IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 75,880

ANTHONY WILLIAMS,

Respondent.

****

ANTHONY LEE WILLIAMS,

Petitioner,

v. CASE NO. 76,010

STATE OF FLORIDA,

Respondent.

ANSWER BRIEF OF RESPONDENT (75,880)
INITIAL BRIEF OF PETITIONER (76,010)

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ANSWER BRIEF OF RESPONDENT (75,880)
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I. PRELIMINARY STATEMENT

Anthony Lee Williams, who is respondent in Case No. 75,880 and the petitioner in Case No. 76,010, will be referred to in this brief as "defendant" or by his proper name. Reference to the volume of the record containing the pleadings and orders filed in this cause will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of the trial will be by use of the symbol "T" followed by the appropriate page number in parentheses. Reference to the volume of the record contain a transcript of the sentencing hearing will be

by use of the symbol "S" followed by the appropriate page number in parentheses.

Reference to the brief of the state filed May 23, 1990, under Case No. 75,880 will be by use of the symbol "BS" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the district court's opinion, which will be referred to by the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

The defendant accepts the statement of the case and facts as represented in the state's brief (BS-2-3). The state's brief, however, does not include any of the facts relating to Issues I and II, infra. The defendant accordingly includes the following account of the facts as bearing on the issues raised in this proceeding:

Count I of an information containing three charges alleged that the defendant, on June 15, 1988, committed an assault with a deadly weapon, a knife, upon Paul Makovich, contrary to Section 784.021(1)(a), Florida Statutes (1987). Count II alleged that the defendant, on June 15, 1988, resisted V. L. Wright, a police officer, with violence, by fighting with Wright, contrary to Section 843.01, Florida Statutes (1987). Count III charged that the defendant, on June 15, 1988, committed battery upon V. L. Wright, a police officer, contrary to Sections 784.03 and 784.07, Florida Statutes (1987)(R-19).

The defendant proceeded to a trial by jury. Paul Makovich, the first state witness, testified that on June 15, 1988, he got off work at about 4:00 p.m., and proceeded on foot to where his car was parked. The witness testified that with his left hand he was carrying a briefcase, and in his right hand he was carrying a vase of flowers sent to him by his girlfriend.

Makovich related that he observed a man running near him. All of the sudden, the man ran right at the witness, grabbed Makovich's left arm, pulled the witness toward him, a placed a

knife blade several inches from his stomach. Mr. Williams was identified by Makovich in court as being the assailant.

The sight of the knife scared Makovich. The witness broke the hold the defendant had upon him. The briefcase went flying off. Williams jumped back and, standing about six feet apart, he and Makovich stared at one another for a couple of seconds. At this point, the defendant ran. Makovich gave chase. He followed Williams for several blocks until he came upon a police car. Makovich told the officer what had happened. The officer asked Makovich if he could point the suspect out, and Makovich said he could.

Together Makovich and the officer ran a couple of blocks. Makovich saw the defendant walking down a street, and Makovich pointed him out to the officer. Williams looked in the direction of Makovich and the officer, and started running. The officer radioed for assistance. The defendant was later found underneath a building.

Makovich retraced the route he had taken looking for witnesses. He found such a person at a retirement home, and told the officer where to find him. During the chase, both before and after Makovich made contact with the officer, there were periods during which Makovich lost sight of the assailant (T-24-60).

Arthur Jernigan, the next state witness, a retired blacksmith and metal fabricator, testified that at about 4:20 p.m. on June 15, 1988, he was sitting in the window of his apartment, which is on the eleventh floor. He heard some

shouting. He looked out and saw a white man, holding a vase of flowers, chasing a black man, who had something in his hand. Mr. Jernigan identified the defendant in court as being the black man he saw running. Jernigan testified further that he again saw Williams after he was apprehended. On cross examination Jernigan stated that had he not seen the man that second time, he indicated that he doubted he could have made an identification based solely upon his sighting of the two men running down the street. The man Jernigan saw in custody had the same build and clothing as the man he saw running down the street.

At this point, defense counsel moved to strike Mr. Jernigan's in court identification since Jernigan testified that he could not have made such an identification based only upon seeing the men running past his apartment. This motion was denied (T-78-80).

Upon further cross examination Jernigan admitted making the following statement at deposition, after he thought the "stenographer had closed up for the day": "If I could lie and get the guy convicted, I would do it because in my neighborhood we have got a high crime rate there." (T-81-85).

Patrolman V. L. Wright testified that at the time in question he was in his patrol car writing a report when Makovich ran up and reported in an excited manner that someone had just tried to knife him. The officer obtained a description. Wright and Makovich looked down the street and saw a person who fit the description. Wright notified his

dispatcher and ran after the man. Wright ordered the man to stop. The man looked at Makovich and ran. Makovich chased him for about six blocks, ultimately apprehending him beneath a house. Other officers, some off duty, arrived at the scene and ordered the defendant to get out from underneath the house. He did not do so. Several officers drug Williams from beneath the house. As Wright was handcuffing the defendant, the defendant hit him on the leg. After Williams was placed in the patrol car, Makovich identified him. The defendant was not armed with a weapon (R-86-128).

At this point in the proceedings the state rested (T-128). Williams's motion for judgment of acquittal was denied (T-128-137).

After argument of counsel, the jury commenced deliberation. After some amount of deliberation, the trial court asked counsel if it would be okay to let the jury vote on whether they would prefer to continue deliberation, or separate until the next day, at which time they would resume deliberations. Counsel for the defense did not object to the jury being allowed to vote. The jury was ushered into the courtroom. The trial court explained that it was too late to order the evening meal, and thus should the jury decide to continue that evening with their deliberations they would do so without being fed. The trial court also indicated that, should it be the jury's wish, they could separate for the evening and resume deliberations the next morning. The jury responded by saying that they had already decided two of the three charges,

but would prefer to break for the evening and resume deliberations the next day. The trial court sealed the verdict forms, admonished the jury to not discuss the case, and discharged them until the next morning (T-209-214).

The jury was reconvened the next morning. As to Count I, aggravated assault, the defendant was found guilty as charged. As to Count II, resisting an officer with violence, the jury found Williams guilty of the lesser offense of resisting without violence. As to Count III, battery upon a law enforcement officer, the jury found the defendant not guilty (T-215-218, R-21-23).

The state gave notice to seek an enhanced penalty (R-15). The sentencing guidelines recommended a sentence of 2-1/2 years to 3-1/2 years (R-61). At sentencing, the state adduced proof that the defendant had been previously convicted of three instances of unarmed robbery and one count of kidnapping in 1975. The trial court adjudged Williams to be a habitual offender and sentenced him to ten years in prison for aggravated assault, and to a concurrent one year sentence for resisting an officer without violence. The trial court indicated it would later enter a written order discussing the reasons why it deemed the defendant a habitual felony offender, and why it departed from the guidelines(S-1-34, R-55-61). The record contains a Sentencing Order Exceeding Guidelines And Determining Defendant An Habitual Offender (R-62-65).

Notice of appeal was timely filed (R-68), Williams was adjudged insolvent (R-69), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

Williams raised three issues before the district court: (1) the trial court erred in admitting the identification testimony of Jernigan; (2) the trial court erred in deeming the defendant a habitual felony offender; and (3) the court erred in not producing the written reasons for departing from the guidelines at the sentencing hearing.

The district court issued an opinion on April 5, 1990. The district court rejected the first issue, ruling that the trial court did not abuse its discretion in admitting the identification testimony. As to the second issue, the district court ruled that, while two of the three reasons listed by the trial court for deeming the defendant a habitual offender were invalid, the district nevertheless affirmed the defendant's classification as a habitual offender. The court went on to reverse the defendant's sentence on the ground that the reasons for departure were not entered during the sentencing hearing. The district court also certified its ruling on the third issue as involving a question of great public importance (A-1-5).

Both parties filed seperate notices of invoking the jurisdiction of the Court. The state's notice gave rise to Case No. 75,880, and the defendant's notice gave rise to Case No. 76,010. By order dated June 20, 1990, the two cases were consolidated.

III. SUMMARY OF ARGUMENT

The trial of this cause turned upon the issue of identification. A state witness, Jernigan, testified that he saw appellant being chased by the victim. Thereafter, he saw the defendant in the custody of the police. At trial, Jernigan testified that he could not have identified Williams in court as being the person he saw being chased, absent his sighting of the defendant after he had been arrested. Since the state did not demonstrate that Jernigan's courtroom identification was based on his view of the suspect as he ran by, as contrasted to it being predicated upon his seeing Williams in custody, the defendant asserts in Issue I, infra, that the trial court erred in denying defense counsel's motion to exclude Jernigan's courtroom identification. Further, since the case turned on identification, the error is not harmless.

In sentencing the defendant as a habitual offender, the trial court relied on the fact that Williams used weapons in three past cases, in which the defendant pleaded to unarmed robbery, after being charged with armed robbery. The trial court also speculated that, but for the actions of the victim in this case, Williams would have committed an armed robbery. In Issue II, infra, the defendant asserts it was error to consider, for sentencing purposes, factors which were dropped in connection with plea negotiations, and speculation on what might have occurred, but did not in fact occur.

In Issue III, infra, Williams asserts it was error to depart from the guidelines without contemporaneously entering a

written order. Williams further argues that, on remand, only a guidelines sentence would be permissible.

The defendant notes that, while the certified question pertains only to the third issue as framed above, since the Court does have jurisdiction by virtue of the certified question, it has discretion to rule upon the issues raised in Issues I and II, infra. Trushin v. State, 425 So.2d 1126 (Fla. 1983) and Cantor v. Davis, 489 So.2d 18 (Fla. 1986).

IV. ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING WILLIAM'S MOTION TO EXCLUDE THE IN-COURT IDENTIFICATION TESTIMONY OF WILLIAMS BY ARTHUR JERNIGAN, SINCE SUCH TESTIMONY WAS THE RESULT OF AN UNNECESSARILY SUGGESTIVE IDENTIFICATION PROCEDURE, THEREBY DEPRIVING THE DEFENDANT OF DUE PROCESS OF LAW AS GUARANTEED BY BOTH THE CONSTITUTION OF THE STATE OF FLORIDA AND THE CONSTITUTION OF THE UNITED STATES.

The state presented evidence from three witnesses. Paul Makovich, a white man, testified that while, walking on the streets of Jacksonville carrying a vase of flowers and a briefcase, the defendant, a black man, grabbed him and displayed a knife. Makovich quickly broke away. The defendant took off running. Makovich gave chase. After chasing Williams for several blocks, Makovich encountered a police officer, Wright, and he told Wright what had happened. Wright and Makovich set out to find the defendant. He was quickly spotted. Williams began running, chased by Wright and Makovich. The defendant was found beneath a house, and taken into custody, at which time Williams resisted Wright.

The third witness was an elderly fellow named Arthur Jernigan. Jernigan, who lives on the eleventh floor of a retirement home situated on one of the streets in which Makovich said he chased Williams, testified that he saw a black man being pursued by a white man carrying a vase of flowers. He testified further that he went down to the ground floor and observed the defendant in custody. On direct examination

Jernigan identified Williams in court as the person he saw run past his apartment.

On cross examination, Jernigan testified that he doubted he could have made an identification in court based exclusively upon his observations of the two men running by him eleven floors below, although the man seen running and the man in custody had the same build and clothing. Defense counsel moved to strike Jernigan's in court identification, arguing that it was not based upon his observations of the chase but rather upon his seeing Williams in custody. This motion was denied (T-77-80). The defendant contends this ruling was patently erroneous.

Seeing the accused singularly in the custody of police may violate due process since such "show-ups" can lead to a substantial likelihood that a witness will believe the person is the perpetrator simply because he is in custody. Holton v. State, 535 So.2d 678 (Fla. 1st DCA 1989). Where, as here, an improper show-up has occurred, any subsequent identification is inadmissible unless it can be shown that the latter identification was based on a source independent of the illegal confrontation. Holton, citing Simons v. State, 389 So.2d 262 (Fla. 1st DCA 1980).

Case law establishes a number of factors to consider in assessing whether an in court identification is admissible in the wake of a suggestive identification procedure, including the witness' opportunity to view the suspect, the witness' degree of attention, etc. See Neil v. Biggers, 409 U.S. 188

(1972). In the instant case, it is not necessary to apply these factors since the Mr. Jernigan admitted his in court identification was not based upon his observation of the person running down the street below him, but was based instead upon his seeing the defendant later in custody:

> DEFENSE COUNSEL: Mr. Jernigan, you have been attempting or you have made some comment in your testimony about having seen this defendant at a later point and you got a better look, you were able to see everything at that point.
> Let me ask you, Mr. Jernigan, had you not seen--had you not seen this defendant after he was apprehended and had been able to come up and get this close view and been able to take in this identity before, had you not had an opportunity to do that, Mr. Jernigan, could you have identified this man?
>
> PROSECUTOR: Objection, Your Honor.
>
> JERNIGAN: I don't think so.
>
> PROSECUTOR: It calls for speculation.
>
> DEFENSE COUNSEL: Your Honor, he can answer. He said--
>
> JERNIGAN: I answered it.
>
> DEFENSE COUNSEL: Yes, sir. You don't think you could have done it, could you?
>
> JERNIGAN: No, I couldn't.
>
> DEFENSE COUNSEL: So, really what aided your identification here in court today was the fact you saw him after he was arrested; Isn't that correct?
>
> JERNIGAN: (no response).
>
> DEFENSE COUNSEL: Isn't that correct, Mr. Jernigan?
>
> JERNIGAN: He, when I saw him afterwards, he was identical in his physical build to the man that was running, yes, with the same clothes on.
> DEFENSE COUNSEL: My point is--

JERNIGAN: So, --

DEFENSE COUNSEL: My point is that without that aid you probably would not have been able to identify this man today; Isn't that correct, Mr. Jernigan.

JERNIGAN: If I hadn't seen him the second time?

DEFENSE COUNSEL: Yes.

JERNIGAN: I agree with you.

DEFENSE COUNSEL: Thank you.

Since there was no evidence that Jernigan's in court identification was based upon a source independent of the suggestive show-up, and since Mr. Jernigan himself recognized that his in court identification was based, not upon his observation of the black man running down the street, but upon his later seeing Williams in custody, it is clear that the trial court erred under Holton and Simons in denying Williams's motion to exclude Mr. Jernigan's court room identification.

Jernigan's testimony that he saw a black man being chased by a white man carrying a vase is admissible. Jernigan could also describe the black man's build and clothing. The prosecutor could elicit the build and clothing of the defendant when arrested from the arresting officer, and argue to the jury that it matched Jernigan's description and, ergo, Williams was the person seen by Jernigan. But the testimony that was allowed and that which the trial court refused to exclude, namely, testimony from Jernigan in court that it was Williams who was running by Jernigan's apartment is inadmissible.

The district court ruled that the defendant "has not demonstrated that the trial court abused its discretion in allowing the witness who saw the victim chasing appellant prior to his arrest to identify appellant in court. Downer v. State, 375 So.2d 840 (Fla. 1979); State v. Cromartie, 419 So.2d 757 (Fla. 1st DCA),rev. den., Cromartie v. State, 422 So.2d 842 (Fla. 1982)" (A-1).

In response, the defendant contends that the district court was in error in saying he did not show the trial court "abused its discretion." The abuse of discretion standard assumes there is at least some evidence to support the trial court ruling. Here, there was no evidence that supports the trial court's ruling.

As noted, Neil v. Biggers requires the assessment of several factors, including the witness' degree of attention, opportunity to observe, etc. In the normal case, application of the various factors do not lend themselves to a nice and neat conclusion one way of the other on the bottom line issue of the admissibility of the identification testimony. In other words, the witness may have had ample opportunity to view the suspect, but did not possess a high degree of attention. Conversely, the witness may have had a high degree of attention but did not have ample opportunity to view the suspect. In these types of cases, which are by far the most common presented to the courts, there will be some evidence that supports the trial court's ruling, no matter what the ruling is. In these types of cases, an appellate court should apply

the abuse of discretion standard. The instant case, however, is not the normal case. In the instant case, the witness himself testified that he could not have made the identification based solely upon his view the time of the offense, as contrasted to seeing the defendant later while in custody.

The district court's reliance upon Cromartie and Downer was misplaced. Cromartie does not even deal with the issue here, the admissibility of an in court identification, as the case arose from a trial court's pre-trial order suppressing identification testimony. In any event, Cromartie tends to support the position taken by the defendant. In Cromartie, the court held that evidence of a suggestive out of court identification was admissible since there was no likelihood of irreparable misidentification. In reaching this conclusion, the Court stressed that the witnesses each viewed the defendant in daylight removing a bicycle from a sorority house.

In this case the witness, Jernigan, testified he would not have been able to testify that it was the defendant whom he saw running by his abode but for having seen him later, in the custody of the police.

In Downer, the witness in question could not make an in court identification, and the issue concerned the admissibility of an out of court show up. Here, and in court identification was made solely upon the basis of a suggestive out of court procedure.

Assuming this type of due process violation is subject to the harmless error doctrine, see Moore v. Illinois, 434 U.S. 220 (1977), Williams contends the error manifestly was not harmless in the instant case. Since the error is of constitutional dimension, for it to be harmless, the state must show it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

In this case, the defendant's entire defense was misidentification. The error complained of is an error concerning identification. Through Jernigan, the state was allowed to bolster its identification evidence with a constitutional violation. If that were not enough, the prosecutor, at some length, argued to the jury in summation that Jernigan had all kinds of good opportunity to see "the defendant," at the time the black man was running by the retirement home, so good, in fact, that the prosecutor argued Jernigan was able to recognize appellant "at a later time" (T-178-180). The defendant requests the reader to please again read the colloquy defense counsel had with Jernigan set out supra, and, once that is done, it will be obvious that the prosecutor's argument is not based upon the testimony of Jernigan who, quite honestly, testified that he could not make an identification based upon his observations of the person running past his abode. Thus, the state has taken a constitutional violation introduced at trial, and thereafter exploited it in summation in a manner that was contrary to the testimony of its own witness, Jernigan.

The state offered Jernigan's in court identification. The state then fought to keep it in by opposing defense counsel's good motion to exclude the in court identification. Obviously, the state felt it could not obtain a conviction without Jernigan's testimony, for it fought tooth and nail for its introduction. In light of these facts, and considering also that the entire case revolved upon the issue of identification, Williams contends the error can hardly be considered harmless.

ISSUE II

THE TRIAL COURT ERRED IN BASING ITS DECISION TO DEEM WILLIAMS A HABITUAL FELONY OFFENDER BY RELYING UPON SPECULATION AND FACTORS SURROUNDING CHARGES REDUCED PURSUANT TO A PLEA AGREEMENT, THEREBY DEPRIVING WILLIAMS OF HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY BOTH THE CONSTITUTION OF THE STATE OF FLORIDA AND THE CONSTITUTION OF THE UNITED STATES.

The jury found the defendant guilty of aggravated assault (R-21), which is normally a third degree felony punishable by no more than five years in prison. Sections 775.082(3)(d) and 784.021(2), Florida Statutes (1987). The trial court, however, sentenced Williams to ten years for aggravated assault (R-58). In doing so, the trial court invoked the procedures of the habitual felony offender statute, Section 775.084, Florida Statutes (1987). Under that act, one found guilty of a third degree felony can receive a ten year sentence. Section 784.084(4)(a)3, Florida Statutes (1987).

In order to be properly sentenced as a habitual felony offender, the trial court must make written findings supported by the record that demonstrate "...it is necessary for the protection of the public to sentence the defendant to an extended term...." Section 784.084(3), Florida Statutes (1987).

In the instant case a written order was entered (R-62-65). Two separate, but interrelated, factors relied upon by the trial court are the focus of this point on appeal. The first concerns the defendant's past record. In this regard, the trial court noted that, in 1985, Williams was charged with

three armed robberies. The defendant, however, was not convicted of these crimes. Instead, Williams engaged in plea negotiations and entered a plea to three counts of unarmed robbery. In sentencing the defendant, the trial court recited that, even though Williams was not convicted of the armed robberies, he nevertheless threatened each victim with a weapon. One of the three victims was said to have been beaten with a gun and threatened with death (R-64).

Thus, in sentencing the defendant as a habitual offender, the trial court explicitly relied upon factors dropped pursuant to plea negotiations.

The second feature of the trial court's order drawn into question here concerns the instant case. As noted, Williams was found guilty of aggravated assault. The trial court said that the defendant would have completed a robbery, but was precluded from doing so because of the victims actions (R-64).

The defendant contends the trial court erred in relying upon facts dropped pursuant to plea negotiations and upon speculation about what might have occurred in the instant case as reasons for imposing an enhanced sentence upon him.

The trial court's speculation that, in the instant case, Williams would have committed armed robbery but for the intervening actions of the victim, is erroneous pursuant to Tillman v. State, 525 So.2d 862 (Fla. 1988). In that case, the trial court imposed an enhanced sentence under the habitual felony offender statute relying, in part, on the view that the defendant, who had in the past been convicted of rape, would

have done so in the present case but for the timely intervention of a third party. The Court held that this factor "is pure speculation as to what might have occurred...." 525 So.2d at 864. The Court went on to expressly hold this reason insufficient in the context of habitual offender sentencing. 525 So.2d at 865.

On authority of Tillman, the defendant asserts it was error to rely upon speculation of what he might have intended or done as a reason to enhance his sentence.

Williams contends it was error also to rely upon factors dropped pursuant to plea negotiations as a reason to impose an enhanced sentence.

In Fletcher v. State, 457 So.2d 570 (Fla. 5th DCA 1984), the defendant was charged with robbery but convicted of grand theft. The trial court departed from the guidelines because the trial court felt the defendant had used force to obtain the victim's property. The court held this reason was invalid, since it had, in effect, been rejected by the jury.

In Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983), the defendant was charged with first degree murder but convicted of second degree murder. In retaining jurisdiction the trial court, in effect, said that the defendant had acted with premeditation. Since the verdict of second degree murder negated any notion of premeditation, the appellate court held the retention invalid, pointing out that the trial court's view of the evidence could be entirely correct, but the court was not free to disregard the jury's finding.

Fletcher and Owen were cited as authority in Borrell v. State, 478 So.2d 1185 (Fla. 4th DCA 1985). There, the defendant was charged with aggravated assault but was found not guilty of that charge. In imposing an enhanced sentence for offenses for which the defendant had been found guilty, the trial court focused upon the acts of violence that had been heard but rejected by the jury. The appellate court, speaking through Judge (now Justice) Barkett, recognized that the trial court's view of the evidence could very well be correct, but acquitted conduct cannot be used for the purpose of additional punishment.

The defendant relies upon Owens, Fletcher, and Borrell, as being analogous to the situation here. The fact that those three cases involve factors heard but rejected by the trier of fact makes the instant situation even more egregious. Here, the view that Williams used weapons to commit the three robberies was never presented to a jury for its consideration. The defendant was never tried for these offenses, as he pleaded to three counts of unarmed robbery. It may well be that the state had serious doubts that it could prove the defendant's use of weapons. What we do know is that, for some reason, the state was perfectly willing to "bargain out" Williams's use of weapons in exchange for not going to trial on the robberies. At least in Owens, Fletcher, and Borrell, the trial judges personally heard the evidence that was rejected by the jury. In this case, the trial court was not even the same one that

took the pleas, and was relying only upon statements made in a P.S.I. (R-64).

In Crosby v. State, 429 So.2d 421 (Fla. 1st DCA 1983), the trial judge imposed an adult sentence on a juvenile delinquent, partly because of an arrest that had been made that the trial court felt the juvenile had been factually guilty of, even though the case ended in a nol pros. The trial judge said, "[T]he juvenile may, in fact, be guilty, not legally or adjudicated, but the facts are such that it is a prima facie case that he is guilty, even though it may show a nol pros." 429 So.2d at 422. On appeal, the Court remanded upon a holding that the trial court erred in considering arrests as evidence of guilt.

In this case, the trial court has, in effect, done the same thing. Presumably, Williams was charged with armed robbery, but pled to unarmed robbery. In this case, the trial court has equated the mere charge of armed robbery as proof that the defendant committed armed robbery. Crosby tells us this is wrong.

In the context of the sentencing guidelines, it is well settled that it is impermissible to base a departure sentence on factors surrounding charges dropped or reduced pursuant to plea negotiations. See Smith v. State, 490 So.2d 1384 (Fla. 1st DCA 1986); Dallas v. State, 490 So.2d 1362 (Fla. 5th DCA 1362 (Fla. 5th DCA 1986); and, Cummings v. State, 489 So.2d 121 (Fla. 1st DCA 1986).

In Tillman, the Court characterized its holding as being applicable to numerous sentencing applications, including the guidelines, habitual offender, and the death penalty. Williams asserts that the guidelines cases discussed above apply with equal force to the instant situation involving the habitual offender statute. If it is wrong in the context of the guidelines, it is (or should be) wrong in the context of the habitual offender statute.

In the district court, the court agreed that the two reasons discussed above were invalid. However, since there remained one valid factor, that offenses were committed shortly after the defendant's release from a prior incarceration, the district court affirmed the habitual offender determination (A-4-5).

The defendant suggests that affirmance was error, and suggests that the more prudent approach to take at this juncture would be to vacate the sentence and remand for resentencing. This is so because there is absolutely nothing in the record that indicates that the trial court would have imposes an extended sentence if the trial court had not considered the facts that were found invalid by the district court. See Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986). Only if the appellate court was convinced beyond a reasonable doubt that the same sentence would have been imposed absent consideration of the invalid reasons would affirmance be proper. See Nixon and Albritton v. State, 476 So.2d 158 (Fla. 1985). This is the approach taken in the context of the

sentencing guidelines. Albritton and Nixon. It is the approach also taken in violation of probation cases where probation is revoked for both technical and substantive reasons, and the substantive reasons are invalidated on appeal. See Tuff v. State, 338 So.2d 1335 (Fla. 2d DCA 1976). The defendant contends further that the instant case cannot be meaningfully distinguished from those habitual offender cases that direct resentencing where the trial court relies upon improper factors in imposing an enhanced sentence. Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979).

For the above reasons the defendant requests the Court to vacate the sentences appealed from and remand for resentencing.

ISSUE III

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 is the issue certified to this Court by the district court, and 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 state does not address the applicability of Pope to the instant case. Instead, the state asserts that the District Court remanded this case "for reimposition of the same sentence using the same written reasons." (BS-8). 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."

The state 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 (BS-11). 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 state's claims of clogged trial court dockets is not a persuasive reason for ignoring a defendant's due process rights 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 cannot be assumed that a trial judge will always impose the same sentence.

The state argues that Ree "overlooks the longstanding 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" (BS-10). The state 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 the state 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.

V. CONCLUSION

For the reasons set forth herein, Williams contends reversible error has been demonstrated. For the reasons asserted in Issue I, supra, Williams requests the Court to vacate the convictions appealed from and remand the cause to the trial court with directions to conduct a new trial. For the reasons asserted in Issue II, supra, Williams requests the Court to vacate the sentences appealed from and remand for resentencing. For the reasons asserted in Issue III, supra, Williams requests the Court to answer the certified question with a qualified "yes" and remand the cause to the trial court with directions to impose a sentence within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, ANTHONY WILLIAMS, #A098846, Baker Correctional Institution, Post Office Box 500, Olustee, Florida, 32072, on this 28th day of June, 1990.

CARL S. MCGINNES