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IN THE SUPREME COURT OF FLORIDA

DANIEL JOSEPH POPE,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 74,163

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner Pope appealed to the District Court of Appeal, Fifth District, following his revocation of community control and a guidelines departure sentence. On appeal, he contended that the departure sentence was illegal because the trial court failed to provide written reasons to justify the departure. Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). The petitioner contended that the appellate court must reverse the sentence and remand for resentencing within the presumptive guidelines range (including the one-cell "bump" for probation revocations). Pope, supra.

The district court agreed that the sentence must be vacated due to the failure to provide written reasons for departure, but disagreed with the relief requested. The court held that since the trial court had announced oral reasons for

the departure, the trial judge, on remand, would be given the opportunity to now provide written reasons and impose the same departure sentence. Pope v. State, supra.

In making this ruling, the court recognized that there has been much confusion and conflict in the district courts over the issue of whether the trial court must resentence the defendant to the presumptive guideline sentence or whether it will be given the chance to now provide the written reasons which it failed to provide in the first place. The district court, however, rejected those cases which remanded for imposition of the guideline sentence.

The petitioner sought discretionary review in this Court because of the conflicting cases. This Court accepted jurisdiction on September **29, 1989.** This brief on the merits follows.

SUMMARY OF ARGUMENT

1. Where a trial court has failed to provide written reasons for the departure, case law from other districts and this Court require that the sentence must be vacated and remanded to the trial court for resentencing within the recommended guidelines range, notwithstanding the existence of oral reasons for the departure. A trial court which fails to comply with all of the rules concerning imposition of a departure sentence is not permitted a second chance to make its sentence legal.

2. Under recent case law, a trial court may not depart more than the one cell automatic "bump" in a probation revocation case where the defendant is being sentenced solely on the revocation (and not on an additional substantive charge).

ARGUMENT

POINT I.

WHERE THE TRIAL COURT FAILED TO PROVIDE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES, THE APPELLATE COURT MUST VACATE THE DEPARTURE AND REMAND TO THE TRIAL COURT FOR RESENTENCING WITHIN THE GUIDELINES, RATHER THAN GIVING THE TRIAL COURT A SECOND CHANCE TO DEPART.

The opinion of the Fifth District in the instant case, if allowed to stand, would permit judges to ignore with impunity the guidelines requirement that reasons for departure be in writing. Written reasons are required to be filed at the time the departure sentence is imposed so that meaningful and expeditious appellate review of the departure sentence can occur. The opinion of the district court here, which would allow for multiple, costly, and time-consuming appeals from a single sentence, expressly and directly conflicts with cases correctly holding that, in a resentencing following the failure to provide written reasons, the trial court is limited to the presumptive guidelines range.

In State v. Jackson, **478** So.2d **1054** (Fla. **1985),** receded from on other grounds, Wilkerson V. State, **513** So.2d 664 (Fla. **1987),** this Court ruled that written reasons must be provided when a judge imposes a departure sentence. Adopting the rationale of then Judge Barkett in Boynton v. State, **473** So.2d

703, 706-707 (Fla. 4th DCA 1985), the Court opined that the requirement of written reasons over oral reasons would allow for more precision in the sentencing process and for more expeditious, meaningful appellate review. State v. Jackson, supra at 1055-1056.

Shull v. Dugger, 515 So.2d 748 (Fla. 1987), requires that where a guidelines sentence is reversed for a deficiency in the written reasons, the trial court cannot have another "bite of the apple" but must sentence the defendant to the presumptive guidelines sentence. Under Shull v. Dugger, a trial judge who fails to comply with all the rules concerning imposition of a departure sentence (i.e. clear and convincing reasons provided in a written order contemporaneously with the pronouncement of the sentence), is not permitted a second chance to make its sentence **"legal."** To hold otherwise, the Court held, would needlessly subject the defendant to unwarranted multiple appeals and resentencings. Shull v. Dugger, supra at 750.

Numerous district court decisions have applied the holding of Shull v. Duaaer, supra, to the identical situation here to require that, where a trial court provides only oral reasons for departure, but not written reasons, the sentence must be vacated and the court, on remand for resentencing, is not permitted to depart, but must resentence the defendant within the presumptive guidelines range. Ransel v. State, 532 So.2d 84 (Fla. 3d DCA 1988); Florence v. State, 532 So.2d 1345 (Fla. 4th DCA 1988); Nichols v. State, 521 So.2d 372 (Fla. 2d DCA 1988);

Crigler v. State, 526 So.2d 176 (Fla. 2d DCA 1988); Martinez v. State, 526 So.2d 1080 (Fla. 2d DCA 1988); Jenkins v. State, 528 So.2d 527 (Fla. 2d DCA 1988). This line of cases should be followed here.

The sentencing guidelines, and the requirement of written reasons for departure have been around for many years (since, at least State v. Jackson, supra, in 1985). Trial courts have no legitimate excuse to refuse to follow this simple legal requirement. The rationale for these rulings is precisely that announced in State v. Jackson, and Shull v. Dugger, supra. The trial court, which is imposing a departure sentence (and which recognizes that it is imposing a departure sentence)[1] should be given only one opportunity to correctly and lawfully impose such sentence, rather than allowing for multiple "bites of the apple," and requiring the defendant to undergo multiple resentencings and multiple appeals in a single case. The fifth district court, in the instant case, however, chose to disregard this logic and issued a ruling contrary to these opinions (although recognizing the conflict on the face of the opinion).

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[1]This situation is entirely different from the situation where the trial court, at the initial sentencing, does not believe that it is sentencing the defendant to a departure sentence. See, e.g., Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988).

This Court should follow the rationale of Shull v. Dugger, supra, and the other above-cited cases, to vacate the decision of the fifth district court of appeal, and remand the case for resentencing solely within the presumptive guidelines range. In so doing, this Court will provide teeth for the long-established requirement of written reasons for guidelines departures.

POINT 11.

THE TRIAL COURT ERRED IN DEPARTING FROM THE PRESUMPTIVE GUIDELINES SENTENCE BEYOND THE ONE-CELL INCREASE ALLOWED FOR PROBATION REVOCATIONS.

After violating his probation (on technical grounds) the court placed the defendant on community control for two years in Case No. **87-140.** (R **46, 56, 58)** The defendant was also placed on two years community control in Case No. **87-2497.** Upon violating the community control, the defendant pleaded guilty to the violations and the court departed from the guidelines (and the permissible one-cell increase for probation violations) and imposed five-year prison terms on each count, to run concurrently and two years consecutive community control on Case No. **87-2497.** (R **12, 22, 28, 30-31, 69, 70, 72-73, 82)** This departure must be vacated.

The judge departed from the allowed community control or twelve to thirty month sentence (which included the one-cell increase). While not reducing his reasons to writing (see Point I, supra), the court announced oral reasons: successive violations of probation and timing of the violations. Although these reasons have, in the past been upheld, State v. Pentaude, 500 So.2d **526, 528** (Fla. **1987),** they are no longer valid. Recently (after the district court's decision in the instant case), this Court has addressed guidelines departures in probation violation cases. In Franklin v. State, **545 So.2d 851**

(Fla. 1989), and in Lambert v. State, 545 So.2d 838 (Fla. 1989), this Court specifically held that sentences in probation revocation cases are limited to the one-cell increase. Id. The Court ruled:

> Upon the violation of probation after incarceration [in a true split sentence], the judge may then resentence the defendant to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence, provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by Florida Rule of Criminal Procedure 3.701(d)14. **Any further departure for violation of probation is not allowed.** [citing Lambert].
>
> Upon violation of probation during a probationary split sentence, a trial court may resentence the defendant to any term falling within the original guidelines range, including the one-cell upward increase. **However, no further increase or departure is permitted for any reason.** Lambert.

Franklin v. State, supra at 852-853. The Court ruled that to allow otherwise would be to permit courts to twice punish a defendant for the same conduct and would have the courts treating the violation as an independent crime, something that is contrary to the legislative intent and contrary to the intent and spirit of the guidelines. Lambert v. State, supra at 841. Accordingly, the Supreme Court receded from State v. Pentaude, supra, and held that factors related to violation of probation or community control cannot be used as grounds for departure.

The fifth district has recently applied Lambert to vacate an identical departure (albeit one with written reasons):

> The character of the probation violations, the number of conditions violated, the number of time the defendant was placed on probation before the violations are all valid considerations for departure under State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987). Pentaude was the law at the time of sentencing but the supreme court has receded from Pentaude in Lambert [supra].
>
> In Lambert it is specifically held "that factors related to violation of probation or community control cannot be used as grounds for departure."
>
> The sentence is vacated and the case remanded for resentencing of appellant. When sentence is imposed after revocation of probation or community control, an increase to the next higher cell in the guideline is permitted by Rule 3.701(d)(14) but no departure sentence is permitted for that factor.

Branton v. State, 14 FLW 2164 (Fla. 5th DCA September 14, 1989).

Under Franklin, Lambert, and Branton, supra, the departure sentence imposed here must fall. The case must be remanded to the trial court for imposition of a sentence within the guidelines range of community control or twelve to thirty months imprisonment.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, vacate the petitioner's sentence, and remand the case to the trial court for the imposition of a sentence within the presumptive guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Fourth Floor, Daytona Beach, FL 32114, and to Mr. Daniel J. Pope, Inmate # 627426, P.O. Box 699, Sneads, FL 32460, this 24th day of October, 1989.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER