IN THE SUPREME COURT OF FLORIDA

ROBERT RAY FERGUSON,

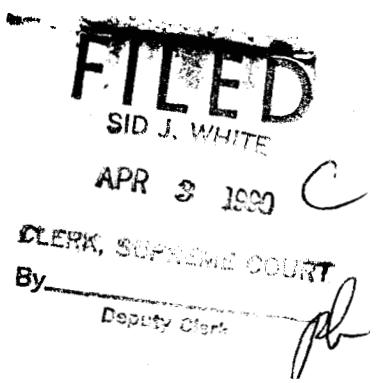
Petitioner,

v. CASE NO. 74,908

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

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. Noncompliance with a rule of procedure which is merely technical in nature is permissible if there is no harm to the defendant. Thus where 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.

ARGUMENT

POINT ON APPEAL

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. See also Ree v. State, 14 F.L.W. 565 (Fla. November 16, 1989). 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.

In the case at bar, the defendant's recommended guidelines sentence was 5½-7 years incarceration (R 18, 59). At the sentencing hearing, the defendant requested that he not be placed on probation following his release from prison (R 19-20). Following Williams v. State, 522 So.2d 1022 (Fla. 5th DCA 1988),

Woods v. State, 542 So.2d 443 (Fla. 5th DCA 1989), and Holley v. State, 483 So.2d 854 (Fla. 5th DCA 1986), which hold that the trial judge in his discretion may sentence the defendant to a one-cell departure sentence where a defendant refuses to accept probation as part of his sentence, the trial judge sentenced the defendant to a one-cell departure sentence, 9 years incarceration (R 24-26, 57). No probation was imposed (R 25-26, 57). No written departure reason or order was entered giving this agreement as the reason for departure.

The case at bar is virtually indistinguishable from Barbera, supra. Here, the trial judge gave one oral reason for the one-cell departure sentence: the agreement not to impose probation. In Barbera, 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, 436 So.2d 1193 (Fla. 4th 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. Charles, 537 So.2d 1136 (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, 552 So.2d 206 (Fla. 5th DCA 1989); Ridqeway v. State, 543 So.2d 339 (Fla. 1st DCA 1989); Fox v. State, 543 So.2d 340 (Fla. 1st DCA 1989); State v. Winter, 549 So.2d 1170 (Fla. 4th DCA 1989); State v. Arnold, 550 So.2d 154 (Fla. 5th DCA 1989).[1] Unfortunately, many of those opinions fail to set forth 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 were 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

[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.

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 form. 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. Noncompliance with a rule of procedure which is merely technical in nature is permissible if there is no harm to the defendant. Tucker v. State, **15** F.L.W. 167, **168** (Fla. March 29, 1990)(no error in

orally waiving jury trial, although rule provides it must be in writing); see also Hoffman v. State, 397 So.2d 288, 290 (Fla. 1981)(rules of criminal procedure are not intended to furnish a procedural device to escape justice). 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). This is especially true for the instant cause, as the departure sentence was given based on a request and an agreement not to impose probation. The defendant suffered no harm or prejudice due to the failure to provide written reasons.

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 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.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by delivery to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 2nd day of April, 1990.

Bonnie Jean Parrish
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Of Counsel