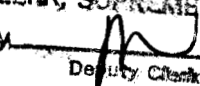


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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,792

VIRGIL ROBINSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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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 that must be resolved in this case is whether the trial court on remand must sentence defendant within the guidelines or whether the trial court can once again attempt to deviate from the guidelines by giving written reasons for the departure. The defendant has twice previously been sentenced by the trial judge in this case. Both times the trial court deviated from the guidelines. Both times the trial court ignored the law at the time of the sentencing and failed to give written reasons for the departure sentence. Defendant's recommended guideline sentence was twelve (12) to thirty (30) months. The trial court sentenced defendant to sixteen (16) years. Defendant has been incarcerated for over two (2) years without the trial court ever signing a valid departure order.

The state in its brief, all but concedes that under Pope v. State, 15 F.L.W. S 243 (Fla. 1990) petitioner would be entitled to be resentenced within the guidelines. The only argument made by the state is that Pope v. State, supra, should be applied prospectively, similar to Ree v. State, 15 F.L.W. S 395 (Fla. 1990) and, therefore, petitioner should not receive the benefit of the holding in Pope v. State, supra. Whether Pope v. State, supra, should be applied prospectively is irrelevant to this appeal since petitioner's conviction was not final by trial or appeal when this Court issued its opinion in Pope v. State,

supra.¹ At the time this Court issued its opinion in Pope v. State, supra, a jurisdictional brief had been filed in this Court raising the issue as to whether petitioner must be sentenced within the guidelines upon remand for resentencing. Therefore, this case is a "pipeline case" and the holding in Pope v. State, supra, should apply.

In State v. Castillo, 486 So.2d 565 (Fla. 1986) this Court recognized that a defendant is entitled to the benefit of the law at the time of appellate disposition. In Castillo, supra, the issue was whether a defendant was entitled to the benefit of the Neil decision despite the fact that this Court held that Neil was not retroactive. In holding that the defendant was entitled to the benefit of Neil, this Court held the following:

Generally, an appellant is entitled to the benefit of the law at the time of appellate disposition . . . We see no exception to this principle in this case. Our comment in Neil that it should not be applied retroactively was intended to apply to completed cases.

In reaching the conclusion that Neil was applicable to all "pipeline" cases, this Court upheld the long-standing principle that "decisional law and rules in effect at the time an appeal is decided governs the case even if there has been a change since

¹ Its defendant's position that Pope v. State, supra, should be applied retroactively since this Court did not announce a rule of law that changed the law in Florida. In reaching its decision in Pope, supra, this Court relied on State v. Jackson, 478 So.2d 1054 (Fla. 1985) and Shull v. Dugger, 515 So.2d 748 (Fla. 1987), two previous opinions of this Court which interpreted the Florida Guidelines. Therefore, unlike Ree v. State, 15 F.L.W. S 395 (Fla. 1990), this Court in Pope v. State, supra, did not announce any new rule and, therefore, Pope v. State, supra, should apply retroactively.

the time of trial." Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983); accord, e.g., State v. Castillo, 486 So.2d 565 (Fla. 1986); Dougan v. State, 470 So.2d 697 (Fla. 1989); Morgan v. State, 392 So.2d 1315 (Fla. 1981).

The rationale for this rule is simple and fair. It would be unjust for an appellate court to apply a new rule to one appellant and not apply that same rule to a similarly situated appellant whose case was heard subsequent to the appellant who received the benefit of the new rule. In Griffith v. Kentucky, 479 U.S. 314, 327 (1987) the United States Supreme Court held the following:

It "hardly comports with the ideal of 'administration of justice with an even hand, ' " when "one chance beneficiary -- the lucky individual whose case was chosen as the occasion for announcing the new principle -- enjoys retroactive application, while other similarly situated have their claims adjudicated under the old doctrine." The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule.

The Fifth District Court of Appeal in Reed v. State, 15 FLW D 1867 (Fla. 1990) specifically rejected the exact same argument that the state is making in this case. In Reed, similar to this case, the state argued that since the Pope, supra, opinion was not in existence at the time of Reed's sentencing, Reed was not entitled to the benefit of Pope. In rejecting this argument, the Fifth District Court of Appeal correctly recognized that retroactivity does not apply to "pipeline cases" when the court held the following:

The state opposes what it terms a retro-active application of *Pope* to this case. The state claims that the trial court, which imposed sentence before the supreme court's *Pope* decision, was entitled to rely on case law as it existed at that time. However, this case is a "pipeline case," and, therefore, the question of retroactivity is not implicated. A "pipeline case" is one in which a conviction is not final by trial or appeal at the time a controlling decision is issued by the supreme court. *Smith v. State*, 496 So.2d 983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. *Thibodeau v. Sarasota Memorial Hospital*, 449 So.2d 297 (Fla. 1st DCA 1984). Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the *Pope* rule at this time. *Cantor v. Davis*, 489 So.2d 18 (Fla. 1986); *State v. Castillo*, 486 So.2d 565 (Fla. 1986); *Wheeler v. State*, 344 So.2d 244 (Fla. 1977); *McIntyre v. State*, 381 So.2d 1154 (Fla. 5th DCA 1980).

It should be pointed out that several courts including this Court have applied *Pope* to "pipeline cases" without addressing the issue of retroactivity. *Ferguson v. State*, 15 F.L.W. S 449 (Fla. 1990); *Smith v. State*, 15 F.L.W. D 2064 (Fla. 2d DCA opinion filed August 8, 1990); and *State v. Whipple*, 15 F.L.W. D 1916 (Fla. 3d DCA 1990).

In *Ferguson v. State*, *supra*, this Court ordered that Ferguson's case be remanded for resentencing within the guidelines pursuant to *Pope v. State*, *supra*. An analysis of the procedural background of *Ferguson* clearly supports petitioner's position that he is entitled to the benefit of *Pope v. State*, *supra*. On September 21, 1989, the Fifth District Court of Appeal reversed Ferguson's sentence since there were no written reasons given for the departure sentence. The court ordered that the

trial court could once again depart from the guidelines if written reasons were given. At the time the Fifth District reached this conclusion, this Court had not entered its opinion in Pope v. State, supra

Ferguson filed a jurisdictional brief with this court alleging conflict with Crigler v. State, 526 So.2d 176 (Fla. 2d DCA 1988). While Ferguson's case was pending before this Court, this Court decided Pope v. State, supra. Since Ferguson's case was pending before this Court when Pope was decided, this Court applied the holding in Pope, supra, and remanded the case for sentencing within the guidelines.

The procedural history in this case is identical to the procedural history of Ferguson v. State, supra. Prior to this Court's opinion in Pope v. State, supra, the Third District held that the trial court could deviate from the guidelines upon remand. Similar to Ferguson, petitioner filed a notice to invoke jurisdiction with this Court. Also similar to Ferguson while petitioner's case was pending in this Court, this Court issued its opinion in Pope v. State, supra. Therefore, similar to Ferguson, petitioner is entitled to the benefit of the holding in Pope v. State, supra.


Since the trial court failed to give written reasons for a departure sentence at petitioner's first two sentencing hearings, and to this date no court has ever signed a written order to justify petitioner's departure sentence, this case must be remanded to the trial court with instructions to sentence petitioner within the guidelines. See Pope v. State, supra.

CONCLUSION

BASED upon the foregoing cases and authorities, this Honorable court is respectfully requested to reverse the judgment of the Third District Court of Appeal.

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 26th day of September, 1990.


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