 1987.

Far from being "tantamount to a clerical error" as casually suggested by the state (there is no computational error in the scoresheet), the pertinent statute [§958.04(3), Fla. Stat.] on December 15, 1987 already had been in effect for two and one-half years and required sentencing within the guidelines -- unless written reasons were provided. The trial judge imposed a sentence in contravention of the guidelines, and with no written reasons provided.

Resentencing with the possibility of yet another departure sentence would subject the defendant to continuing and unwarranted efforts to justify the original sentencing time period.

Moreover, to allow departure at resentencing, as here, would permit any sentencing court, by simply not keeping current with legal development, to have another chance to resentence -- when that case and sentence should already be final -- because of his or her failure to keep abreast of what is the law.

The opinion of the Third District requiring a guidelines sentence *where there had been no scoresheet miscalculation* should be affirmed.

ARGUMENT

THE TRIAL COURT'S MISTAKE AS TO WHAT WAS THE LAW AT THE TIME OF SENTENCING SHOULD NOT BE A BASIS FOR SUBJECTING THE DEFENDANT TO POTENTIAL DEPARTURE FROM THE GUIDELINES AT A TIME OF RESENTENCING.

Certainly, "to err is human." But, the essence of a judicial error ought to dictate whether that error should even be *able* to be corrected.

The sentencing guidelines became effective October 1, 1983 to eliminate "unwarranted variation in the sentencing process" and were to be generally applicable to all non-capital felonies. Florida Rule of Criminal Procedure 3.701; §921.001(4)(a), Fla. Stat. (1985).

While there continued to be problem areas revealing tension between the guidelines and other statutory sections pertaining to sentencing,[1] by July 1, 1985, any tension dissipated between the sentencing guidelines and the Youthful Offender Statute.

Section 958.04(3), Fla. Stat. (1985) provided:

> (3) The provisions of this [Youthful Offender] section *shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines* pursuant to *s.* 921.001 unless clear and convincing reasons are explained in writing by the trial court judge. A sentence imposed outside of such guidelines shall be subject to appeal by the defendant pursuant to s. 924.06.

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1 See, e.g. Whitehead v. State, 498 So.2d 863 (Fla. 1986).

The opinion of the Third District under review allows for the application of the required law as it existed on the date of the initial sentencing, December 15, 1987, and as it exists today.

The Third District's opinion expressed concern as to the consistency of its determination [remand for imposition of guidelines sentence] with *Dyer* v. *State,* 534 So.2d 843 (Fla. 5th DCA 1988) and *Waldron* v. *State,* 529 So.2d 772 (Fla. 2d DCA 1988). However, it is respectfully submitted, factual nuances of both *Waldron* and *Dyer* are, to a significant extent, distinguishable from the matter at bar.

In *Waldron,* the guidelines sentence for the probation violation included "community control or twelve to thirty months' incarceration.'' At the time of the sentencing (wherein the trial judge imposed both community control and incarceration), the Second District stated the trial judge -- aside from potential scoresheet miscalculations due to counseless convictions -- did not have the benefit of a recent opinion of this Court[2] when it imposed both sanctions. *Waldron* at 773. Consequently, in *Waldron* the holding would permit a trial judge on remand to attempt to articulate reasons for departure when there were none given, presumably because the chosen sentence was not initially considered a departure *"and* the sentence imposed is [by judicial construction], *later* determined to be a departure." *Id.* at 774.

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[2] State v. Van Kooten, 520 So.2d 830 (Fla. 1988).

To the contrary, in this cause at the time of sentencing, Section 859.04(3), Fla. Stat. (1987)[3] unequivocally required the trial judge to provide written reasons for departure if the maximum under the Youthful Offender Statute ["four plus two"] exceeded the sentencing guidelines.

Additionally, in *Dyer* the Fifth District decision recognized that the sentence imposed -- were it a departure sentence -- could have been based upon a valid departure reason because of that defendant's "criminal episodic" behavior as articulated at sentencing by the trial court. Id. at 844. The appellate court concluded that the intent of the trial court to impose the harsher sanction (regardless of the sentence being a departure or not) was apparent because of the statements of the trial judge at the time of the sentencing.

No such presumption can be indulged in the matter at bar; in fact, there are no statements for departure whatsoever from the trial judge, other than the Youthful Offender Statute, itself. (T. 161). As a consequence, the issue here is more closely akin to the scenario ultimately facing this Court in *Whitehead, supra* at 866, wherein the sole possible basis for guidelines departure was another sentencing concept within the Florida Statutes, that is, the Habitual Offender Statute.[4]

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3 Effective date: July 1, 1985.

4 §775.084(3), Fla. Stat. (1985).

Subsequent opinions from this Court have stated that, for retroactivity purposes, *Whitehead* "was only an evolutionary refinement in the law." *State* v. *Loftin*, 534 So.2d 1148 (Fla. 1988). The state is unable to maintain in this cause that the mistake made below was due only to such an evolutionary change; any evolutionary tension between the sentencing guidelines and the Youthful Offender Statute stopped on July 1, 1985.[5]

In *Shull* v. *Dugger*, 515 So.2d 748, 750 (Fla. 1987), this Court envisioned the potentially absurd result of numerous resentencings. Likewise here, to allow a resentencing outside of the guidelines, with the potential exposure of a new and longer sentence other than that commanded by the sentencing law in effect, then, would permit just such another absurd result.

For in actuality a trial judge could abuse the concept of sentencing finality, and impugn the overall supremacy of the

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For support, the state summons forth this Court's decision in Smith v. State, 536 So.2d 1021, 1022 (Fla. 1988) [placing the defendant in the position he would have been in absent the sentencing error]: ironically, the Smith decision would place this defendant in precisely the same position as the Third District has ordered: that is, written reasons on December 15, 1987 would have been required for a departure from the guidelines.

The state's final reliance upon State v. Whitfield, 487 So.2d 1045 (Fla. 1986) and Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985) also is misplaced. Both involved computational/arithmetic errors. There is no claim here of an improperly prepared scoresheet. See, e.g., Kelly v. State, 522 So.2d 533 (Fla. 5th DCA 1988).

With the greatest of respect for the opinion of the Third District at bar, even its own decision of Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988), is distinguishable because of the scoresheet miscalculations therein, as contrasted with the error here in the sentencing law.

sentencing guidelines, simply, by not knowing the law. Sentence could be imposed, and yet, when upon remand the correct law is finally applied to the facts of the sentencing scenario, the trial judge would be permitted "another bite at the apple." This type of judicial mistake as to knowledge of the law -- certainly as contrasted with judicial factual/computational mistakes -- ought not be allowed.

CONCLUSION

Based on the cases and authorities cited herein, the respondent requests this honorable Court to affirm the decision of the Third District Court of Appeal and require remand for resentencing within the sentencing guidelines because no written reasons for departure were provided.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, DEBORA J. TURNER, Assistant, Suite N-921, 401 N.W. ?nd Avenue, Miami, Florida 33128, this 31st day of July, 1989.

HENRY H. HARNAGE
Assistant Public Defender