6-1

IN THE SUPREME COURT OF FLORIDA

VASTEN E. BLAIR,	:	
Petitioner,	:	
v.	:	CASE NO. 75,937
STATE OF FLORIDA,	:	
Respondent.	:	

JURISDICTIONAL BRIEF OF PETITIONER

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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JURISDICTIONAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Blair v. State, 15 F.L.W. D904 (Fla. 1st DCA April 4, 1990).

Petitioner was the appellant in the district court and the defendant in the circuit court, and will be referred to as petitioner or by name. Respondent was the appellee in the District Court and the prosecutor in the circuit court, and will be referred to as respondent or the state.

II. STATEMENT OF THE CASE AND FACTS

Appellant was convicted after jury trial of first degree murder and armed robbery.

On the first degree murder conviction, he was sentenced to life imprisonment with no possibility of parole for twenty-five years. On the armed robbery conviction, the trial judge departed from the recommended guideline sentence of twelve to seventeen years and sentenced appellant to life imprisonment with a three-year mandatory minimum, consecutive to the sentence imposed on the first degree murder conviction.

The First District Court of Appeal affirmed appellant's conviction but reversed the sentence and remanded for resentencing. Blair v. State, 15 F.L.W. D904 (Fla. 1st DCA April 4, 1990).

The court ruled that the evidence established the two offenses arose from a single continuous criminal episode and therefore the imposition of consecutive minimum mandatory sentences was error.

The court further ruled that the trial court's finding that a departure from the guidelines, based on an escalating pattern of criminality, was a proper reason for departure and supported by the record.

The court then held:

> Additionally, the supreme court has recently held in Ree v. State, ___ So.2d ___ (Fla. 1989), opinion filed November 16, 989 [14 F.L.W. 565], that written reasons for departure must be issued at the time sentence is pronounced. Since written reasons in the instant case were not

> entered until after the March 23, 1989 sentencing hearing, reversal for resentencing according to Ree is required.
>
> Accordingly, we affirm the judgment of guilt on both counts, affirm the sentence in part, and reverse and remand for resentencing. The trial court is instructed that any mandatory minimum sentences must be imposed concurrently, and is directed to follow the mandates of Ree v. State, supra, with regard to the entry of written reasons for departure from the sentencing guidelines.

Blair v. State, supra, 15 F.L.W. at 904-905.

Petitioner's notice to invoke discretionary jurisdiction was filed with this court on April 27, 1990.

III. SUMMARY OF ARGUMENT

The First District Court of Appeal reversed appellant's sentence based on the trial judge's failure to issue contemporaneous written reasons for departure from the guidelines. The court, however, went on to find the reason for departure valid, and authorized resentencing outside the guidelines.

The holding that petitioner can be resentenced outside the guidelines conflicts with this court's recent decision in Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990) and earlier decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

In Pope, this court held 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" Id. at S244.

IV. ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE DECISION IN BLAIR V. STATE, 14 F.L.W. D904 (Fla. 1ST DCA APRIL 4, 1990) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN POPE V. STATE, 15 F.L.W. S243 (Fla. APRIL 26, 1990) AND SHULL V. DUGGER, 515 So.2d 748 (Fla. 1987).

The opinion of the District Court of Appeal in petitioner's case found that:

> On the armed robbery count, the trial court departed from the recommended guideline sentence of 12-17 years and sentenced appellant to life imprisonment with a three year mandatory minimum, to run consecutively to the sentence imposed for first degree murder. Although the trial court announced at the hearing that its departure was based on appellant's escalating pattern of criminal activity, the written order listing this reason was not prepared until after the hearing, and was not filed until March 28, 1989 -- five days after the hearing.

Blair v. State, 14 F.L.W. D904 (Fla. 1st DCA April 4, 1990).

The court found the imposition of consecutive minimum mandatory sentences error in petitioner's case and further, relying on this Court's opinion in Ree v. State, 14 F.L.W. S565 (Fla. November 16, 1989), held:

> Since written reasons in the instant case were not entered until after the March 23, 1989 sentencing hearing, reversal for resentencing according to Ree is required. ... The trial court is directed that any mandatory minimum sentences must be imposed concurrently, and is directed to follow the mandates of Ree v. State, supra, with regard to the entry of written reasons for departure from the sentencing guidelines.

Blair v. State, supra, 14 F.L.W. D904 at 904-905.

In Ree v. State, supra, this Court held written reasons for departure not imposed contemporaneously with the imposition of sentence were invalid.

The District Court of Appeals opinion in Blair v.State, supra, requiring resentencing of appellant for failure to provide written reasons at sentencing, follows in part the dictates of Ree v. State, supra. However, in authorizing resentencing of appellant on remand to a sentence which is a departure from the guidelines, Blair v State, supra, conflicts with this Court's recent decision in Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990) and earlier decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

In Shull v. Dugger, supra, this Court held that "generally, when all the reasons stated by the trial court in support of departure are found invalid, resentencing following remand must be within the presumptive guidelines sentence." Id. at 749.

This Court held in Pope v. State, supra, 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." Id. at S244.

Based on the above stated conflict between Blair v. State, supra, and this Court's opinion in Pope v. State, supra, and Shull v. Dugger, supra, this Court should accept jurisdiction and reverse the portion of the District Court of Appeal's

opinion in Blair v. State, supra, which authorizes a departure from the guideline sentence.

V. CONCLUSION

Based upon the foregoing argument and citation of authority, petitioner requests this Court take jurisdiction of this case due to the conflict between the opinion of the District Court of Appeal in Blair v. State, supra, and this Court's decisions in Pope v.State, supra and Shull v. Dugger, supra.

Respectfully submitted,

BARBARA M. LINTHICUM
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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been forwarded by hand delivery to Robert Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32399-1050 and a copy has been mailed to Vasten Blair, this 7th day of May, 1990.

Lynn A Williams
LYNN A. WILLIAMS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

VASTEN E. BLAIR :

Petitioner, :

vs. : Case No. 75,937

STATE OF FLORIDA, :

Respondent :

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A P P E N D I X

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COUNSEL FOR APPELLANT

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

VASTEN E. BLAIR,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 89-893

Opinion filed April 4, 1990.

An Appeal from the Circuit Court for Santa Rosa County.
Ben Gordon, Judge.

Michael E. Allen, Public Defender; Lynn A. Williams, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

SHIVERS, Chief Judge.

Appellant/defendant appeals his judgment for armed robbery and first-degree murder, arguing that the trial court erred in denying his pretrial motion to suppress two incriminating statements made following his arrest. Appellant also challenges the sentence imposed by the trial court, alleging several bases for reversal.

We affirm the judgment of guilt on both counts, finding ample evidence to support the trial court's conclusion that the consent to search given by appellant's girlfriend, which eventually led to appellant's arrest and subsequent statements, was given voluntarily and not improperly coerced. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968).

With regard to appellant's sentence, however, we find it necessary to reverse in part and remand for resentencing. At a hearing on March 23, 1989, the trial court sentenced appellant on the first-degree murder count to life imprisonment without possibility of parole for 25 years. On the armed robbery count, the trial court departed from the recommended guideline sentence of 12-17 years and sentenced appellant to life imprisonment with a three-year mandatory minimum, to run consecutively to the sentence imposed for first-degree murder. Although the trial court announced at the hearing that its departure was based on appellant's escalating pattern of criminal activity, the written order listing this reason was not prepared until after the hearing, and was not filed until March 28, 1989--five days after the hearing.

Initially, we find that the trial court's reason for departure on the armed robbery count was proper. The facts in the record clearly support a pattern of criminal activity escalating from nonviolent property crimes to escape, disorderly conduct, aggravated battery, weapons charges, and finally, in the

instant case, armed robbery and first-degree murder. Under these facts, the trial court properly departed from the recommended guildelines sentence based on an escalating pattern of criminality. Keys v. State, 500 So.2d 134 (Fla. 1986); section 921.001(8), Florida Statutes (1987).

We find that the court erred in imposing consecutive mandatory minimum sentences, however, as the evidence establishes that the two offenses arose from a single continuous criminal episode. Palmer v. State, 438 So.2d 1 (Fla. 1983). Additionally, the supreme court has recently held in Ree v. State, ___ So.2d ___ (Fla. 1989), opinion filed November 16, 1989 [14 F.L.W. 565], that written reasons for departure must be issued at the time sentence is pronounced. Since written reasons in the instant case were not entered until after the March 23, 1989 sentencing hearing, reversal for resentencing according to Ree is required.

Accordingly, we affirm the judgment of guilt on both counts, affirm the sentence in part, and reverse and remand for resentencing. The trial court is instructed that any mandatory minimum sentences must be imposed concurrently, and is directed to follow the mandates of Ree v. State, supra, with regard to the entry of written reasons for departure from the sentencing guidelines.

WIGGINTON and BARFIELD, JJ., CONCUR.