IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 75,878

RANDY LYLES,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Randy Lyles, defendant/appellant below, will be referred to herein as "Respondent." Petitioner, the State of Florida, plaintiff/appellee below, will be referred to herein as "Petitioner" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of case and facts set forth in its initial brief on the merits.

SUMMARY OF ARGUMENT

I. 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.

II. The trial court properly departed upward from the guidelines in sentencing Respondent where "threats to a witness" and "subsequent unscored convictions" are well-recognized departure reasons consistently upheld by Florida district courts of appeal.

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?

The State again urges this Honorable Court to answer the certified question in the negative.

Respondent contends that the failure to issue written reasons for departure at the same time that oral sentence is pronounced is per se prejudicial to a criminal defendant. Respondent argues, and the State recognizes, that the possibility of prejudice exists where certain reasons for departure are given at the sentencing hearing, but others appear on the written order. This situation, however does not apply to the instant case as it addresses a situation not presented by the certified question or the facts of the case.

Respondent can point to no resulting prejudice when written reasons for departure are issued within a few days of sentencing and the written and oral reasons are in agreement. Citing State v. Jackson, 478 So.2d 1054 (Fla. 1985), Respondent asserts that orally stated reasons are "fraught with disadvantages" (Respondent's brief, p.6). The

State would point out to the Court that Jackson involved the situation where no written reasons for departure were issued at all. The State is not arguing that written reasons should be done away with, but that where written reasons comporting with the oral pronouncement are issued within a few days of sentencing and no prejudice to the defendant is discernible, that there is no error, or at worst, harmless error.

As a side issue, Respondent assumes the invalidity of the departure reasons in this case (even though the district court below held the reasons valid, slip opinion, p.2) and argues that on remand the trial court is restricted to imposing a sentence within the guidelines, citing Pope v. State, ___ So.2d ___, 15 F.L.W. S243 (Fla. April 26, 1990).

This is incorrect, as Pope does not apply to the instant case. In Pope this Court stated "...we hold that when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines." (emphasis supplied). Pope, supra at S244. It is clear that in the instant case written reasons were issued, albeit subsequent to the sentencing hearing. Pope is thus inapplicable. Moreover, this side issue properly belongs in Issue II, (infra), where the departure reasons themselves are discussed, as this side issue is irrelevant to consideration of the certified question.

Consequently, the State respectfully urges this Court to 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 satisfies the "contemporaneity" requirement and is not error, or at worst, harmless error.

ISSUE II

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

In sentencing Respondent to a guidelines departure sentence, the trial court entered the following written reasons for departure;

1. The Defendant threatened Cynthia Carmony, a witness in the instant case. These threats included, but were not limited to, a confrontation approximately two (2) weeks before trial when the Defendant was out on bond, where the Defendant said to Miss Carmony, "Bitch, I'm going to kill...If I can't have you no one can...It ain't over yet".

Williams v. State, 462 So.2d 36 (1st DCA 1985);

Hall v. State, 510 So.2d 979 (1st DCA 1987).

2. The Defendant has convictions which cannot be scored on his guideline sheet because the convictions were subsequent to the instant offense. Specifically, the Defendant was convicted of Breach of Peace and Disorderly Intoxication on October 27, 1988 and of Driving While Intoxicated on March 3, 1989. These offenses occurred when the Defendant was awaiting trial while out on bond in the instant case.

Hunt v. State, 468 So.2d 1100, 1101 (1st DCA 1985);

> Austin v. State, 507 So.2d 132 (1st DCA 1987).

(R 57, 58)

Respondent contends that the departure reasons are invalid. The State maintains that both reasons are valid and that their affirmance by the First District Court of Appeal was not error, particularly since, in the absence of contrary higher authority, a district court of appeal draws for precedent on its own prior decisions. Morgan v. State, 337 So.2d 951 (Fla. 1976).

As to the first reason, threats to a witness, the First District stated in Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1984), review denied, 471 So.2d 44 (Fla. 1985);

> We are of the view that the defendant's threats made to the victim's father, as reflected by evidence duly received at trial, is a legitimate aggravating circumstance which may be taken into account in determining the defendant's sentence. Certainly, prior to the advent of sentencing guidelines, there would have been no question about such being a legitimate sentencing consideration. We do not believe that the guidelines preclude such factor being regarded as a reason for guidelines departure.

Williams, supra at 37, 38.

The First District reaffirmed its holding that "threats to a witness" constitutes a valid reason for departure in Hall v. State, 510 So.2d 979 (Fla. 1st DCA 1987), review denied, 519 So.2d 987 (Fla. 1988), and Knotts v. State, 533

So.2d 827 (Fla. 1st DCA 1988). This is the state of the law also in the Third District; Walker v. State, 496 So.2d 220 (Fla. 3d DCA 1986), in the Fourth District; Bannerman v. State, 544 So.2d 1132 (Fla. 4th DCA 1989); and in the Second District; Rodriquez v. State, 547 So.2d 708 (Fla. 2d DCA 1989), overruling sub silentio Allen v. State, 479 So.2d 257 (Fla. 2d DCA 1985), and McNealy v. State, 502 So.2d 54 (Fla. 2d DCA 1987). In sum, every district court of appeal that has addressed this issue has agreed that "threats to a witness" is a valid reason for departure.

Respondent argues that "threats to a witness" cannot be considered as a valid reason for departure because this reason constitutes the offense of tampering with a victim or witness, which is an offense for which Respondent has not been convicted. The State would point out that had Respondent been charged and convicted of this offense, it would have been calculated into Respondent's guidelines scoresheet and could not have been considered as a reason for departure.

Respondent cites for this proposition State v. Tyner, 506 So.2d 405 (Fla. 1987), and Lambert v. State, 545 So.2d 838 (Fla. 1989), however these cases are factually distinguishable. In Tyner, the defendant was given a departure sentence based on murder charges which had been dismissed, and in Lambert, the defendant was given a departure sentence based on conduct for which he had been charged but not yet tried.

Similarly, in Wesson v. State, ___ So.2d ___, 15 F.L.W. S177 (Fla. March 29, 1990), the defendant was given a departure sentence based on conduct for which he had been arrested but not convicted. Here, the Respondent was neither arrested nor charged with an offense related to threatening a witness. To hold that a departure reason based on conduct appurtenant to but not a part of the underlying offense is invalid would be an unwarranted jurisprudential departure from the established law in Florida. Such a holding would represent an erosion of trial courts' discretion in matters relating to their personal observation of defendants and witnesses and their assessment of the equities of a specific case.

Respondent next contends that his unscored convictions cannot form a basis for departure. Respondent was convicted of three offenses while out on bond awaiting trial in the instant case. (R 57, 58). In support of this departure reason the trial court relied on Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985), and Austin v. State, 507 So.2d 132 (Fla. 1st DCA 1987). In Hunt, the First District stated:

> Florida Rule of Criminal Procedure 3.701d.5.a) prohibits consideration of past criminal conduct for which convictions were not obtained prior to the commission of the primary offense for purposes of scoring under the prior record category. Here, the trial court properly did not consider the unarmed robbery conviction for that reason. However, nothing in Rule 3.701 prohibited the court from taking that conviction into consideration for

> purposes of departure. Rule 3.701d.11. only prohibits as reasons for departure factors relating to prior arrests without conviction, or to the instant offense for which convictions have not been obtained. The court considered nothing to contravene that prohibition. In holding this reason to be proper, we note that at least two of our sister courts have arrived at similar conclusions. See Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1984); and Davis v. State, 455 So.2d 602 (Fla. 5th DCA 1984).

Hunt, supra at 1101, 1102.

In Austin, the court stated:

> The second ground for departure states that, subsequent to adjudication of guilt of the instant offenses but prior to imposition of sentence, Austin was convicted of felony murder and sentenced to life imprisonment, "to be served consecutive to the sentence imposed in this case." The murder conviction was not scored on the sentencing guidelines scoresheet as a prior record because the conviction occurred after commission of the primary offense. Rule 3.701(d)(5), Fla.R.Crim.P. Accordingly, it was not error for the trial court to rely upon this conviction as an additional ground for imposition of a departure sentence. Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985); Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1985); Davis v. State, 455 So.2d 602 (Fla. 5th DCA 1984).

Austin, supra at 133. See also Roseman v. State, 519 So.2d 1129 (Fla. 5th DCA 1988); Snelling v. State, 500 So.2d 328 (Fla. 1st DCA 1986); Pugh v. State, 499 So.2d 54 (Fla. 1st DCA 1986); Kigar v. State, 495 So.2d 273 (Fla. 5th DCA 1986); Wright v. State, 491 So.2d 283 (Fla. 2d DCA 1986); Torres v. State, 544 So.2d 1100 (Fla. 2d DCA 1989).

Respondent relies on Musgrove v. State, 524 So.2d 715 (Fla. 1st DCA 1988), for the proposition that in order to depart for unscored subsequent convictions, the convictions must be "extensive." Musgrove, however, concerned a defendant's unscored juvenile record and is thus inapplicable to the instant situation.

Consequently, it is clear that the trial court's reasons for departure are valid and the judgment of the trial court and appellate court must be affirmed.

CONCLUSION

Based on the above citations of legal authority, Petitioner prays this Honorable Court answer the certified question in the negative and uphold Respondent's guidelines departure sentence.

Respectfully submitted,

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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 6th day of July, 1990.

Bradley R Bischoff

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