

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,792

FILED

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CLERK, SUPREME COURT

By _____
Deputy Clerk

VIRGIL ROBINSON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER

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vs.

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INTRODUCTION

The petitioner, Virgil Robinson, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the appellant will be referred to as petitioner and the respondent as the state.

The symbol "A" will designate the appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

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A jury convicted petitioner of two counts of resisting arrest with violence, one count of battery on a law enforcement officer, and one count of simple battery. The trial court ordered a fifteen-year sentence rather than the recommended guideline sentence of twelve to thirty months, but provided no accompanying written statement of the reasons for departure as required by Florida Rule of Criminal Procedure Rule 3.701(d)(11). Instead, it orally gave two reasons for the ordered departure sentence. Initially, on appeal, petitioner claimed that because the court failed to issue written reasons for the departure and because the reasons given orally were improper, he was entitled to have a guidelines sentence ordered. The Third District Court vacated the sentence but observed that the lower court could depart from the guidelines by written order. Robinson v. State, 541 so.2d 1261 (Fla. 3d DCA 1959).

Upon remand, the trial court resentenced petitioner to the same sentence originally ordered. Once again, no written reasons were contemporaneously given to support departure, although some seven months later written reasons for departure were recorded. The Third District Court of Appeal once again reversed petitioner's sentence and remanded the case to the trial court for a new sentencing hearing. In its opinion the court indicated that the trial court could once again deviate from the sentencing guidelines as long as the court put its reasons for the deviation in writing at the time of the sentencing.

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Petitioner filed a motion for clarification with the Third District Court of Appeal and argued that since the trial court's written reasons were illegally entered seven months after the sentencing hearing, the case should be remanded with instructions to resentence petitioner within the guidelines. The motion for clarification was denied. Judge Ferguson dissented from the denial of the motion to clarify.

A timely notice to invoke discretionary jurisdiction was filed. This petition follows.

QUESTION PRESENTED

THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN REE V. STATE, 14 FLW 565 (FLA. 1989).

SUMMARY OF ARGUMENT

The trial court deviated from the sentencing guidelines in this case. Seven months after the sentencing the court put her reasons in writing. The Third District Court of Appeal vacated the sentence. However, the Third District Court of Appeal held that at the resentencing, the trial court could once again deviate from the sentencing guidelines if she put her reasons in writing.

It is petitioner's position that the opinion of the Third District Court of Appeal directly conflicts with this court's decision in Ree v. State, 14 FLW 565 (Fla. 1989). In Ree v.

State, supra, this court held that written reasons for a departure sentence must be entered at the time of the sentencing and a written order signed after the sentencing is invalid. The only logical interpretation of this opinion would be that if a trial judge does not enter the written reasons for the departure at the original sentencing hearing, he should not be allowed to depart from the guidelines at the resentencing hearing. Otherwise, all the trial court would have to do is adopt the original invalid written order at the resentencing hearing. This result would defeat the entire purpose behind the Ree v. State, supra, decision.

Since the Third District Court of Appeal decision in this case directly conflicts with this court's decision in Ree v. State, supra, this court should accept this case to resolve the issue as to what the appropriate remedy should be when a sentence is reversed due to the fact that the trial judge entered its written departure order after the sentencing.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION
IN THIS CASE DIRECTLY CONFLICTS WITH THIS
COURT'S OPINION IN REE V. STATE, 14 FLW 565
(FLA. 1989).

Petitioner was convicted of two counts of resisting arrest with violence, one count of battery on a law enforcement officer, and one count of simple battery. The recommended guideline sentence was twelve to thirty months. Without giving written reasons for the departure sentence the trial court deviated from

the guidelines and sentenced petitioner to fifteen years. The Third District Court of Appeal reversed the sentence and remanded the case for resentencing. In its opinion the court allowed the trial court to deviate from the guidelines if there was a written order at the resentencing hearing.

Upon remand the trial court deviated from the recommended guideline sentence and sentenced petitioner to fifteen years. Once again the trial court failed to give written reasons for the departure sentence. Seven months after the sentence was imposed and while the case was pending on appeal, the trial court entered a written order listing her reasons for the departure sentence. The Third District Court of Appeal reversed the trial court, vacated the sentence and remanded the case for a third sentencing hearing. Once again the court gave the trial court the opportunity to deviate from the guidelines if she put her reasons in writing.

It is petitioner's contention that the portion of the Third District's opinion that allows the trial court to once again deviate from the guidelines is in direct conflict with this court's opinion in Ree v. State, 14 FLW 565 (Fla. 1989); State v. Jackson, 478 So.2d 1054 (Fla. 1985); and State v. Oden, 478 So.2d 51 (Fla. 1985). In Ree v. State, supra, this court was asked to answer the following certified question:

Must a trial court produce written reasons for departure from the sentencing guidelines at the sentencing hearing?

In Ree v. State, supra, the trial court entered its written order five (5) days after the sentencing hearing. This court relying on State v. Jackson, supra, and State v. Oden, supra,

ruled that the order entered five (5) days after the sentencing hearing was invalid. Since the court also ruled that pursuant to Lambert v. State, 545 So.2d 838 (Fla. 1989) the trial court could not deviate more than one cell due to the fact that the sentencing was for a probation violation, the court did not specifically address the issue as to whether a trial court on remand pursuant to Ree, supra, can once again deviate from the guidelines by merely adopting the written reasons that were originally signed after the sentencing hearing.

It is petitioner's position that in order for Ree. v. State, supra, to have any meaning the only logical conclusion that can be reached is that when a trial court enters a written order attempting to justify a departure sentence after the sentencing hearing, the only appropriate remedy is to reverse the sentence with instructions to the trial court to sentence the defendant within the guidelines. An analysis of the Ree, supra, opinion reveals that this court went into great detail as to what is the appropriate way for the trial court to enter a departure sentence. The court listed the following options that are available to the trial judge:

1. If the trial judge finds that departure is not warranted, he or she then may immediately impose a sentence within the guideline range, or delay sentencing if necessary:

2. After hearing argument and receiving any proper evidence or statements, the trial court can impose a departure sentence by writing out its reason for departure while still on the bench:

3. If further reflection is required to determine the

propriety or extent of departure, the trial court may separate the sentencing hearing from the actual imposition of sentence. In this event, actual sentencing need not occur until a date after sentencing.

In outlining the above mentioned procedure this court recognized that these procedures may be inconvenient, however, the court felt they were necessary due to the fact that a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

If the Third District Court of Appeal's analysis is correct and a trial court, upon remand, can give written reasons for a departure sentence after the initial sentence has been vacated for failure of the trial court to give the reasons in writing at the time of the sentencing hearing then the entire rationale of Ree v. State supra, is defeated. An analysis of the facts in this case clearly establish why the trial court should not be allowed to deviate from the guidelines once a sentence has been vacated for failure to give written reasons at the time of the sentencing.

The petitioner in this case initially received a departure sentence without written reasons. The case was remanded. The court once again departed from the guidelines without giving written reasons. Seven months after the sentencing hearing the trial court entered her written reasons for the departure sentence. If the case is remanded to the trial court with instructions that she can depart from the guidelines if she puts her reasons in writing all the trial court will have to do is

adopt the reasons that she signed seven months after the original sentencing hearing. Therefore, the reversal for failure to put the reasons in writing at the time of the sentencing hearing basically is a meaningless act.

It is petitioner's contention that this court did not intend for this to be the result of its decision in Ree v. State, supra. As the court noted in Ree, a departure sentence is an extraordinary punishment and if the trial court incorrectly imposes this punishment at the original sentencing hearing he should be required to impose a guideline sentence on remand. Therefore, the Third District Court of Appeal's decision in this case directly conflicts with this court's decision in Ree v. State, supra.

REASONS FOR GRANTING REVIEW IN THIS CASE

This Court in Ree v. State, supra, has clearly held that a trial judge must enter his or her written reasons for a departure sentence at the sentencing. The court's opinion does not specifically state what the remedy is if a trial court does not enter the order at the time of the sentencing. It is petitioner's position that the only remedy that makes sense is a remand to the trial court for resentencing within the guidelines. Since this issue is relevant every time an appellate court reverses a trial court's sentence for failure to put the reasons in writing contemporaneously with the sentence this court should accept jurisdiction of this case and clearly define what the remedy is when a trial court does not enter the written reasons for departure at the time of sentencing.

CONCLUSION

Based on the foregoing, petitioner requests this court to grant discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida this ____ day of March, 1990.

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ROBERT KALTER
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