12-A

OIA 1-9-90

IN THE SUPREME COURT OF FLORIDA

DANIEL JOSEPH POPE,

Petitioner,

v. CASE NO. 74,163

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BONNIE JEAN PARRISH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #768870
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4996

COUNSEL FOR RESPONDENT

TOPICAL INDEX

AUTHORITIES CITED

CASES: PAGES:

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

POINT I Where oral departure reasons are given, but the trial judge fails to provide written reasons, the cause should be remanded to give the trial judge an opportunity to provide written reasons. This court has previously decided this issue in Barbera v. State, infra, in which this court found a valid reason for a downward departure and agreed that remand was necessary so that written reasons could be provided. Furthermore, the formal requirements of Rule 3.701(d)(11) should not prevail over the substance of the rule. Thus, were reasons are given, the trial judge should not be penalized for failing to reduce those reasons to writing. Finally, Shull v. Dugger, infra, is not violated by affording the trial judge an opportunity to enter written reasons on remand where no written reasons were previously provided.

POINT 11: Whether the oral reasons given by the trial court are valid or invalid is prematurely before this court. Petitioner has not yet been resentenced. Respondent recognizes the authority of Lambert v. State, infra; Franklin v. State, infra; and Dewberry v. State, infra. However, it is unclear wither Pentaude v. State, infra, was totally receded from or merely receded from in part. It appears that it was receded from only in part, thus, the number of violations and the timing of violations remain viable departure reasons.

ARGUMENT

POINT I

WHERE THE TRIAL COURT PROVIDES ORAL REASONS FOR DEPARTURE, BUT FAILS TO REDUCE THEM TO WRITING, THE CAUSE SHOULD BE REMANDED TO GIVE THE TRIAL COURT AN OPPORTUNITY TO PROVIDE WRITTEN REASONS.

Florida Rule of Criminal Procedure 3.701(d)(11) requires that written reasons accompany a departure sentence. However, the rules do not provide for a remedy where reasons were given, but not reduced to writing. Respondent recognizes that a uniform approach is necessary concerning the instant issue. However, respondent asserts that this court has previously decided the instant issue in Barbera v. State, 505 So.2d 413 (Fla. 1987).

In Barbera, supra, the trial judge sentenced the defendant to a downward departure sentence. The trial judge adopted the alternate sentencing program of the defense at the sentencing hearing, but failed to enter a written departure order. This court approved the reason for downward departure relied on by the trial court and agreed that the cause "must be remanded for resentencing so that the trial judge can write out his specific reasons for departure." Id., at 414.

The case at bar is virtually indistinguishable from Barbera, supra. Here, the trial court gave oral reasons for departure: number of violations of probation and timing of those violations (R 13). In Barbera, supra, the trial judge adopted the defense's sentencing recommendation. In both cases, the trial

judges failed to reduce the departure reasons to writing. Thus, respondent asserts that this issue has been decided, that Barbera, supra, is controlling and that the appellate court properly remanded the instant cause to allow the trial judge to enter a written departure order.

Should this court determine that Barbera, supra, is not controlling, respondent asserts that the appellate court properly remanded the cause for the imposition of a written departure order where oral reasons for departure were given.

The appellate courts in many instances have afforded the trial judge an opportunity to enter written reasons where none were provided. See, State v. Martinez, 534 So.2d 1248 (Fla. 3d DCA 1988); Padgett v. State, 534 So.2d 1246 (Fla. 3d DCA 1988); State v. Richardson, 536 So.2d 1193 (Fla. 4th DCA 1989); State v. Charles, 537 So.2d 1136 (Fla. 3d DCA 1989); State v. Alverez, 538 So.2d 956 (Fla. 3d DCA 1989); State v. Ohler, 539 So.2d 38 (Fla. 3d DCA 1989); State v. Simmons, 539 So.2d 40 (Fla. 3d DCA 1989); State v. Lawler, 531 So.2d 752 (Fla. 4th DCA 1988); State v. Wayda, 533 So.2d 939 (Fla. 3d DCA 1988); State v. Adams, 528 So.2d 548 (Fla. 3d DCA 1988); Kelly v. State, 14 F.L.W. 1678 (Fla. 5th DCA July 13, 1989); Ridgeway v. State, 543 So.2d 339 (Fla. 1st DCA 1989); Fox v. State, 543 So.2d 340 (Fla. 1st DCA 1989); State v. Winter, 14 F.L.W. 2375 (Fla. 4th DCA October 11, 1989); State v. Arnold, 14 F.L.W. 2473 (Fla. 5th DCA October 19, 1989).[1] Unfortunately, many of those opinions fail to set forth

[1] It should be pointed out that the majority of cases remanded for the imposition of written reasons, where none were originally given, are cases in which downward departure sentences were imposed.

sufficient facts. It is thus impossible to tell whether or not oral reasons were given. However, there are a number of opinions which do state that oral reasons were given or the reasons where apparent from the record. Pursuant to those opinions, the trial judges were afforded the opportunity to reduce those reasons to writing. See, Barbera v. State, 505 So.2d 413 (Fla. 1987); Moore v. State, 538 So.2d 123 (Fla. 1st DCA 1989); State v. Bledsoe, 538 So.2d 94 (Fla. 3d DCA 1989); Viera v. State, 532 So.2d 743 (Fla. 3d DCA 1988); Weakley v. State, 547 So.2d 951 (Fla. 5th DCA 1989); Burnett v. State, 546 So.2d 1191 (Fla. 2d DCA 1989); State v. Brown, 542 So.2d 1371 (Fla. 4th DCA 1989); Vara v. State, 546 So.2d 1071 (Fla. 2d DCA 1989); Ellison v. State, 545 So.2d 480 (Fla. 5th DCA 1989); State v. Wilson, 523 So.2d 178 (Fla. 3d DCA 1988). It is apparent that the appellate courts, as well as this court, while recognizing that written reasons were required, determined that substance was of greater importance than form.

Respondent asserts that the substance of rule 3.701(d)(11) should prevail over the farm. As previously stated, the rules provide that written reasons are required, but fail to address the situation where reasons are given but not reduced to writing. As this court is aware, the entire legal system is inundated with more than it can comfortably handle. Judicial time and economy have been stretched to their limits, particularly at the trial level. The trial judges and the public should not be penalized due to the trial judges not having the time to enter written orders which amount to more

than a grant or denial, or not having the resources to employ staff assistants who could prepare written orders for the judges to sign.

Thus, where oral reasons are given, particularly where those reasons are valid or at least one reason is valid, the trial judge should on remand be given the opportunity to enter a written order. By departing and giving oral reasons, the trial judge obviously felt that a departure sentence was necessary. The defendant is neither harmed nor prejudiced by affording the trial judge this opportunity. As oral reasons were given, the defendant was aware that he was receiving a departure sentence. He was aware as to why he received that sentence. To allow the trial judge to enter a written order on remand, merely formalizes that which was previously done. The decision of the trial judge should not be vacated merely due to a failure to follow the formal requirements of Rule 3.701(d)(11).

Finally, petitioner argues that the dictates of Shull v. Dugger, 515 So.2d 748 (Fla. 1987), are violated where a trial judge is afforded an opportunity to enter written reasons on remand where no written reasons were previously provided. Respondent asserts that Shull, supra, is not violated where oral reasons have been given, but not reduced to writing and where the trial court is afforded an opportunity to enter a written departure order. Shull, supra, provides that a trial court may not give new reasons for a departure sentence after the original reasons were found to be invalid by an appellate court. However, that is not the situation here. In the instant cause,

the appellate court never addressed the oral reasons given. They were neither found to be valid nor invalid. The appellate court's reversal was not founded on invalid reasons, but rather it was based on the lack of a written departure order. Here, the trial court was not given a chance to depart anew, but rather to formalize that which he had already done. Thus, Shull, supra, is neither violated, nor controlling in the instant cause.

The decision of the Fifth District Court of Appeal should be affirmed.

POINT II

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM APPELLANT'S RECOMMENDED GUIDELINES SENTENCE BEYOND THE ONE-CELL BUMP ALLOWED FOR PROBATION REVOCATIONS.

Prior to addressing the merits of this claim, respondent asserts that this issue is prematurely before this court. Petitioner has not yet been resentenced. Thus, the trial court has not entered a departure order containing the oral reasons given at the original sentencing hearing. What petitioner is asking this court to do by raising this issue prior to re-sentencing, is to issue an advisory opinion. Thus, this issue is not properly before this court.

Proceeding to the merits of the instant claim, assuming solely for the purpose of argument that this issue is properly before this court, respondent recognizes the authority of Lambert v. State, 545 So.2d 838 (Fla. 1989); Franklin v. State, 545 So.2d 851 (Fla. 1989); and Dewberry v. State, 546 So.2d 409 (Fla. 1989). However, respondent submits that the facts in this case are distinguishable from the above-mentioned cases and the reasons given for departure are valid.

In the instant cause, petitioner pled guilty to burglary of a dwelling and grand theft auto and was placed on probation for a term of three years (Case No. 87-140) (R 32, 41-44). Approximately five months later, an affidavit of violation of probation was filed alleging petitioner violated his probation (R 46). Petitioner pled guilty to violating his probation, the probation was revoked, and he was placed on community control

for a term of two years (R 56, 58). Petitioner also pled guilty to an additional offense of grand theft auto and was placed on community control for a term of two years to be served concurrently with the term in Case No. 87-140 (Case No. 87-2497) (R 19, 22, 24, 31). Approximately three months later, an affidavit alleging violation of community control was filed in both cases (R 59, 60). Petitioner pled guilty to the violations and his community control was revoked (R 12, 30, 31, 82). Petitioner was adjudicated guilty and sentenced to two concurrent five year terms of incarceration in Case No. 87-140 and to a two year term of community control in Case No. 87-2497, to run consecutively to Case No. 87-140 (R 15, 22, 28, 30, 31, 69, 70, 72-73). The trial judge indicated that the sentence was a departure sentence and gave two oral reasons for the departure: timing of the violations and the number of violations (R 13, 16).

In Lambert, supra; Franklin, supra; and Dewberry, supra, the defendants all received departure sentences based on violations af probation. However, unlike the case at bar, the reason for the departure was the commission of a new substantive offense, an offense for which no conviction had been obtained at the time of sentencing on the violations. It is apparent that the trial judges determined that these offenses were more than minor violations and were sufficiently egregious in nature to warrant a departure. Respondent submits that that is the only part of Pentaude, supra, which has been receded from and that the remaining factors set forth in Pentaude, supra, should survive.

The number of times a defendant has been placed on probation and violated the same probation is one of those factors, as is the timing of the offense.

The Lambert, supra; Franklin, supra; and Dewberry, supra, decisions appear to have been predicated on the fact that departures for new offenses were prohibited by Florida Rules of Criminal Procedure 3.701(d)(11) and were factors already weighted in arriving at the presumptive guidelines sentence. The departure in this case was not based on prior arrests without convictions, rather it was based on petitioner's second violation of probation and the timing of the violations, neither of which is taken into account on the scoresheet. Thus, there has been no "double dipping,'' the second basis for the Lambert, supra, decision, in the case at bar.

The number of times a defendant has been placed on probation has, in the past, been included as a valid basis for departure. See, Lambert, (Overton, J., dissenting), at 842; Booker v. State, 514 So.2d 1079 (Fla. 1987)(prior probation violations were valid reason to depart form sentencing guidelines because probation violation which occurs between substantive offense and current revocation is not scored on guidelines scoresheet).

The timing of the offense has also been held to be a valid reason for departure. Pentaude v. State, 500 So.2d 526 (Fla. 1987). In Pentaude, supra, this court specifically permitted a departure based on the length of time on probation before the violation.

Here, petitioner's first violation occurred approximately five months after having been placed on probation. The second violation occurred approximately three months after his probation was revoked and he was placed on community control.

Although the respondent recognizes that this court appears to have receded from Pentaude, supra, respondent submits that it is unclear as to whether it has been totally receded from or merely receded from in part. Respondent submits that it appears Pentaude, supra, has been receded from only in part. Thus, the oral reasons given for the departure are valid.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Bonnie Jean Parrish

BONNIE JEAN PARRISH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #768870
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4996

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondents Brief of the Merits has been furnished by delivery to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 13th day of November, 1989.

Bonnie Jean Parrish
Bonnie Jean Parrish
Of Counsel