

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 75,878

RANDY LYLES,

Respondent.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|-------------|
| TABLE OF CONTENTS | i |
| TABLE OF CITATIONS | ii |
| I PRELIMINARY STATEMENT | 1 |
| II SUMMARY OF THE ARGUMENT | 2 |
| III ARGUMENT | 3 |
| <u>ISSUE I</u> | |
| WHETHER A SENTENCE MUST BE REVERSED AND REMANDED FOR RESENTENCING PURSUANT TO THE OPTIONS PROVIDED IN <u>REE V. STATE, 14 F.L.W.</u> <u>565 (FLA. NOV. 16, 1989)</u> , WHEN THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THE REASONS FOR DEPARTURE FROM THE GUIDELINES WHICH WERE ORALLY PRONOUNCED AT THE IMPOSITION OF SENTENCE AND THE WRITTEN REASONS WHICH WERE ENTERED THE SAME DAY OR WITHIN A FEW DAYS OF THE IMPOSITION OF SENTENCE? | 3 |
| <u>ISSUE II</u> | |
| THE REASONS PROVIDED BY THE TRIAL COURT FOR DEPARTING FROM THE GUIDELINES SENTENCE ARE INVALID. | 8 |
| IV CONCLUSION | 13 |
| CERTIFICATE OF SERVICE | 14 |

TABLE OF CITATIONS

| <u>CASES</u> | <u>PAGE(S)</u> |
|---|----------------|
| Allen v. State, 479 So.2d 257 (Fla. 2d DCA 1985) | 9,10 |
| Boyton v. State, 473 So.2d 703 (Fla. 4th DCA 1985) | 6 |
| Brown v. State, 509 So.2d 1342 (Fla. 1st DCA 1987) | 9 |
| Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984) | 9 |
| Hall v. State, 510 So.2d 979 (Fla. 1st DCA 1984) | 10 |
| Knotts v. State, 533 So.2d 826 (Fla. 1st DCA 1988) | 8,10 |
| Lambert v. State, 545 So.2d 838 (Fla. 1989) | 8 |
| McNealy v. State, 502 So.2d 54 (Fla. 2d DCA 1987) | 9,10 |
| Merriex v. State, 521 So.2d 249 (Fla. 1st 1988) | 8,11 |
| Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988) | 11 |
| Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1989) | 2,3,12 |
| Rease v. State, 485 So.2d 5 (Fla. 1st DCA 1986) | 10 |
| Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989) | 2 |
| Shull v. Dugger, 515 So.2d 748 (Fla. 1987) | 3,12 |
| State v. Jackson, 478 So.2d 1054 (Fla. 1985) | 3 |
| State v. Tyner, 506 So.2d 405 (Fla. 1987) | 8,10 |
| Welker v. State, 504 So.2d 802 (Fla. 1st DCA 1987) | 9 |
| Wesson v. State, 15 F.L.W. S177 (Fla. March 29, 1990) | 9 |
| Wilkerson v. State, 513 So.2d 664 (Fla. 1987) | 3 |
| Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1984) | 9,10,11 |
| <u>STATUTES</u> | |
| Section 914.22, Florida Statutes | 10 |
| Section 921.001(5), Florida Statutes | 4 |

RULES

Florida Rules of Criminal Procedure 3.701(d)(11)

2,3,4,5
8,9,11

Florida Rules of Criminal Procedure 3.988

8

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
v. : CASE NO. 75,878
RANDY LYLES, :
Respondent. :
_____ :

ANSWER BRIEF OF RESPONDENT

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the District Court, and will be referred to as respondent in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. Petitioner's Initial Brief and Appendix will be referred to as "PB" and "A", respectively.

II SUMMARY OF ARGUMENT

I. The certified question should be answered in the affirmative. Remand - for a guidelines sentence - is necessary where the trial court fails to provide contemporaneous written reasons for departure. The trial court's reasons for departure are not valid because they were not provided for in a contemporaneous written statement, as required by Florida Rules of Criminal Procedure, Rule 3.701(d)(11) and Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989). This Court recently held that where, as in this case, no valid reasons for departure exist at the time of remand, the case must be remanded for imposition of a guidelines sentence. Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990).

II. In addition to the lack of a contemporaneous written statement, the reasons for departure (threats to a witness and unscored convictions), are not valid under the facts of this case. The first reason constitutes the offense of tampering with a victim or witness, an offense for which the respondent has not been convicted. A departure sentence based on this reason violates Rule 3.701(d)(11). Secondly, the respondent's three unscored misdemeanor convictions do not amount to "extensive" unscored convictions and cannot support a five cell departure from the guidelines sentence.

III ARGUMENT

ISSUE I

WHETHER A SENTENCE MUST BE REVERSED AND REMANDED FOR RESENTENCING PURSUANT TO THE OPTIONS PROVIDED IN REE V. STATE, 14 F.L.W. 565 (FLA. NOV. 16, 1989), WHEN THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THE REASONS FOR DEPARTURE FROM THE GUIDELINES WHICH WERE ORALLY PRONOUNCED AT THE IMPOSITION OF SENTENCE AND THE WRITTEN REASONS WHICH WERE ENTERED THE SAME DAY OR WITHIN A FEW DAYS OF THE IMPOSITION OF SENTENCE?

This question should be answered with a qualified "yes". This conclusion is mandated by this Court's recent decision in Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990), which precludes the trial court in the instant case from imposing a departure sentence on remand. Although there may be "no significant difference" between the orally pronounced reasons and the untimely written reasons, they are still both invalid. Thus, resentencing to a guidelines sentence - one of the options provided in Ree v. State - is necessary.

In Pope, this Court, relying on State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and Shull v. Dugger, 515 So.2d 748 (Fla. 1987), remanded for the imposition of a guidelines sentence where the trial court had failed to provide written reasons for departure. Jackson requires compliance with Florida Rules of Criminal Procedure, Rule 3.701(d)(11), which mandates that departure sentences be "accompanied by a written statement delineating the reasons for departure". Orally stated reasons are invalid.

Shull held that where the initial reasons for departure are later held to be invalid, the case must be remanded for imposition of a guidelines sentence. This result avoids multiple appeals, multiple sentencings, and unwarranted efforts to justify an original departure. Pope, at S244.

Reading these decisions together in Pope, this Court held:

Effectively, Jackson and Shull both determined that at the point of remand no valid reasons for departure existed under the rule. Jackson said oral reasons were invalid and required resentencing. Shull said invalid reasons, even if written, must be remanded only for a guidelines sentence.

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 are no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines.

Pope, at S244. Applying the principles of Jackson, Shull, Ree, and Pope to the instant case results in resentencing with no possibility of departure.

There are a number of criteria which a departure sentence must meet in order to be valid. The sentence must be (1) accompanied by contemporaneous, (2) written reasons for departure. Ree, Jackson, Rule 3.701(d)(11). The departure sentence must be, (3) based on circumstances which reasonably justify the departure and, (4) the facts supporting the departure must be shown by a preponderance of the evidence. F.S. section, 921.001(5). The departure reasons, (5) must not include factors relating to prior arrests without convictions, or, (6) factors relating to the instant offense for which

convictions have not been obtained. Rule 3.701 (d)(11). None of these criteria can be said to be any more or less important than the others. All of the criteria must be met for there to be a valid departure sentence. If the sentence fails to meet any of the criteria, it is an invalid departure sentence.

Here, the orally pronounced reasons were invalid. Jackson. The untimely written reasons were also invalid. Ree; (A 2). Thus, since no valid reasons for departure existed at the time of remand, under the principles of Pope, this case should be remanded with instructions to impose a guidelines sentence.

The petitioner does not address the applicability of Pope to the instant case. Instead, the petitioner asserts that the District Court remanded this case "for reimposition of the same sentence using the same written reasons." (PB 7). This is incorrect. First, as discussed above, the imposition of the same departure sentence would be improper under Pope. The District Court did not have the benefit of this Court's decision in Pope at the time of its opinion in the instant case.

Secondly, the District Court's opinion remands this case for resentencing in compliance with Ree, which contains three options, including the imposition of a guidelines sentence. The District Court's opinion in no way states that the trial court must impose the "same sentence."

Petitioner further argues that a defendant is not

prejudiced by not remanding the illegal sentence because the defendant is "on notice" as to the reasons for the departure sentence at the moment sentence is orally pronounced (PB 10). This is also incorrect. Appellate review is limited to the trial court's written reasons. Jackson recognizes that orally stated reasons are "fraught with disadvantages" in that the reasons for departure that an appellate court might take from the record of the sentencing might not have been the trial court's reasons and written sentencing orders often contain far less than what a trial judge states during the hearing. Id., at 1054, quoting Boyton v. State, 473 So.2d 703 (Fla. 4th DCA 1985).

If certain reasons for departure are discussed at the sentencing hearing, but others appear on the written order, the defendant will not have the opportunity to present an argument or evidence on these new reasons. As this Court recognized in Ree, this would be a violation of due process:

We agree with Judge Sharp that the sentencing guidelines and accompanying rules do not permit a trial court to decide a sentence before giving counsel an opportunity to make argument. Fundamental principles of justice require that decisions restricting a person's liberty be made only after a neutral magistrate gives due consideration to any argument and evidence that are proper.

Id., at 566. Contemporaneous written reasons are logically and legally necessary when a trial court imposes a departure sentence.

The petitioner's claims of clogged trial court dockets is not a persuasive reason for ignoring a defendant's due process rights (A 8-9). If remands are in fact causing clogged trial dockets, the solution is for trial judges to initially comply with the Rules of Criminal Procedure, not to deny defendant's the ability to correct a wrong. Even ignoring Pope, remand for resentencing is never an useless act in light of the three options discussed in Ree. It can not be assumed that a trial judge will always impose the same sentence.

The petitioner argues that Ree "overlooks the long-standing jurisprudential doctrine that a court's oral pronouncement of sentence controls, as the written sentence is merely a record of the actual sentence pronounced in open court" (PB 9). The petitioner overlooks the fact that the sentencing guidelines have, at least since Jackson was decided in 1985, required written reasons for departure. The cases cited by the petitioner are inapplicable to the instant case.

In conclusion, this Court should answer the certified question in the affirmative, qualifying that answer with regard to its recent decision in Pope. Where the trial court improperly imposes a departure sentence without providing contemporaneous written reasons to support the departure, the proper remedy is remand for imposition of a guidelines sentence.

ISSUE II

THE REASONS PROVIDED BY THE TRIAL COURT FOR DEPARTING FROM THE GUIDELINES SENTENCE ARE INVALID.

The prosecutor argued, and the trial court adopted as its reason for departure, threats to a witness by the respondent and three unscored misdemeanor convictions. The trial court imposed a five cell departure sentence (R 56). F.R. Crim. P., 3.988. The First District Court of Appeal affirmed the reasons for departure, citing to Knotts v. State, 533 So.2d 826 (Fla. 1st DCA 1988) and Merriex v. State, 521 So.2d 249 (Fla. 1st DCA 1988) (A 2).

The trial court's first reason for departure is invalid. The trial court relied upon a factor specifically prohibited by Rule 3.701(d)(11), Florida Rules of Criminal Procedure, which states:

Reasons for deviating from the guidelines shall not include factors relating to the instant offense for which convictions have not been obtained.

This Court, in State v. Tyner, 506 So.2d 405 (Fla. 1987) answering a question of great public importance, held that a trial court is not permitted to consider "any factors relating to the instant offense as a basis for departure from the guidelines if such factor would have subjected the defendant to prosecution for a crime of which he has not been convicted". Recently, this position was reaffirmed in Lambert v. State, 545 So.2d 838, 841 (Fla. 1989):

This Court has consistently required prior conviction for guideline departure in

original sentencing proceedings. See, State v. Jagers, 526 So.2d 682, 684 (Fla. 1988) ("Charges of criminal activity alone have never provided valid grounds for departure."); Williams v. State, 500 So.2d 501, 503 (Fla. 1988) ("permitting departures for an offense for which a defendant has not been convicted is clearly prohibited.")

See also, Wesson v. State, 15 F.L.W. S177 (Fla. March 29, 1990) (conduct relating to offenses without convictions cannot support departure).

The Second District Court of Appeal has held that threats to a witness cannot stand as a valid reason for departure where the defendant was not convicted of that offense. Allen v. State, 479 So.2d 257 (Fla. 2d DCA 1985); McNealy v. State, 502 So.2d 54 (Fla. 2d DCA 1987).

The First District Court of Appeal has rejected a strict interpretation of Rule 3.701(d)(11), which it felt would preclude a trial court from considering anything that occurred before or after the criminal episode unless a conviction for a specific offense resulted. Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1984); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984). However, the Court has also interpreted Rule 3.701(d)(11) to preclude consideration of offenses for which there has not been a conviction. Welker v. State, 504 So.2d 802 (Fla. 1st DCA 1987) (fact that additional drugs and a firearm were in defendant's car at the time of his arrest is not a valid reason for departure where defendant was not convicted of possession of the firearm or other drugs); Brown v. State, 509 So.2d 1342 (Fla. 1st DCA 1987) (fact that

proceeds of thefts were used to commit further crime of purchasing drugs is not a valid reason for departure where defendant was neither charged nor convicted of the further crime); Rease v. State, 485 So.2d 5 (Fla. 1st DCA 1986) (although, at time of sentencing, there was evidence tending to support a finding that the gun which was the basis for defendant's conviction for possession of a firearm by a convicted felon was stolen and defendant had attempted to escape while being transported to court for sentencing, these reasons for departure were invalid where no conviction for these crimes had been obtained).

Here, the trial court relied on Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1984) and Hall v. State, 510 So.2d 979 (Fla. 1st DCA 1987). Hall, as well as the recent case of Knotts, supra, simply state the proposition that a threat to a witness is a valid reason for departure and cite to Williams. However, Williams is in conflict with the later decisions of the Second District Court of Appeal in Allen and McNealy, supra.

Here, it is clear that the alleged actions which served as the basis for departure constitute the offense of tampering with a witness or victim. F.S. section 914.22. As this Court stated in Tyner, supra:

This language [of Rule 3.701(d)(11)] is plain. Judges may consider only that conduct of the defendant relating to an element of the offense for which he has been convicted. To hold otherwise would effectively circumvent the basic

requirement of obtaining a conviction before meting out punishment.

Id., at 406.

Respondent would urge this Court to find that a departure based on threats to the witness, for which there was no conviction at the time of sentencing, is invalid and prohibited by Rule 3.701(d)(11), approving Allen and McNealy, and disapproving the First District Court of Appeal's decision in Williams, supra.

The second reason for departure was unscored convictions. These convictions consisted of three misdemeanors; breach of the peace, disorderly intoxication and driving under the influence, which occurred and resulted in convictions during the pendency of the instant offense. This is an invalid reason for departure because three misdemeanors do not amount to "extensive" unscored convictions. Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988) held that unscored convictions may be properly considered as a basis for departure only if they are "extensive." The court found that the defendant's three unscored convictions, only one of which was a felony, did not warrant departure.

Merriex, supra, cited by the District Court merely states; "It is settled law that unscored but valid convictions can be used as grounds for departure." Id., at 250. The unscored conviction in Merriex was for possession of cocaine. The decision did not discuss the "extensive" aspect of this departure reason.

Since no valid reasons for departure exist, this sentence should be reversed and remanded for imposition of a guidelines sentence. Shull v. Dugger, 515 So.2d 748 (Fla. 1987); Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990).

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court remand this case for imposition of a guidelines sentence.

Respectfully submitted,

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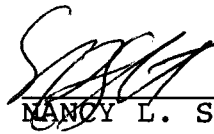


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent has been furnished by hand delivery to Bradley Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent Randy Lyles, #028393, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida 32124, this 18th day of June, 1990.



NANCY L. SHOWALTER