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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 RESPONDENT ON THE MERITS

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INTRODUCTION

In this Brief, the Petitioner MARK KEPNER will be referred to as the Defendant or the Petitioner. The Respondent THE STATE OF FLORIDA will be referred to as the State or the Respondent.

STATEMENT OF THE CASE AND FACTS

Between April 24, 1989 and May 1, 1989, the Defendant was charged with six separate informations for a spree of crimes committed over a period of five days, which crimes ranged from armed burglary of an occupied conveyance to armed robbery to grand theft and unlawful possession of a firearm.

The Defendant was adjudicated guilty after having entered a plea of guilty to all charges (R.4-5).

On September 19, 1989 a sentencing hearing was held (T.1-23). The sentencing guidelines scoresheet scored the Defendant at "267", indicating a guideline sentence range of 12 to 17 years (R.46-46A). The State requested the maximum sentence of 17 years.

Over the State's objection, the trial court sentenced the Defendant under the Youthful Offender Act to a term of six years, with no credit for time served (R. 6,7,9). The six years were to be served by four years of jail time and two years of community control (R.6,7.9). As a special condition of probation, the Defendant was to serve the first portion of community control in the Dade County Stockade Drug program, and he would further not be permitted to participate in the Boot Camp program (R.10). No written reasons were offered for the downward departure.

The State appealed the sentence, claiming that the trial court erred in imposing a downward departure sentence under the Youthful Offender Statute without providing contemporaneous written reasons (R.55). The Third District Court of Appeals agreed with the State, concluding that the effect of the 1987 amendment allowing state appeals also had the "concomitant effect of requiring a lawful basis for a downward departure sentence in the form of written reasons" (R.57-62). In reversing the sentence, the Third District Court of Appeal certified its opinion to be in direct conflict with State v. Nealy, 532 So.2d 1117 (Fla. 2d DCA 1988) and State v. Green, 541 So.2d 789 (Fla. 4th DCA 1989).

On March 28, 1990, the Defendant timely filed his Notice to Invoke Discretionary Jurisdiction. On July 19, 1990, this Court accepted jurisdiction.

QUESTION PRESENTED

WHETHER WRITTEN REASONS MUST BE PROVIDED WHEN IMPOSING A DOWNWARD DEPARTURE SENTENCE UNDER THE YOUTHFUL OFFENDER STATUTE.

SUMMARY OF ARGUMENT

The 1987 amendment to the Youthful Offender Act gave the state the right to appeal downward departure sentences imposed thereunder. In giving the state this right, the legislature implicitly required the trial court to explain its reasons for a downward departure in writing, in accordance with the guidelines requirement. Failure to require written reasons gives the state nothing more than an "empty right" to appeal Youthful Offender sentences.

ARGUMENT

WRITTEN REASONS MUST BE PROVIDED WHEN IMPOSING A DOWNWARD DEPARTURE SENTENCE UNDER THE YOUTHFUL OFFENDER STATUTE.

In its opinion, the Third District Court of Appeal correctly analyzed the evolution of the interrelationship between the sentencing guidelines and the Youthful Offender Act, including the impact of the latest amendment to the Youthful Offender Act.

Prior to July 1, 1984, all statutory sentencing alternatives, including the Youthful Offender Act, were deemed to supersede the guidelines. See Fla.R.Crim.P. 3.701(d)11 Committee Note (1983). As of July 1, 1984, the aforementioned Committee Note was stricken[1], and the opposite rule came into effect. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla. 1984). In an explanation of the change, this Court stated:

> "The Committee Note to 3.701(d)(11), which discusses statutory alternatives, has ben completely eliminated. While these statutory alternatives are acknowledged, the sentencing court is required to explain the guideline departure when an alternative program is used."

[1] The deleted committee note read as follows:

> "Sentences under provisions of the Youthful Offender Act (ch. 958), the Mentally Disordered Sex Offender Act (ch. 917), or which require participation in drug rehabilitation programs (sec. 397.12) need not conform to the guidelines."

Id at 824, n.12. This Court made no exception for downward departure sentences to the above requirement that departure sentences must be explained by the trial court.

In other words, a sentence imposed under the Youthful Offender Act no longer superseded the sentencing guidelines, and, in fact, the trial court was no longer exempt from the requirement of entering written reasons for its downward departure merely because the sentence imposed was pursuant to the Youthful Offender Act. State v. Evans, 503 So.2d 985 (Fla. 5th DCA 1987).

In 1985, the Florida legislature amended the Youthful Offender Act in Section 958.04(3) by explicitly prohibiting guideline increases without adherence to the clear and convincing requirements of the sentencing guidelines. Moreover, the amendment allowed a defendant the right to appeal any Youthful Offender Act sentence imposed outside of such guidelines.

This Court analyzed the impact of the aforesaid 1985 amendment in State v. Diers, 532 So.2d 1271 (Fla. 1988). The Supreme Court, in dismissing the State's appeal of a downward departure sentence, held:

> 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. Since, as a part of this scheme, the statute does not provide for appellate review of downward departures and since the state's right to appeal from final orders like this is entirely statutory, State v. Creighton, 469 So.2d 735 (Fla. 1985), the appeal is dismissed.

Diers, supra at 1272.

Subsequent thereto, in 1987, the amended statute which had been interpreted by the Supreme Court in Diers was once again amended. Specifically, section 958.04, Florida Statutes (1985) was amended to read as follows:

> 958.04 Judicial disposition of youthful offenders.
>
> (3) 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. 924.06 or s. 924.07.

Ch. 87-110, s. 3, 4, Laws of Fla. The last sentence, which previously allowed only defense appeals on youthful offender sentences, was modified to exclude the limiting language "by the defendant." Thus, under the 1987 amendment, the state was allowed to seek appellate review of a sentence that represented a departure downward from the sentencing guidelines, even if that sentence was imposed under the Youthful Offender Act. State v. McLeod, 524 So.2d 702 (Fla. 2d DCA 1988); State v. Nealy, 532 So.2d 1117 (Fla. 2d DCA 1988). Therefore, the latest legislative amendment of section

958.04(3) in effect overruled this Court's opinion in Diers.

Nevertheless, while the amendment added the right of the state to appeal downward departure sentences, it remained silent as to whether the trial court was required to state written reasons for a downward departure sentence under the Youthful Offender Act. The only language in the present statute on this issue requires that in the event of imposition of a greater sentence than the maximum recommended range as established by the sentencing guidelines, reasons which reasonably justify departure must be explained in writing bythe trial court judge. It does not specifically refer to lesser sentences.

The only three district court cases which have interpreted the 1987 amendment and expressed an opinion on the issue currently before this Court, have been the Fourth District in the Green[2] case, the Second District in the Nealy[3] case and the Third District Court in this case. Green and Nealy have held that written reasons are not required where a youthful offender sentence is below the recommended guidelines sentence. However, both of these cases appear to base their finding on the simple fact that the statute does not specifically provide for written reasons on departure sentence. In so doing, these cases misapprehend the impact of the

[2] State v. Green, 541 So.2d 789 (Fla. 4th DCA 1989).

[3] State v. Nealy, 532 So.2d 1117 (Fla. 2d DCA 1988).

amendment.

Judge Parker, however, did not misapprehend the impact of the amendment, and he discussed the fallacy of the majority's opinion in his concurring opinion in Nealy. Judge Parker's concern was that if the trial court were not required to set forth its reasons for departure in writing, then the state (by virtue of the amendment) had been given an "empty right to appeal":

> "I disagree with the majority that the silence of the statute concerning downward departures removes the necessity of written reasons to justify such departures. While the majority opinion acknowledges this right of appeal by the state, it does not explain what it is that the state may appeal. It seems illogical that the legislature would amend the statute to afford the state the right to appeal a sentence below the guidelines, but at the same time not require some justification by the trial court for the departure. Indeed, why afford the state such an empty right of appeal?"

Nealy, 532 So.2d at 1119.

In the instant case, the Third District Court of Appeals picked up on Judge Parker's reasoning and reiterated the critical fallacy made in the Petitioner's argument:

> "..if written reasons are not necessary to justify a departure, as they are in every other case, merely because the sentence is imposed under the Y.O.A., the right now conferred by the 1987 amendment to 958.04(3) would be an entirely illusory and futile one. In the absence of such a requirement, there

> would be simply no basis for any such appeal; no argument which could be asserted by the state for reversal; and no possible outcome but summary affirmance. An appeal, in other words, which has no chance to succeed is no appeal at all, and a holding to this effect, which is precisely the one sought by the defendant, would run directly counter to the most basic principle of statutory interpretation that the legislature is deemed to intend that each of its enactments, particularly an amendatory one, serves a useful and viable purpose [citations omitted]. Applying this principle, we conclude that giving the state the right to appeal in itself means that it has the right to review a Y.O.A.-downward departure on a meaningful basis. That can only involve the requirement that the sentence be based upon legally satisfactory written reasons."

This argument is further bolstered by a full reading of section 958.04(3). The 1987 amendment to section 958.04(3) added a reference to an appeal pursuant to section 924.07. Section 924.07, Fla.Stat. (1989) reads, in part, that a state may appeal from "a sentence imposed outside the range recommended by the guidelines authorized by s. 921.001." Section 921.001, Fla. Stat. (1989), in turn, requires that "any sentence imposed outside the range recommended by the guidelines be explained in writing by the trial court judge." Therefore, reading section 958.04(3) in pari materia with the other cross referenced sections of the sentencing guidelines clearly requires written reasons for any time of departure, including downward departure.

Such a requirement is also consistent with the generally stated policy behind the sentencing guidelines of establishing a

uniform sentencing scheme.

The only other case relative to the issue before this Court is Wiedeman v. State, 506 So.2d 1079 (Fla. 5th DCA 1987), which the Respondent asserts is persuasive. In Wiedeman, the Fifth District vacated a trial court's downward departure sentence under the Youthful Offender Act because written reasons were not provided by the trial court as required by Florida Rule of Criminal Procedure 3.701(d)(11) for a departure sentence. Though Wiedeman was decided prior the 1987 amendment, the amendment does not affect the result or reasoning of Wiedeman. Nealy, 532 So.,2d at 1120, n.4.

In summation, it is the Respondent's contention that in light of the fact that the Petitioner in this case was sentenced to six (6) years instead of the guideline range of twelve (12) to seventeen (17) years, the trial court was under an affirmative duty to state its contemporaneous written reasons for departure. By failing to do so, it deprived the state from taking an effective appeal, as provided by the Youthful Offender statute. Therefore, the Third District Court of Appeals decision should be affirmed in all respects, and this matter should be remanded for the entry of written reasons or for resentencing within the guidelines.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities cited herein, the Respondent respectfully requests that this Court affirm the Third District Court of Appeal's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by United States mail to BENNETT H. BRUMMER, Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125 on this 18th day of September, 1990.

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