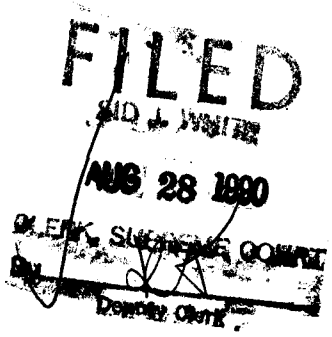
IN THE SUPREME COURT OF FLORIDA



CASE NO. 75,793

MARK KEPNER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3010

ROBERT KALTER
Assistant Public Defender
Florida Bar No. 260711

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,793

MARK KEPNER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON MERITS

INTRODUCTION

The petitioner, Mark Kepner, was the appellee in the Third District Court of Appeal and the defendant in the trial court. The respondent, the State of Florida, was the appellant in the Third District Court of Appeal and the plaintiff, in the trial court. The symbol "R" will be used to refer to the portions of the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Between March 21, 1989 and March 25, 1989, petitioner committed several robberies, burglaries and grand theft. During these crimes, Petitioner possessed a firearm. The State of Florida filed six (6) separate informations in case nos. 89-12099, (R1-2a), 89-12377 (R. 14-15a), 89-12378 (R. 21-2a), 89-12380 (R. 27-30a), 89-89-12717 (R. 37-341a), 89-13525 (R. 48-49a).

On September 19, 1989, petitioner entered guilty pleas as to all the counts in all the informations. The trial court consolidated all the cases for sentencing and since petitioner was between 18-21 and petitioner had never previously been sentenced as a youthful offender the court sentenced petitioner as a youthful offender. The court sentenced petitioner to the maximum youthful offender sentence of four years (4) incarceration followed by two years community control. Since the court concluded that petitioner had a severe drug problem, the court ordered that petitioner attend a drug treatment program while on community control. The sentence received by defendant was less than the recommended guideline sentence. (R. 4-7, 9-10, 16-19, 22-25, 31-34, 42-46a, 50-53).

Pursuant to this court's decision in State v. Diers, 532 So.2d 1271 (Fla. 1988) the court did not prepare a separate written order listing reasons for the downward departure sentence. The court did sign a written order classifying petitioner as a youthful offender. (R. 4-7, 16-19, 22-25, 31-34, 42-46a, 50-53).

The State of Florida filed a notice of appeal. On appeal, the only issue raised by the state was that petitioner's sentence was

illegal since the trial court did not give written reasons for the downward departure sentence. The state did not argue that the trial court wrongfully classified petitioner as a youthful offender.

The Third District Court of Appeal ruled that the 1987 amendment to the Youthful Offender Statute which gave the state the right to appeal a departure sentence under the Youthful Offender Act by implication also added the requirement that the trial judge give written reasons for a downward departure sentence when a defendant is sentenced as a youthful offender.

The Third District Court of Appeal recognized that their opinion was in direct conflict with the second district's case of State v. Green, 541 So.2d 789 (Fla. 4th DCA 1984); and State v. Nealy, 532 So.2d 1117 (Fla. 784 (Fla. 4th DCA 1989) which both held that written reasons are not required for downward departure sentences if the defendant is sentenced as a youthful offender.

On July 19, 1990, this Court ordered petitioner to file a brief on the merits.

QUESTION PRESENTED

WHETHER WRITTEN REASONS ARE REQUIRED FOR A DOWNWARD DEPARTURE SENTENCE WHEN A DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER.

SUMMARY OF ARGUMENT

The most recent amendment to the Youthful Offender Statute specifically states that written reasons are required if a youthful offender sentence results in a more severe sentence than the recommended guideline sentence. The amendment does not require written reasons for a downward departure sentence.

This Court in State v. Diers, supra, has held that prior to the 1987 amendment, written reasons were not required for downward departure sentences pursuant to the Youthful Offender Act. The court reached this conclusion based upon the rules of statutory construction and an analysis of the purpose of the Youthful Offender Statute.

Nothing in the 1987 amendment to the Youthful Offender Statute effects the rational relied upon by this Court to conclude that written reasons are not required for downward departure sentences pursuant to the Youthful Offender Act. The 1987 amendment amended the youthful offender to give the state the right to appeal a youthful offender departure sentence. The legislature did not change the portion of the statute that specifically requires written reasons for upward departure sentences. The new amendment similar to the old statute does not mention that written reasons are required for downward departure sentences. If the legislature had intended to require written reasons for youthful offender sentences that result in downward departure sentence, the legislature would have included this language in the amendment.

Since the 1987 amendment does nothing to change the rational behind this Court's opinion in State v. Diers, supra, this Court should affirm the trial court's decision that written reasons are not required if a trial court sentences a defendant as a youthful offender and that sentence is less than the recommended guideline sentence.

ARGUMENT

WHETHER WRITTEN REASONS ARE REQUIRED FOR A DOWNWARD DEPARTURE SENTENCE WHEN A DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER.

The only issue this Court must resolve in this appeal is whether a trial court who sentences a defendant as a youthful offender pursuant to Florida Statute 958.04 must give written reasons to justify a departure sentence if the youthful offender sentence is less than the recommended guidelines sentence. The Third District Court of Appeal in this case has concluded that since the legislature amended Florida Statute 958.04(3) to give the state the right to appeal a departure sentence, by implication the legislature has amended the statute to also require written reasons for a downward departure sentence.

The Second District Court of Appeal in State v. Nealy, 532 So.2d 1117 (Fla. 2d DCA 1988) and the Fourth District Court of Appeal in State v. Green, 541 So.2d 789 (Fla. 4th DCA 1989) have both concluded that since Florida Statute 958.04(3) specifically states that written reasons are necessary for an upward departure and does not state that written reasons are necessary for a downward departure the rules of statutory construction require the conclusion that written reasons are not necessary for a downward departure sentence if the court sentences a defendant as a youthful offender.

This Court in State v. Diers, 532 So.2d 1271 (Fla. 1988) was asked to decide the exact same question that is presented in this appeal. However, in State v. Diers, supra this Court was asked to

interpret the 1985 amendment to Florida Statute 958.04. Since this Court's decision in Diers the Florida legislature has once again amended Florida Statute 958.04. Therefore, the issue that must be resolved by this Court now is whether the 1988 amendment to Florida Statute 958.04 changes this Court's conclusion in State v. Diers, supra, that written reasons are not required for youthful offender sentences that are less than the recommended guideline sentence.

A comparison of the 1985 amendment with the 1988 amendment will establish that the exact same rationale that led this Court to the conclusion that written reasons are not required for Youthful Offender sentences resulting in downward departures exist even after the 1988 amendment to the Youthful Offender Act.

In 1985 the legislature amended the Youthful Offender Act to include the following concerning the effect of the sentencing guidelines on the Youthful Offender Act.

> The provisions of this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines pursuant to § 921.001 unless clear and convincing reasons are explained in writing by the trial court judge. *A sentence imposed outside of such guidelines shall be subject to appeal by the defendant pursuant to § 924.06.*

Relying on both rules of statutory construction and the rational of the Youthful Offender Act this Court concluded that written reasons were not required to justify a downward departure sentence if the defendant was sentenced as a youthful offender.

Initially, this Court relied on rules of statutory construction to support its decision in Diers. The Youthful

Offender Statute specifically states that "the provisions of this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide guidelines pursuant to § 921.001 unless clear and convincing reasons are explained in writing". The statute did not prohibit downward departures pursuant to the Youthful Offender Statute and more importantly the statute did not state that written reasons were required for a downward departure.

In Diers v. State, supra, the rule of statutory construction relied upon by the court were expressio unius est exclusion alterius which means that when a piece of legislation specifically mentions something and specifically does not mention the opposite, the legislation only means to include what is mentioned. In Diers, supra, the court concluded that "by mentioning only a defense appeal, the legislature wished to exclude one by the prosecution to which it did not refer. The exact same logic is applicable to written reasons for a downward departure. When the legislature specifically stated that written reasons were required for an upward departure sentence and made no similar requirement for a downward departure than the legislature must not have intended written reasons for a downward departure.

In reaching the conclusion that written reasons were not required for youthful offender sentences that are less than the guidelines, this Court also recognized the following:

> We believe, in sum, that section 958.04(3) represents a conscious decision by the legislature that an appropriate employment of the Y.O.A. pursuant to the statutory

> requirements as to the particular defendant, see *Ellis v. State*, 475 So.2d 1021 (Fla.App. 1985), itself constitutes a proper basis for a more lenient, but not necessarily for a harsher, sentence than under the guidelines.

It is petitioner's position that the 1987 amendment to the Youthful Offender Statute did not change any of the rationale behind this Court's decision in State v. Diers, supra.

In 1987 the legislature amended Florida Statute 958.04(3) as follows:

> The provisions of this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines pursuant to s. 921.001 unless reasons are explained in writing by the trial court judge which reasonably justify departure. A sentence imposed outside of such guidelines shall be subject to appeal pursuant to s. 924.07.

The only change made by the 1987 amendment was the legislature eliminated the language that only a defendant could appeal a departure sentence. An analysis of the statute establishes that the statute still only states that "this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines pursuant to s. 921.001 unless reasons are explained in writing by the trial court judge which reasonably justify departures.

Therefore, similar to the 1985 amendment the 1987 amendment specifically discusses the fact that the Youthful Offender Statute shall not be used to impose sentences greater than the recommended guideline sentence and if the court does use the Youthful Offender

Statute to impose an upward departure, the reasons must be placed in writing.

Also, similar to the 1985 amendment, the 1987 amendment makes no mention of the fact that a youthful offender sentence should not result in a downward departure. Furthermore, the statute does not require written reasons for a downward departure. Therefore, the same rules of statutory construction that lead this Court to conclude that the state had no right to appeal pursuant to the 1985 amendment applies to the 1987 amendment and whether written reasons for downward departures are required. If the legislature had intended to require written reasons for a downward departure the statute would have specifically stated that reasons are required for all departure sentences pursuant to the Youthful Offender Act or written reasons are required for both upward and downward departure sentences. Instead, the statute specifically limited the requirement for written reasons only for upward departures.

The Second District Court of Appeal in State v. Nealy, supra, recognized that the amended statute did not change this Court's conclusion that no written reasons are required for a downward departure when the court held the following:

> The right of appeal by the state was added by the legislature last year. That amendment of section 958.04(3) was the only material change the legislature made to the statute. It did not alter the original wording, which only requires written reasons to be submitted by the trial court when it departs upward from the recommended guidelines range.
>
> As stated in *State v. Diers*, 517 So.2d 788, 789 (Fla. 2d DCA 1988). The Y.O.A. is more than the guidelines scheme and directs that the

> penalties are to be imposed "[i]n lieu of other criminal penalties authorized by law." § 958.04(2), Fla.Stat. (1985). Second, the legislative amendment to the Y.O.A. specifically provides for a defendant's appeal from an upward departure from the guidelines but is silent on both downward departures and the state's right to appeal.
>
> Though the latest legislative amendment of section 958.04(3) has added the right of the state to appeal, it remains silent as to downward departure.

The Fourth District Court of Appeal in State v. Green, supra, also concluded that the 1987 amendment to the Youthful Offender Statute did not change the court's decision in Diers, supra, when the court stated the following:

> In *Diers*, the court found that the "explicit" restriction imposed by the statute with respect to guideline increases, which, "read together with the just-as-pointed omission of a reverse prohibition of a downward departure," was a basis for concluding that the legislature did not intend to require that written clear and convincing reasons be given for a downward departure in a youthful offender sentence. Id. at 1272.
> (emphasis in original)
>
> We recognize that the reasoning in *Diers* was in part based on the language in the 1985 statute, omitted in the 1987 amendment, restricting the right of appeal under the Act to defendants. However, notwithstanding the modification permitting appeals by the state, we conclude that clear and convincing reasons for the downward departure are not required where a youthful offender sentence is below the recommended guideline sentence. *See State v. Diers; State v. Nealy*, 532 So.2d 1117 (Fla. 2d DCA 1988). The defendant's sentence is therefore affirmed.

The Third District Court of Appeal rejected the opinions of the Second District Court of Appeal and the Fourth District Court of Appeal and concluded that once the legislature amended the youthful

offender statute to give the state the right to appeal departure sentences the legislature by implication also amended the statute to require written reasons for downward departure sentences.

In reaching this conclusion, the Third District Court of Appeal failed to even discuss the fact that the statute specifically requires written reasons for upward departures and has no similar requirement for downward departures. The Third District based its decision solely on the theory that if the legislature intended to give the state the right to appeal departure sentence then obviously written reasons must be required for downward departures since that would be the only issue the state would want to appeal.

Initially, it is petitioner's position that the Third District has read into the statute something that is clearly not in the statute. The statute does not require written reasons intended for downward departures. If the legislature intended the 1987 amendment to have this effect they would have changed the statute to reflect this desire. Furthermore, the Third District's position that giving the state the right to appeal departure sentences pursuant to the Youthful Offender Statute would be meaningless if the trial judge was not required to give written reasons for a downward departure is without merit.

This Court has recognized in Diers, supra, that being a youthful offender is in itself a valid reason to receive lenient treatment. Therefore, when the court signs a Youthful Offender order he has in essence given his reason for the downward departure. Under the 1985 amendment the state may have been prohibited from appealing

a trial judge's determination that a defendant was a youthful offender. In order to be correctly classified as a youthful offender, the court must find the following:

> 1) The defendant was between the age of 18-21 at the time of the commission of the offense.
>
> 2) The defendant has never been previously classified as a youthful offender.
>
> 3) The defendant was not found guilty of a capital or life felony.

Therefore, the legislature may have amended Florida Statute 958.04(3) to allow the state to appeal a trial judge's decision to classify a defendant as a youthful offender.

The most compelling argument to justify the conclusion that the youthful offender statute only requires written reasons for upward departure sentence is an analysis of the purpose of the youthful offender statute. The legislature passed the youthful offender statute for the sole purpose of giving trial court's the opportunity to treat youthful offenders more leniently than adult offenders. The legislature recognized that in certain situations a youthful offender sentence may be more serious than the recommended guideline sentence. In order to prohibit a trial judge from using the Youthful Offender Statute to punish a youthful offender more severely than an adult offender, the legislature amended the youthful offender act to include the following language:

> The provisions of this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines pursuant to S. 921.001 unless reasons are explained in writing by the trial court judge which reasonably justify departure.

Since the legislature intended the youthful offender act to serve as an alternative to the guidelines if it would benefit the young offender, the legislature did not deem it necessary to state that a trial could not deviate downward from the guidelines without giving written reasons for the departure. The reason no written reason is required is because the classification of a youthful offender <u>is</u> a valid reason to give a young offender a more lenient sentence than the recommended guideline sentence.

The Third District Court of Appeal concluded in its opinion that the 1987 amendment reinstated the old rule that the legislature did not intend for statutory sentencing alternatives to replace the guidelines. However, an analysis of legislation after the 1987 amendment reveals that the legislature did not intend to create a rule that statutory sentencing alternatives can not displace the guidelines.

In 1988, the Florida Legislature amended the sentencing guidelines to include a provision that an habitual offender sentence is not a guideline sentence and therefore, no written reasons are necessary for a departure sentence if a defendant is sentenced as an habitual offender. Therefore, contrary to the Third District's opinion, the Florida Legislature has continued to recognize that certain statutory sentencing alternatives have replaced the guidelines.

The exact same rationale that supports the conclusion that no written reasons are necessary for an upward departure sentence for a habitual offender sentence exists to support the rational that

no written reasons are required for a downward departure pursuant to the Youthful Offender Act.

By passing the habitual offender statute the legislature has recognized that if an individual meets the requirement of that statute, a trial judge is entitle to treat him more harshly than a defendant who has committed a similar crime. By definition, when a trial court finds a defendant to be an habitual offender there is a valid reason to treat him more severely than a normal defendant. For this reason the legislature concluded that it was not necessary for an upward departure sentence if the defendant is determined to be an habitual offender. The reason written reasons are required for departure sentences is so that an appellate court can be apprised of the reasons for the departure and can assure itself that the reason for departure is supported by the record.

Since a trial court must conduct a hearing before declaring a defendant an habitual offender and he must make specific findings of facts to support this conclusion, the legislature concluded that there would be no purpose served in requiring a trial judge to give written reasons to support his decision to deviate from the guidelines pursuant to the habitual offender statute.

The exact same rational applies to a downward departure sentence pursuant to the Youthful Offender Act. When a trial judge chooses to impose a youthful offender sentence, the court has decided to treat the youthful offender more leniently. The mere imposition of a youthful offender sentence is a valid reason to treat a defendant less severe than an adult. Therefore, there would be no purpose

served by requiring the trial judge to put in writing his reasons for the downward departure, since the imposition of the youthful offender sentence is the reason why the court gave the lesser sentence. It is for this reason that the legislature specifically required written reasons for upward departure youthful offender sentence and did not require written reasons for the downward departure youthful offender sentence.

Since the trial court correctly determined that petitioner was a youthful offender this Court should affirm defendant's youthful offender sentence.

CONCLUSION

BASED upon the foregoing this Honorable Court is respectfully requested to reverse the judgment of Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: 
ROBERT KALTER
Assistant Public Defender
Florida Bar No. 260711
(305) 545-3010

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 33128 this 27th day of August, 1990.


ROBERT KALTER
Assistant Public Defender