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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,792

VIRGIL ROBINSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

JUL 20 1993
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ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS.....2-4

QUESTION PRESENTED.....5

SUMMARY OF ARGUMENT.....6

ARGUMENT 7-11

WHETHER THE TRIAL COURT CAN DEVIATE FROM THE
GUIDELINES ON A REMAND WHEN THE COURT FAILED
TO GIVE WRITTEN REASONS FOR THE DEPARTURE AT
THE ORIGINAL SENTENCING HEARING?

CONCLUSION.....12

CERTIFICATE OF SERVICE.....12

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>BECKER v. STATE</u> 307 So.2d 855 (Fla. 4th DCA 1975)	11
<u>BOYD v. STATE</u> 518 So.2d 462 (Fla. 2d DCA 1988)	10
<u>POPE v. STATE</u> 15 FLW S243 (Fla. 1990)	4, 7, 9, 12
<u>STATE v. JACKSON</u> 478 So.2d 1094 (Fla. 1985)	9
<u>REE v. STATE</u> 14 FLW 565 (Fla. 1989)	3, 4, 9
<u>ROBINSON v. STATE</u> 541 So.2d 1261 (Fla. 3d DCA 1989)	3, 8
<u>SHULL v. DUGGERS</u> 515 So.2d 748 (Fla. 1987)	9
<u>VAN ROYAL v. STATE</u> 497 So.2d 625 (Fla. 1986)	10
<u>WOLFSON v. STATE</u> 437 So.2d 174 (Fla. 2d DCA 1983)	10
<u>WOODS v. STATE</u> 516 So.2d 52 (Fla. 2d DCA 1988)	10, 11

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CASE NO. 75,792

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ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

The Petitioner, Virgil Robinson, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the plaintiff in the trial court. The parties will be referred to as they stand in this Court. The symbol "R" will be used to refer to portions of the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On July 13, 1987 the State of Florida filed a five (5) count information charging Petitioner with one (1) count of aggravated battery, two (2) counts of resisting arrest with violence, and two (2) counts of battery on a law enforcement officer. (R. 1-5A.). On the same day Petitioner stood mute and the court entered a not guilty plea on his behalf. (R. 6). The jury convicted Petitioner of two (2) counts of resisting arrest with violence, one (1) count of battery on a law enforcement officer and one (1) count of simple battery.

On March 3, 1988 the trial court sentenced Petitioner to five (5) years as to counts one (1), two (2), and three (3). The court ordered that all three (3) sentences run consecutive to one another. Petitioner was sentenced to one (1) year as to count (5) five. This sentence was ordered to run consecutive to the other sentences. Therefore, Petitioner's total sentence was sixteen (16) years. The trial court deviated from the recommended guideline sentence of twelve (12) to thirty (30) months but did not give written reasons for the departure. (R. 35). The court stated on the record that she deviated from the guidelines due to extensive victim injury, and the fact that Petitioner had been convicted of battery on a law enforcement officer three (3) years earlier and resisting arrest with violence nine (9) years earlier.

A timely notice of appeal was filed on March 31, 1988. (T. 38). On appeal Petitioner argued that his sentence had to be vacated since the court failed to give written reasons for the

departure sentence. Petitioner further argued that the oral reasons given by the court did not justify a departure sentence and therefore, the court should order the trial court to sentence Petitioner within the guidelines. On March 14, 1989, the Third District Court of Appeal in Robinson v. State, 541 So.2d 1261 (Fla. 3d DCA 1989) vacated Petitioner's sentence and remanded the case to the trial court with instructions to the trial judge to clarify the reasons for departure in a written order.

Pursuant to the mandate, the trial court resentenced Petitioner on May 12, 1989. The trial court deviated from the guidelines and gave Petitioner the exact same sentence as he originally received. Once again, however, the trial court failed to give written reasons for the departure sentence. (R. 24-28). A timely notice of appeal was filed on June 7, 1989. (R. 32). Petitioner argued in his brief that the departure sentence should once again be vacated since there were no written reasons justifying the sentence.

On November 4, 1989, approximately five (5) months after the notice of appeal was filed and six months after the sentencing, the state filed a notice of filing which contained written reasons signed by the trial judge on November 3, 1989. The trial judge prepared this written order despite having no jurisdiction.

While the appeal was progressing, this Court rendered its opinion in Ree v. State, 14 FLW 565 (Fla. 1989) which held that the trial court must put its reasons for departure in writing at the time of the sentencing hearing. Since the trial judge's order was entered without jurisdiction and six months after the sentencing hearing the state conceded error.

The Third District Court of Appeal reversed the sentence and ruled that the court once again could deviate from the guidelines at a resentencing hearing. Petitioner filed a petition for clarification requesting that the Third District Court of Appeal amend its decision to require the trial court to sentence petitioner within the guidelines. The petition for clarification was denied with the Honorable Wilkie Ferguson dissenting.

A petition for discretionary review was filed with this Court alleging conflict with Ree v. State, 14 FLW 565 (Fla. 1989). Subsequent to the filing of the petition for discretionary review, this Court in Pope v. State, 15 FLW S243 (Fla. 1990) specifically held that a trial court must sentence a defendant within the guidelines on remand if the trial court failed to give written reasons for the departure in writing at the original sentencing hearing.

On July 19, 1990, this Court entered an order requiring Petitioner to file a brief on the merits.

QUESTION PRESENTED

WHETHER THE TRIAL COURT CAN DEVIATE FROM THE GUIDELINES ON A REMAND WHEN THE COURT FAILED TO GIVE WRITTEN REASONS FOR THE DEPARTURE AT THE ORIGINAL SENTENCING HEARING?

SUMMARY OF ARGUMENT

The trial court deviated from the sentencing guidelines. No written reasons were prepared by the trial court. Five (5) months after the notice of appeal was filed, the court signed a written order. Since the trial court had no jurisdiction to sign this order it was a nullity.

The Third District Court of Appeal ruled that on remand, the trial court can once again deviate from the guidelines if she gives written reasons.

This Court has held in Pope v. State, supra, that if a trial court fails to put her (his) reasons in writing at the original sentencing hearing, on remand the trial court must sentence defendant within the guidelines. Therefore, this Court should reverse the decision of the Third District Court of Appeal and remand this case for resentencing within the guidelines.

ARGUMENT

WHETHER THE TRIAL COURT CAN DEVIATE FROM THE GUIDELINES ON A REMAND WHEN THE COURT FAILED TO GIVE WRITTEN REASONS FOR THE DEPARTURE AT THE ORIGINAL SENTENCING HEARING?

The only issue this Court must resolve in this appeal is whether the trial court on remand for resentencing for failure to give written reasons for a departure sentence must sentence Petitioner within the guidelines. The undisputed relevant facts dealing with the long history of this case will reveal that the Third District Court of Appeal's decision allowing the trial court to deviate from the guidelines at the resentencing hearing directly conflicts with this Court's decision in Pope v. State, 15 FLW S243 (Fla. 1990) and, therefore, the court should vacate the Third District's opinion and order the trial court to sentence petitioner within the guidelines.

The undisputed facts in this case establish the following:

1. Petitioner was convicted by a jury of two (2) counts of resisting arrest with violence, one (1) count of battery on a law enforcement officer and one count of simple battery. (R. 15).

2. The trial court sentenced petitioner to a total period of incarceration of sixteen (16) years.

3. The recommended guideline sentence was twelve (12) to thirty (30) months. (R. 35).

4. The trial court gave oral reasons for the departure sentence. The trial court failed to give written reasons for the departure sentence.

5. An appeal was filed with the Third District Court of Appeal since the trial court failed to give written reasons for the departure sentence.

6. The Third District Court of Appeal reversed petitioner's sentence and indicated that the trial court could deviate from the guidelines if she clarified her oral reasons and put them in writing. See Robinson v. State, 541 So.2d 1261 (Fla. 3d DCA 1989).

7. On May 12, 1989, the trial court sentenced petitioner to a total sentence of sixteen (16) years incarceration. Once again the trial court failed to give written reasons for the departure sentence. (R. 26-28).

8. A timely notice of appeal was filed on June 7, 1989. (R. 32). Petitioner argued in its brief that the departure sentence was illegal since there were no written reasons to support the departure.

9. Approximately three weeks after petitioner filed his brief and several months after the sentencing hearing and the filing of the notice of appeal, the State of Florida filed a notice of filing which contained a written departure order which was signed by the trial judge on November 3, 1989. The trial judge wrote on the order that the order was nunc pro tunc to April 12, 1989.

10. Prior to the oral argument, the state confessed error in this case. Despite the fact that Petitioner argued in their brief that the appropriate remedy was to remand the case for resentencing within the guidelines, the Third District Court of Appeal ruled that the trial court can once again at the third sentencing hearing deviate from the guidelines if she puts her reasons in writing.

In Pope v. State, supra, this Court specifically held that if a trial court does not put reasons in writing at the original sentencing hearing, upon remand, the court must sentence the defendant within the guidelines. In reaching this conclusion, the court relied upon the principles of State v. Jackson, 478 So.2d 1094 (Fla. 1985) and Shull v. Duggers, 515 So.2d 748 (Fla. 1987) and held the following:

Applying the principles of *Jackson* and *Shull*, and for the same policy reasons: we hold that when an appellate court reverses a departure sentence because there was no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines.

In the instant case, the trial court deviated from the sentencing guidelines without giving any written reasons for the departure. Five (5) months after the notice of appeal was filed and six (6) months after the sentencing, the trial court signed a written order justifying the departure sentence. The court attempted to make the order nunc pro tunc to April 12, 1989. It is petitioner's position that once the notice of appeal was filed the trial court had no jurisdiction to sign the sentencing order. Therefore, this case is identical to the facts in Pope v. State, supra, which is that the trial court departed from the guidelines without written reasons.¹

¹ In *Ree v. State*, 14 FLW 565 (Fla. 1989) this Court held that a sentencing order signed five (5) days after the sentencing hearing is invalid. The court did not specifically state whether a remand pursuant to *Ree v. State*, *supra*, requires sentencing within the guidelines. In *Ree v. State*, *supra*, the court had jurisdiction to sign the order. In this case, the court did not have jurisdiction to sign the order, therefore, *Pope v. State*, (Cont'd)

The law in this state has consistently recognized that once a notice of appeal has been filed the trial court loses jurisdiction over the proceedings while the appeal is pending. The only exception to this rule is Rule 9.600 which gives the trial court concurrent jurisdiction while the record is pending to render orders on any procedural matter relating to the cause.

In the instant case, the trial court's written sentencing order was filed after the record and petitioner's brief was filed. Therefore, Rule 9.600(a) is not applicable. Furthermore, the courts have consistently held that orders entered by a trial court concerning sentencing after the notice of appeal has been filed are invalid since they are not merely procedural. ~~See Van~~ Royal v. State, 497 So.2d 625 (Fla. 1986) (Trial court's findings concerning death penalty, signed after notice of appeal, invalid since trial court no longer had jurisdiction); Boyd v. State, 518 So.2d 462 (Fla. 2d DCA 1988) (Trial court was without jurisdiction to determine amount of restitution and magnitude of supplemental fine after defendant filed notice of appeal); Woods v. State, 516 So.2d 52 (Fla. 2d DCA 1988) (Trial court was without jurisdiction to amend sentence to comply with sentencing guidelines after defendant filed his notice of appeal); Wolfson v. State, 437 So.2d 174 (Fla. 2d DCA 1983) (Trial court has no jurisdiction to change sentence after a notice of appeal has been filed and the appeal is pending).

In the instant case, the trial court, after the notice of appeal was filed, attempted to supplement the record with written

supra, is the controlling case in this matter.

reasons to support the departure sentence so that the sentence would conform to the requirements of the guidelines. In Woods v. State, supra, the Second District Court of Appeal correctly recognized that once a notice of appeal has been filed, an order entered by the trial court to correct a sentence is invalid. Therefore, the trial court's sentencing order signed five (5) months after the notice of appeal was a nullity.

The trial court wrote on the order that the order was nunc pro tunc to April 12, 1989. The record is clear that the order was not signed on April 12, 1989 but instead was signed on November 3, 1989. There is nothing in the record to indicate that a written order was ever signed on April 12, 1989. In Becker v. King, 307 So.2d 855 (Fla. 4th DCA 1975) the court defined what nunc pro tunc means when the court stated the following:

Nunc pro tunc means "now for then" and when applied to the entry of a legal order or judgment it normally does not refer to a new or fresh (de novo) decision, as when a decision is made after the death of a party, but relates to a ruling or action actually previously made or done but concerning which for some reason the record thereof is defective or omitted. The later record making does not itself have a retroactive effect but it constitutes the later evidence of a prior effectual act.

Therefore, the mere fact that a trial court puts the words nunc pro tunc on an order does not result in an invalid order becoming valid. The trial court prepared the order on November 3, 1989 not April 12, 1989.²

² The Petitioner was sentenced in this case on May 12, 1989 not April 12, 1989. Therefore, even if this Court gave credence (Cont'd)

In conclusion, it is Petitioner's position that since the trial judge's written sentencing order was filed five (5) months after the notice of appeal, this order had no effect. Therefore, since the trial court deviated from the guidelines without a written sentencing order this case should be remanded to the trial court for resentencing with instructions to sentence petitioner within the guidelines. Pope v. State, supra.

to the nunc pro tunc language it would still be meaningless because then the order would have been signed one (1) month prior to the sentencing hearing.

CONCLUSION

Based upon the foregoing cases and authorities, this Court should reverse the Third District's decision and order the trial court to sentence defendant within the guidelines.

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 Patricia Ann Ash, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 this 26th day of July, 1990.



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