IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 74,294

CHESTER T. BYERS,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida was the plaintiff in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, and was the appellant in the Second District Court of Appeal. The State is the Petitioner in this Court and will be referred to as "State" or "Petitioner" in this brief. The Respondent, Chester T. Byers, was the defendant in the trial court and the appellee before the Second District. He will be referred to as "Defendant" or "Respondent" in this brief.

There is pending before this Court several cases with the identical issue, whether the notice of appeal filed by the State is timely when it is filed within **15** days of the rendering of the trial court's order setting forth the reasons for departure from the sentencing guidelines. Cases with this issue now pending in this Court are State v. Hieber, Case No. **73,531** and Fox v. District Court of Appeal, Case No. **73,697**.

STATEMENT OF THE CASE AND FACTS

This Court accepted this case for discretionary review of a decision from the Second District Court of Appeal reported as State v. Byers, 545 So.2d 931 (Fla. 2d DCA 1989). The State appealed the trial court's downward departure from the sentencing guidelines in eight (8) cases involving this defendant. The district court determined the State's notices of appeal were untimely and dismissed the appeals.

On August 5, 1988 the trial judge in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida signed and filed a judgment and order placing the defendant in various terms of probation in eight cases (Case Nos. 88-02488, 88-02489, 88-02490, 88-02491, 88-02492, 88-02494, 88-02495 and 88-02496). The probation represents a downward departure from the sentencing guidelines recommended range. The State filed a notice of appeal on August 24, 1988. The trial court entered it's order supporting the downward departure on September 9, 1988. The State filed amended notices of appeal on September 22, 1988.

Pursuant to a Motion to Determine Jurisdiction filed by the State, the Second District held the notices of appeal were untimely as not being filed within 15 days of the rendering of the judgments and sentences. The court acknowledged it's decision was in conflict with that of the Third District in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985).

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal erred in finding the notices of appeal filed in this case to be untimely. As the court indicated in State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985), the State's notice of appeal filed within 15 days of the rendition of the written order setting forth the reasons for departing from the guidelines recommended range is timely. The notices, *sub judice*, were filed within 15 days from the filing of the written reasons for the downward departure. Since the notices were timely, the cases should proceed on appeal.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL ERRED IN FINDING THE STATE'S NOTICE OF APPEAL UNTIMELY WHEN FILED WITHIN 15 DAYS FROM THE RENDITION OF THE ORDER SETTING FORTH REASONS FOR DEPARTURE FROM THE GUIDELINES RECOMMENDED RANGE

Respondent was before the trial court for sentencing on August 5, 1988. Judgments and sentences were filed on that date. The State filed notices of appeal on August 24, 1988. On September 9, 1988, the trial judge filed an order setting forth the reasons for sentencing respondent to less than the guidelines recommended range. The State filed amended notices of appeal on September 22, 1988, less than 15 days from entry of the order supporting the departure. Since the Second District Court of Appeal had on several previous occasions dismissed state appeals where the notice was within 15 days from the order of departure but more than 15 days from the entry of the judgment and sentence, the State filed a motion to determine jurisdiction. *See,* State v. Cajunste, 532 So.2d 687 (Fla. 2d DCA 1988); Ealy v. State, 533 So.2d 1173 (Fla. 2d DCA 1988) and State v. Hieber, 541 So.2d 1208 (Fla. 2d DCA 1989). The Second District followed it's earlier precedents and dismissed the appeals in this case, but the court acknowledged conflict with State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985).

In State v. Williams, *supra,* the Third District held the State's notice of appeal was timely where it was filed within fifteen (15) days of the trial court's written order setting

forth the reasons for departure from the sentencing guidelines. In *so* doing, the court noted:

> Florida Rule of Criminal Procedure 3.701(d)11 requires that "[a]ny sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure." Where a sentence is imposed below the range recommended by the guidelines, the State is given the right to appeal. ***See,*** Fla.R.App.P. 9.140(c)(1)(J). But unlike an appeal from an illegal sentence under Rule 9.140(c)(1)(I), where the illegality is manifest with the mere pronouncement of sentence, the propriety *vel non* of a sentence imposed outside of the recommended guideline range cannot be said to be known until the written reasons for the departure from the guidelines are given. The essence of an appeal under Rule 9.140(c)(1)(J) is not that the trial court departed from the guidelines, but rather that the reasons given by the trial court fir departing from the guidelines do not justify the departure. Thus, an appeal which precedes the filing of the written statement delineating the reasons for departure is premature. (emphasis added)

Text at 463 So.2d at 525-526.

The reasoning of the Third District is sound and should be adopted by this Court. It is undisputed that a trial judge may sentence a criminal defendant to more or less than the sentence recommended by the guidelines. However, in order for that departure sentence to be valid, it must be supported by clear and convincing reasons. Additionally, those clear and convincing reasons must be in writing. It has been consistently held by our courts that articulation in the record is not the writing contemplated under Rule 3.701, Florida Rules of Criminal Procedure. ***See,*** State v. Jackson, 478 So.2d 1054 (Fla. 1985). In

Jackson this Court accepted the reasoning of the Fourth District in Boynton v. State, 473 So.2d 703 (Fla. 4th DCA 1985), explaining while oral pronouncements in the record will not suffice as the written for departure purposes. Judge Barkett said in Boynton:

> The alternative of allowing oral pronouncements to satisfy the requirement for a written statement is fraught with disadvantages which, in our judgment, compel the written reasons.
>
> First, it is very possible...that the "reasons for departure" plucked from the record by an appellate court might not have been the reasons chosen by the trial judge were he or she required to put them in writing. Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders.
>
> Second, an absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for the reasons utilized by the trial courts.

This Court additionally indicated the requirement of a separate writing gives the trial court the opportunity to make precise and reasoned decisions that may not be reflected in the hectic setting of a sentencing hearing.

Just as the defendant is entitled to have a written order outlining the trial court's reasons for an upward departure, the State should have the same when reviewing a downward departure. As Justice Cardozo indicated in Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 687 (1933), "But justice, though due to the accused, is due to the accuser also." Justice for the

State requires there be something to appeal before filing a notice of appeal.

Sub judice, the State filed an amended notice of appeal after the filing of the trial court's order setting forth the reasons for the downward departure. Should the State have to proceed with an appeal before the filing of the order of departure, the courts will be burdened with two appeals. The first appeal would require remanding the case to the trial court for imposition of an appropriate order with clear and convincing reasons, and the second appeal would involve the validity of the reasons. At the very least, the parties would have to go through a relinquishment of jurisdiction to get an order. By filing the notice of appeal after the entry of the departure order, the State obviates the need for separate appeals and/or time spent in relinquishing jurisdiction. This procedure would also reduce the ultimate cost, time involved, appellate caseload and avoid wasting scarce judicial resources.

As was stated above, the ultimate question to be answered when the State appeals a sentence which is less than the guidelines recommended range is whether or not the reasons given in support of the departure are clear and convincing. That question can only be answered when there is an order containing reasons. The State can only make its decision to seek review of the order after having seen the order. It makes good sense to allow the filing of a notice of appeal after the order to be appealed has been entered. The Second District Court of Appeal

erred in finding the notices filed in this instance to be untimely. These notices were filed within 15 days from the entry of the order setting forth the reasons for departure.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Petitioner respectfully requests this Court approve the decision in State v. Williams, supra, and reverse the decision of the Second District in the instant case and remand to the district court for consideration of the appeals on the merits.

Respectfully submitted,

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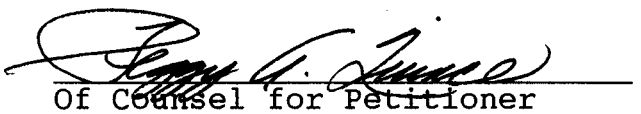
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, this 1st day of September, 1989.



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