IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,806

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT L. BETANCOURT,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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REPLY BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JORGE ESPINOSA
Assistant Attorney General
Florida Bar No. 0779032
Department of Legal Affairs.
401 N. W. 2nd Avenue, Suite N-921
Miami, Florida 33128
(305) 377-5441

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WHERE A TRIAL JUDGE BELIEVES HE IS SENTENCING THE DEFENDANT WITHIN THE GUIDELINES BUT IS FOUND TO HAVE EXCEEDED THE RECOMMENDED GUIDELINES SENTENCE ON APPEAL THROUGH AN INNOCENT MISUNDERSTANDING OF LAW HE MAY PROPERLY ENTER REASONS FOR DEPARTURE ON REMAND.

Within the last few months this Court has addressed the instant issue and determined that "it is proper for the judge to reconsider whether a departure from the guidelines is appropriate when the corrected guidelines scoresheet is before him on remand." Roberts v. State, 14 F.L.W. 187 (Fla. July 28, 1989). If his reasoning is applied the defendant would apparently distinguish Roberts on the grounds that it dealt with a computational error on the sentencing scoresheet rather than a misapplication of law as in the case at bar. This distinction, however, is unreasonable and the State again submits that, for purposes of remanding for resentencing, the error below amounts to the importance of a clerical error and the trial judge should be allowed to enter reasons for departure.

Appellee's distinction of Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988), is unconvicing. The fact that a sentence could have been based on a valid reason is not the kind of speculation upon which the Fifth district based its decision. While the court did note that a potentially valid departure reason had been mentioned at the sentencing hearing it in no way

indicated that this fact was dispositive in their determination. Dyer at 844. In fact Florida Courts in general and this Court in particular have refused to speculate on the trial court's departure action on remand. State v. Whitfield, 487 So.2d 1045, 1047 (Fla. 1986) Why should a judge who thinks he is sentencing within the guidelines be required to discuss potential departure reasons on the record in the eventuality that he has misconstrued the law. It is therefore unreasonable to pull the Fifth District's incidental comment out of context and convert it into the foundation of what is a sound and reasoned opinion.

What the court in Dyer did was to first determined that a split sentence of four years incarceration and two years community control misconstrued the law set forth in section 958.04 Florida Statutes and the sentence had to be reversed and remanded for resentencing. Id. Then, separately addressing the question of allowing the judge to depart upon remand, the court determined that where the trial judge thought he was sentencing the defendant within the guidelines he should be allowed to depart and provide reasons on remand. Id. The Dyer court clearly saw no problem with allowing such a departure where the judge misconstrued the law.

An even more illustrative case which the defendant has ignored is Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988). In Brown the defendant was convicted of sexual battery,

kidnapping and burglary. Id. at 332. The sentencing quidelines in effect on the date of the crime yielded a recommended sentence of 17 to 22 years. Id. at 333. At sentencing the trial judge, over defendant's objections, applied the newly amended guidelines which allowed for life imprisonment. Id. On appeal the First District rejected the retroactive application of the amended guidelines but determined that since the trial judge had inadvertently misconstrued the law in issuing the erroneous sentence he should have the opportunity to enter departure reasons on remand. Again, as with the Fifth district the First District found no problem with allowing a trial judge to depart on remand from a sentencing error caused by the trial judge's innocent misinterpretation of the law.

Interestingly, the Third District Court of Appeal, from were the present case arises, has shown itself inconsistent in applying its own rule. In State v. Wayda, 533 So.2d 939 (Fla. 3d DCA 1988), the court held that a downward departure sentence not supported by reasons was to be remanded to the trial court to give reasons or to sentence with in the guidelines. Although the opinion does not indicate whether the sentence arose from an error of law or from a scoresheet miscalculation the Third District obviously did not consider the distinction relevant to mention.

In order for the goal of the sentencing guidelines to be fulfilled the trial judge must be allowed to make an informed sentencing decision. In the case of an error the parties should be returned to the position they where in prior to sentencing and the judge must be allowed to resentence with a clean slate. [1] To reward the one side or the other as a result of an innocent error unfairly punishes the people of the State of Florida, diminishes respect for the institution of law and propagates the kind of inconsistent sentencing which the guidelines sought to avoid.[2]

With the astounding caseload born by the judges of this state the possibility of error is always present. Fortunately in cases like the one at bar the error can be corrected to no one's detriment. Therefore, the opinion of the Third District Court of Appeal in the instant case should be reversed and/or quashed.

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[1] Defendant's contention that he is exposed to a potentially higher sentence on remand is totally inaplicable to the consideration at bar, as it was in Roberts.

[2] Contrary to defendant's contention, the issue at law below was not clear. §958.04(3) Fla.Stat. (1987) did not specifically address the effect of community service to the guidelines sentence.

CONCLUSION

Based on the foregoing arguments and citation of authorities the decision below should be reversed and/or quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JORGE ESPINOSA
Assistant Attorney General
Florida Bar No. 0779032
Department of Legal Affairs
401 N. W. 2nd Avenue
(Suite N-921)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF was furnished by mail to HENRY H. HARNAGE, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 22nd day of August, 1989.

JORGE ESPINOSA
Assistant Attorney General

gp.