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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v. CASE NO. 75,878

RANDY LYLES,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, plaintiff/appellee below, will be referred to herein as "the State". Respondent, Randy Lyles, defendant/appellant below, will be referred to herein as "Respondent". A copy of the slip opinion of the case on review is attached hereto as "Appendix A".

References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcript of the sentencing hearing will be by the symbol "S" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent in this case was convicted by a jury of aggravated battery. (R 27). The sentencing guidelines recommended a sentence of 2½ to 3½ years. (R 54). At sentencing, the State adduced proof that Respondent had threatened a witness and had three subsequent unscored misdemeanor convictions. The trial court departed upward and sentenced Respondent to ten years in prison. (R 54).

The sentencing hearing was held on April 7, 1989. (S 1). The trial court executed a Statement for Reasons for Departure from Sentencing Guidelines on the same day, but filed the statement on April 10, 1989. (R 57).

Respondent appealed his sentence and conviction to the First District Court of Appeal. In a per curiam opinion issued on April 5, 1990, the court affirmed the conviction but reversed the sentence pursuant to the mandate of Ree v. State, infra, but certified a question to this Court as a matter of great public importance (Appendix "A", p.4).

Notice to invoke this Court's discretionary jurisdiction to answer the certified question was filed on April 16, 1990.

SUMMARY OF ARGUMENT

The State requests that this Honorable Court answer the certified question in the negative and hold that where written reasons for departure from the sentencing guidelines are issued within a few days of oral imposition of sentence that, since no prejudice attaches to the defendant, issuing the written reasons at such time is not error, or at worst harmless error.

Such a holding would prevent further clogging of already overburdened court dockets and prevent useless remanding of cases for reimposition of the original sentence.

ARGUMENT

ISSUE

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?

The State respectfully requests that this Court answer the certified question in the negative.

The Respondent in the instant case was convicted of aggravated battery. (R 27). Respondent's recommended guidelines sentence was 2½ to 3½ years in prison, but the trial judge departed upward and sentenced Respondent to ten years in prison. (R 54). The sentencing hearing in this case was held on April 7, 1989. (S 1). The trial court executed a Statement for Reasons for Departure from Sentencing Guidelines on April 7, 1989 (R 57, 58), but the statement was not filed until April 10, 1989. (R 57). The written reasons comported with the oral pronouncement.

In a per curiam opinion, the First District Court of Appeal affirmed Respondent's convictions but reversed as to the guidelines departure sentence on the basis of Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989), rehearing pending. The District Court stated:

> The reasons given by the trial court for departing from the recommended guidelines sentence, appellant's having threatened a

> witness, and three misdemeanor convictions which could not be scored because they occurred subsequent to the instant offense, are valid. Knotts v. State, 533 So.2d 826 (Fla. 1st DCA 1988); Merriex v. State, 521 So.2d 249 (Fla. 1st DCA 1988).
>
> These reasons for departure were orally pronounced at the sentence hearing. The trial court's written statement of reasons for departure, containing these same reasons, was signed the same day as the sentencing hearing, and was filed three days later. Because the record does not demonstrate that the written reasons for departure were actually issued at the sentencing hearing, we find that we are bound by the recent Florida Supreme Court opinion in Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989), rehearing pending, which held that the trial court must produce its written reasons for departure from the sentencing guidelines at the same hearing at which sentence is imposed...
>
> In situations such as this case presents, where there is no significant difference between the reasons for departure orally pronounced at the imposition of sentence and the written reasons entered the same day or within a few days of the sentencing hearing, we can find no prejudice to the defendant, or any logical reason for remand so that the trial court may reimpose the same sentence using the same written reasons. We would be inclined to find no error in this case, or at worst, harmless error. But like our sister court in Holmes v. State, 15 F.L.W. D487 (Fla. 4th DCA Feb. 21, 1990), we acknowledge that until the supreme court alters its position, we are bound by Ree.

(slip opinion, infra, p.2-3).

In Holmes v. State, supra, the Fourth District Court of Appeal wrote:

> We already "reluctantly" held in Ree v. State, 512 So.2d 1085 (Fla. 4th DCA 1987), that the oral pronouncement and the written reasons must be said and produced at the same

instant in time and that any delay (presumably as little as one hour) between the actual hearing and the written reasons would be unacceptable. However, our Ree panel obviously did not like that result and certified the question hoping for a reversal. It was not to be, for the Supreme Court, in a very recent opinion upheld our earlier Ree decision. Ree v. State, 14 F.L.W. 565 (Fla. November 16, 1989).

The Supreme Court, citing other cases to support the proposition that the written reasons must be contemporaneous with the oral pronouncement, held that the word "contemporaneous" means "at the time of sentencing." In other words, they construed "contemporaneous" as being synonymous with "instantaneous".

We are required, most properly so, to adhere to the dictates of our superiors in Tallahassee, yet we are still unhappy with this result. The big dictionary in our law library, Webster's Third New International Dictionary (Unabridged 1966), gives as its first definition of "contemporaneous":

1. existing or occurring during the same time (as during a year, decade or longer span of time)...

The smaller, but still large dictionary in this author's chambers, The American Heritage Dictionary of the English Language (1981), defines contemporaneous as:

Originating, existing or happening during the same *period* of time. (emphasis supplied).

We see nothing in those definitions mandating that the sentence and the written reasons be produced at the same moment in time or *instantaneously*.

A "contemporary" of this author would be any judge on this court. On this very panel, there is an age differential of seventeen years. To be contemporaneous, we do not all need to be the same age, never mind all be born on the Fourth of July. By the same token, a lapse of a mere seventeen days between the sentence and the written order of

> upward departure on the same defendant in the same case is certainly within an acceptable *span* or *period* of time and should satisfy any dictionary definition of the word "contemporaneous".
>
> Parenthetically, we would also point out that the oral reasons given for the departure at the sentencing hearing sub judice dovetailed with those set forth in the subsequently written order, except that the former are more wordy and the latter includes case citations. Accordingly, there is no prejudice to the defendant, particularly since there is no change in the actual sentence imposed.
>
> The dicta herein should not be interpreted as a venting of the spleen. A motion for a rehearing has been filed in the Supreme Court in Ree. Perhaps our views would prove helpful.

Holmes, supra at 487, 488.

The dissatisfaction of the various district courts with Ree v. State is shared by the State. The result in the instant case is illustrative: because the trial court did not file its written reasons for departure instantaneously upon pronouncing those reasons at Respondents sentencing hearing, the appellate court was required to remand the case to the trial court for reimposition of the same sentence using the same written reasons. This result represents an unconscionable waste of judicial time and resources at a juncture when such resources are already severely taxed to the limit, and further provides no more than an illusory benefit to criminal defendants.

As examples of these limited judicial resources and clogged court dockets, the State would refer this Court to Grube v. State, 529 So.2d 789 (Fla. 1st DCA 1988), and Terry v. State, 547

So.2d 712 (Fla. 1st DCA 1989), wherein the First District granted motions by the Public Defender to withdraw from up to one hundred and up to one hundred and fifty cases, respectively, due to staffing shortages. The Public Defender for the Second Judicial Circuit is currently seeking leave to withdraw from approximately three hundred appellate cases. Motion to Withdraw from Appeals and for Authorization to Withdraw from Future Appeals, (Fla. 1st DCA, filed May 10, 1990).

As further evidence of excessive appellate caseloads, the State would refer this Court to its recent decisions in In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 15 F.L.W. S278 (Fla. May 3, 1990), and Hatten v. State, 15 F.L.W. S282 (Fla. May 3, 1990). In In Re Order, supra, this Court cited a study by a special committee of the Florida Judicial Council, which concluded that

> the problem of the criminal workload within the judicial system of the State of Florida is a problem of volume that cannot be regulated, but must be dealt with as it occurs. Not only does the problem exist now in crisis proportions, but is appears that the workload in regard to all parts of the criminal justice system is likely to increase.

In Re Order, supra at S278.

This Court noted that the backlog of criminal appeals to the Second District Court awaiting briefing "has grown from 408 cases in June 1986 to 1,005 cases in March 1989...(t)he Public Defender for the Tenth Judicial Circuit ... has estimated that currently as many as 1700 cases could be awaiting the filing of appellate briefs." In Re Order, supra at S278.

The situation created by this Court's decision in Ree v. State, supra, is analogous to that created by Jenkins v. State, 444 So.2d 947 (Fla. 1984), wherein this Court held that costs for the Crimes Compensation Fund and F.D.L.E. Training Fund (totalling 12 Dollars) which were imposed without notice or an opportunity to be heard, would have to be stricken. As a result of Jenkins, the routine practice for the State became to concede error on this point in numerous subsequent appeals and thereby have the case remanded to the trial courts for reimposition of the same costs following notice and an opportunity to be heard.

The end result of this exercise was to further clog already burdened court dockets and reimpose on defendants the same costs that they were initially assessed. The defendants would neither lose nor benefit, but the judicial system bore the burden, to the detriment of all.

Similarly, the instant case demonstrates the same waste of resources. Pursuant to Ree v. State, supra, the Respondent's case was ordered remanded to the trial court for reimposition of the same sentence that he initially received, resulting in duplicative proceedings.

In addition, the Court's opinion in Ree v. State 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. Taylor v. State, 425 So.2d 1191 (Fla. 1st DCA 1983); Timmons v. State, 453 So.2d 143 (Fla. 1st DCA 1984); Bivins v. State, 454

So.2d 723 (Fla. 1st DCA 1984); Jeffrey v. State, 456 So.2d 1307 (Fla. 1st DCA 1984).

In the final analysis, it is clear that Ree v. State mandates needless resentencing procedures where no prejudice to the defendant can be ascertained. As Justice Overton noted in his dissent in Ree v. State, supra, the "instantaneous" written departure reasons requirement is an elevation of form over substance. A defendant is on notice as to the reasons for his/her departure sentence at the moment sentence is orally pronounced. A subsequent written memorandum of that pronouncement in no way changes the sentence or the notice thereof and opportunity to appeal. As the First District noted in its opinion below, in reality there is "no error in this case, or at worst, harmless error." (slip opinion, infra at 3).

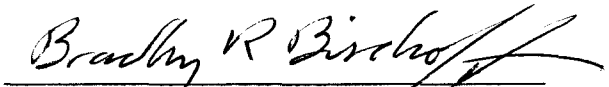
The State would in addition alert this Court that the same question was certified by the First District in Williams v. State, 15 F.L.W. D895 (Fla. 1st DCA 1990) (Florida Supreme Court Case No. 75,880). The State's brief in Williams has been filed in this Court contemporaneously with the instant brief.

CONCLUSION

Petitioner respectfully requests that this Honorable Court answer the certified question in the negative and recognize that a written departure order issued no more than several days after the sentencing hearing is still "contemporaneous", and that the issuance of such an order is not error or, at the worst, harmless error.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Nancy L. Showalter, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 24th day of May, 1990.

Bradley R. Bischoff
Assistant Attorney General