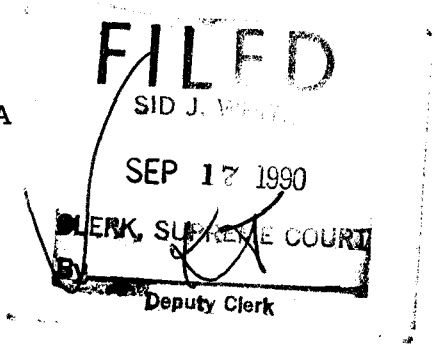
IN THE SUPREME COURT OF FLORIDA



VASTEN BLAIR,

Petitioner,

v. CASE NO.: 75,937

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Appellant, VASTEN BLAIR, the defendant below, will be referred to in this brief as "Petitioner." Respondent, the State of Florida, the prosecuting authority below, will be referred to in this brief as either "Respondent or "the state." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent is in agreement with Petitioner's recital of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I:

This Court should reverse the district court's order remanding the instant case for resentencing pursuant to Ree v. State, as Ree may only be applied prospectively. Neither Pope v. State nor Shull v. Dugger would apply to this case as a valid written reason for departure was issued by the trial court.

ISSUE II:

Petitioner's life sentence for robbery does not violate equal protection or due process as his sentence is one established by the legislature and is not cruel and unusual.

ISSUE III:

The issue of the validity of the guidelines departure reason in this case is not preserved for review by this Court. Even so, escalating pattern of criminality is a valid departure reason in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO ISSUE CONTEMPORANEOUS WRITTEN REASONS FOR DEPARTURE AT THE TIME OF SENTENCING. (RESTATED).

In its opinion dated April 4, 1990, the District Court of Appeal below reversed Petitioner's guidelines departure sentence because the trial court did not issue its written reason for departure at the time that Petitioner's sentence was orally imposed. The district court relief on this Court's pronouncement in Ree v. State, ___ So.2d ___, 14 F.L.W. 565 (Fla. November 16, 1989) (Ree I).

Respondent asserts that Petitioner's original sentence should be reinstated on the authority of this Court's opinion on rehearing in Ree v. State, ___ So.2d ___, 15 F.L.W. S395 (Fla. July 19, 1990) (Ree II). In Ree II this Court unequivocally stated that Ree ". . .shall only be applied prospectively." Ree II, supra at S396. Since Petitioner was sentenced on March 23, 1989, application of Ree to Petitioner's case would be retrospective and thus impermissible.

The logic of applying Ree prospectively only is unassailable. A trial judge can be expected to change a custom or procedure only when put on notice by the legislature or a high court that the existing custom or procedure is no longer in compliance with exiting law. Clearly, a trial judge is expected

to apply the law as it exists at the time, and not to anticipate what changes may be handed down in the future. To apply Ree retrospectively would in effect penalize trial courts for following a customary and then legitimate sentencing practice, and would further needlessly burden overcrowded criminal court dockets. The Court's wisdom in applying Ree prospectively only is readily apparent.

Ree II became final on August 3, 1990, as that is when the mandate issued (Rule 9.340(a), Fla.R.App.P.). Consequently, Ree does not apply to defendants sentenced before that date. Petitioner was sentenced on March 23, 1989, and Ree I did not even issue until November 16, 1989, so clearly Ree does not apply to Petitioner as the trial judge had no notice whatsoever that contemporaneous (i.e. instantaneous) written reasons for departure would be required later. This situation is materially different from that in State v. Jones, 485 So.2d 1283 (Fla. 1986), as a State v. Neil violation presumably prejudices a defendant at trial, thus possibly resulting in an unjust conviction. It has never been demonstrated that a Ree violation prejudices a defendant at all.

Indeed, this Court is currently considering whether a Ree violation is even harmful error. In State v. Lyles, Case No. 75,878, and State v. Williams, Case No. 75,880, the following certified question is before this court:

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?

A negative response to the certified question is urged.

Petitioner contends that the District Court of Appeal below erred in authorizing in its remand that the trial court may again sentence him outside of the guidelines. In support, Petitioner relies on Pope v. State, 561 So.2d 554 (Fla. 1990, and Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

As Respondent pointed out previously, Ree does not apply to Petitioner, and thus resentencing is neither authorized nor necessary. However, assuming arguendo that Petitioner was to be resentenced, Pope v. State, supra. 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. Pope, supra. at 556. (emphasis supplied). In Pope, the trial court issued oral reasons only.

In contrast, a written reason for departure was issued in this case, albeit after the sentencing hearing (R 388).

Petitioner seems to suggest that if written reasons for departure are not issued contemporaneously that the written reasons somehow magically disappear. Common sense and logic do not support this conclusion. Pope does not apply to this case.

Shull v. Dugger, 515 So.2d 748 (Fla. 1987), does not apply to the instant case either, as Petitioner contends. In Shull, this Court held that, upon remand, a sentencing judge would not be permitted to provide new reasons for departure when the original reasons had been reversed by an appellate court. In the instant case, although the issue was not preserved for appellate review, the district court sua sponte approved the departure reasons given the trial court. (See Issue III, infra).

In sum, Petitioner seeks reversal of that portion of the opinion below that authorizes reimposition of a departure sentence on remand. Respondent urges this Court to reverse that portion of the opinion below which relies on Ree I, as this Court's subsequent pronouncement in Ree II prohibits retroactive application of the rule announced in Ree. Once this is done, the resentencing issue is moot.

ISSUE II

WHETHER APPELLANT'S LIFE SENTENCE FOR ROBBERY VIOLATES EQUAL PROTECTION AND DUE PROCESS. (RESTATED)

Petitioner contends that the trial court erred in imposing a life sentence with three (3) years minimum mandatory for his robbery conviction because that sentence is more onerous than his life sentence for first degree murder. Petitioner argues that his life sentence for robbery violates equal protection and due process in contravention of the Florida and U.S. constitutions.

For this proposition Petitioner relies on Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L.Ed 1655 (1942), a case dealing with the constitutionality of an Oklahoma statute which provided for the sterilization of habitual criminals. In Skinner, the U.S. Supreme Court held that where the statute applied to persons convicted of larceny, including larceny by fraud, but expressly exempted from its operation persons convicted of embezzlement, although both were punishable in the same manner under state law, the statute violated the equal protection clause of the Fourteenth Amendment. There is no such statute at issue here. Petitioner's life sentence was a guidelines departure sentence based on his criminal record.

Petitioner argues that the legislature cannot arbitrarily divide up the penalties for crimes so that one crime (robbery)

which is less serious than another (murder) receives a harsher penalty. Petitioner overlooks the fact that his life sentence for robbery was a guidelines departure sentence which was based on facts peculiar to the previous criminal episodes in which he participated, and was not based on a mandatory statutory classification such as that in Skinner. The sentence sub judice does not involve an arbitrary statutory classification without rational basis, but rather a legislatively sanctioned judicial determination based on Petitioner's own actions.

Petitioner also relies on Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982). The situation in Zimmerman involved a fair employment practice claimant who was denied a hearing before the state commission because the commission itself failed to hold a preliminary conference within the 120 day statutory period. The Supreme Court held that the complainant was deprived of a protected property interest in violation of the due process clause. In a separate opinion four justices concluded that because claimants whose claims were processed within the prescribed time were treated differently than those whose claims were not, the claimant here was deprived of his Fourteenth Amendment right to equal protection of the law.

The situation in Zimmerman is not analogous to that in the case at bar. Petitioner has not demonstrated that he was treated differently than other similarly-situated defendants,

nor has he demonstrated that he was deprived of a due process right by the action of the state. Petitioner's sentence was commensurate with his negative impact on society, and the statutory machinery which authorized that sentence is rationally related to legitimate governmental and societal objectives.

There is no constitutional violation regarding Petitioner's sentence. In Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987), the defendant received a life sentence under the guidelines. The court stated:

> Appellant contends that his life sentence denies him his constitutional right to equal protection under the law. He points to the fact that he has received a more severe sentence than a person convicted of a capital felony who does not receive the death penalty. Under present law, a capital crime felon who does not receive the death penalty receives a life sentence but is eligible for parole consideration after serving 25 years. On the other hand, a person convicted of a life felony is punishable by either life imprisonment or a term of years not exceeding 40. See Section 775.082(3)(a), Florida Statues. And, so the appellant asserts, since the trial court sentenced him to life imprisonment instead of term of years, and since life felonies are not exempt from the sentencing guidelines and his sentence is therefore not subject to parole; he is denied equal protection. We disagree.
>
> In order to comply with equal protection requirements, a statute must treat all people within a class the same, and the division into classes must bear some reasonable relationship to a legitimate state objective. Renau v. State, 436 So.2d 268 (Fla. 1st DCA 1983). The Equal Protection clause admits to a wide

> discretion in the exercise by the state of its power to classify in the promulgation of police laws, and even though application of such laws may result in some inequality, the law will be sustained where there is some reasonable basis for the classification. Hamilton v. State, 366 So.2d 8, 10 (Fla. 1978) (quoting from Linsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed 369 (1910).
>
> The legislature has chosen to denominate certain crimes as capital felonies and others as life felonies. With respect to the capital class, the legislature has essentially provided that if the capital offense is not so severe as to warrant the death penalty, then the penalty must be life imprisonment with the provision that the offender may be eligible for parole, but only after serving a minimum of 25 years. With respect to the life felony class, the legislature has, in effect, provided that if the life felony is not so severe as to warrant a life sentence (without eligibility for parole), then the penalty will be a term of years no greater than 40 years (again without eligibility for parole).
>
> Appellant has failed to establish that there is no rational basis for such classifications. Moreover, it is clear that all persons falling within the life felony class are subject to the same range of penalties; so also with respect to those in the capital felony class.

Bloodworth, supra. at 498, 499.

In essence, Petitioner is arguing that because the minimum penalty for first degree murder (25 years) is less onerous than the maximum penalty for robbery (life in prison), that his sentence is unconstitutional. Petitioner overlooks the fact that the maximum penalty for first degree murder is death. As a proportionality analysis, Petitioner's argument must fail.

Clearly, Petitioner's sentence is authorized pursuant to §812.13(2)(a), Fla. Stat. This Court has consistently held that where a sentence is one that has been established by the legislature and is not on its face cruel and unusual, it will be sustained when attacked on the grounds of due process, equal protection, or separation of power theories. Sowell v. State, 342 So.2d 969 (Fla. 1977). See also State v. Bailey, 360 So.2d 772 (Fla. 1978). Petitioner does not contend that his sentence constitutes cruel and unusual punishment.

Consequently, it is evident that Petitioner's life sentence is not the result of a arbitrary classification nor is it without a rational basis. Since the sentence is legislatively authorized and is not cruel and unusual, Petitioner sentence must be affirmed.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DEPARTING UPWARD FROM THE GUIDELINES AND SENTENCING PETITIONER TO LIFE IMPRISONMENT ON THE ROBBERY CONVICTION.

Petitioner is attempting to present an issue to this Court which was not preserved by objection in the trial court and was not an issue on appeal before the district court. The failure to raise an issue before either the trial court or the District Court of Appeal warrants that the Supreme Court decline to address the issue when presented for the first time on petition for review. Trushin v. State, 425 So.2d 1126 (Fla. 1982). In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be a part of that presentation. Tillman v. State, 471 So.2d 32 (Fla. 1985). Absent a contemporaneous objection, sentencing errors must be apparent on the face of the record to the cognizable on appeal. Dailey v. State, 488 So.2d 532 (Fla. 1986). See also Forehand v. State, 537 So.2d 103 (Fla. 1989).

Petitioner's guidelines departure sentence of life imprisonment with a three year minimum mandatory is thus not preserved for review by this Court. The district court below sua sponte stated:

> 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 guidelines sentence based on an escalating pattern of criminality. Keys v. State, 500 So.2d 134 (Fla. 1986); section 921.001(8), Florida Statues (1987).

Blair v. State, 559 So.2d 349, 350 (Fla. 1st DCA 1990).

The court's finding, although correct, was gratuitous in that the issue was neither preserved nor presented for review. The State maintains that this sua sponte finding is insufficient to confer jurisdiction regarding this issue upon this Court.

Even so, it is clear that Petitioner was given a departure sentence based on a valid reason supported by the record. See Keys v. State, 500 So.2d 134 (Fla. 1986); Williams v. State, 504 So.2d 392 (Fla. 1987); State v. Simpson, 554 So.2d 506 (Fla. 1989).

Petitioner's sentence must consequently be affirmed.

CONCLUSION

Based on the above cited legal authorities, Respondent prays that this Honorable Court reverse that portion of the district court opinion remanding Petitioner's case for resentencing pursuant to Ree v. State and affirm the district court in all other respects.

Respectfully submitted,

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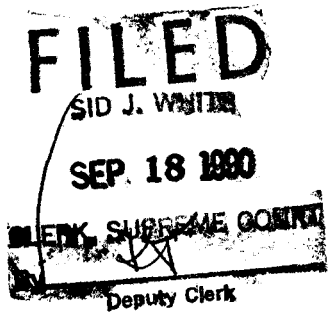
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to LYNN A. WILLIAMS, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of September, 1990.

Bradley R Bischoff

BRADLEY R. BISCHOFF
Assistant Attorney General



IN THE SUPREME COURT OF FLORIDA

VASTEN BLAIR,

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v. CASE NO. 75,937

STATE OF FLORIDA,

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_____/

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to LYNN A. WILLIAMS, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of September, 1990.

Bradley R Bischoff

BRADLEY R. BISCHOFF
Assistant Attorney General

Criminal Law ⇐1287(9)

Defendant's release from prison 17 months prior to offenses did not justify upward departure from guidelines sentence.

Michael E. Allen, Public Defender, W.C. McLain, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

SHIVERS, Chief Judge.

Appellant/defendant appeals a sentence of life imprisonment for armed robbery, five years for aggravated assault, and one year for false report of a crime, representing an upward departure from the recommended guideline sentence of 7–9 years. In imposing the departure sentence, the trial court relied on the fact that appellant had been released from incarceration for several prior offenses on April 29, 1986, then committed the three new offenses less than 17 months later.

We reverse, based on the supreme court's recent holding in *Gibson v. State*, 553 So.2d 701 (Fla.1989). While recognizing that timing may justify a departure sentence in some circumstances, the court in *Gibson* held that the defendant's release from prison 14 months prior to the commission of his new offenses was too long a period of time to justify departure on that basis. Therefore, the trial court's use of the 17–month period in the instant case must be reversed.

Accordingly, appellant's departure sentence is remanded for resentencing within the sentencing guidelines.

REVERSED and REMANDED.

WIGGINTON and BARFIELD, JJ., concur.

Vasten E. BLAIR, Appellant,

v.

STATE of Florida, Appellee.

No. 89–893.

District Court of Appeal of Florida, First District.

April 4, 1990.

Defendant was convicted in the Circuit Court, Santa Rosa County, Ben Gordon, J., of armed robbery and first-degree murder, and he appealed. The District Court of Appeal, Shivers, C.J., held that: (1) escalating pattern of criminality was proper basis for departure on armed robbery count; (2) consecutive mandatory minimum sentences should not have been imposed; and (3) written reasons for departure had to be issued at time sentence was pronounced.

Judgment of guilt affirmed; sentence affirmed in part, reversed and remanded for resentencing in part.

1. Searches and Seizures ⇐198

Evidence supported trial court's conclusion that consent to search given by defendant's girlfriend, which eventually led to defendant's arrest and subsequent statements, was given voluntarily and not improperly coerced. U.S.C.A. Const.Amend. 4.

2. Criminal Law ⇐1287(7)

Trial court properly departed from recommended guidelines sentence for armed robbery based on escalating pattern of criminality; facts in record clearly supported pattern of criminal activity escalating from nonviolent property crimes to escape, disorderly conduct, aggravated battery, weapons charges, and finally, in instant case, armed robbery and first-degree murder. West's F.S.A. § 921.001(8).

3. Criminal Law ⇐1210(4)

Trial court should not have imposed consecutive mandatory minimum sentences

for armed robbery and first-degree murder, as evidence established that offenses arose from single continuous criminal episode.

4. Criminal Law ⇐1321(2)

Written reasons for departure had to be issued at time sentence was pronounced.

Michael E. Allen, Public Defender; Lynn A. Williams, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Bradley R. Bischoff, Asst. Atty. Gen., 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.

[1] 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, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (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.

[2] 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).

[3, 4] 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.