

IN THE SUPREME COURT OF FLORIDA

CASE NO.
DCA NO. 88-1649

76100

RANDY B. BROWN,
Petitioner,

FILED
JUN 1 1990

-vs-

THE STATE OF FLORIDA,
Respondent.

CLERK, SUPREME COURT
DEPT. OF JUSTICE

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioner, Randy B. Brown, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the plaintiff in the trial court. The symbol "A." will be used to refer to the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

In sentencing Randy Brown, the trial judge departed from the sentencing guidelines range, announcing oral reasons (A. 2-3), but failing to provide any written reasons for the departure. (A. 1). The Third District Court of Appeal issued an opinion reversing the sentence which simply stated "we remand the cause for resentencing". (A. 1). The court cited the case of Padgett v. State, 534 So.2d 1246 (Fla. 3d DCA 1988) in which the Third District, addressing a single sentencing issue, reversed a departure sentence and remanded to allow the trial court to supply written reasons for the departure. (A. 1).

Petitioner Brown moved for clarification or rehearing, taking the position that the cause had to be remanded for resentencing within the guidelines. (A. 4-6). While the motion for clarification or rehearing was pending, this court issued its opinion in Pope v. State, 15 F.L.W. 243 (Fla. April 26, 1990), which held that when an appellate court reverses a departure sentence because there are no written reasons given, it must remand for resentencing within the guidelines. Petitioner Brown filed Pope as a notice of supplemental authority in the Third District Court of Appeal. (A. 7-9). The Third District denied the motion for rehearing on the sentencing guidelines issue. (A. 10).

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CONFLICTS WITH THE FOLLOWING DECISION OF THIS COURT ON REVERSAL AND REMAND OF SENTENCES DEPARTING FROM THE GUIDELINES: POPE V. STATE, 15 F.L.W. 243 (Fla. April 26, 1990)?

SUMMARY OF ARGUMENT

In Pope v. State, 15 FLW 243, 244 (Fla. April 26, 1990) 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. Here, the Third District Court of Appeal reversed because there were no written reasons for departure, but simply remanded for resentencing. In doing so the court cited a case which authorized the articulation of written reasons upon remand. Appellant's motion for rehearing, with Pope cited in a notice of supplemental authority, was denied. The decision of the Third District, by failing to remand for resentencing within the guidelines, expressly and directly conflicts with Pope.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CONFLICTS WITH THE FOLLOWING DECISION OF THIS COURT ON REVERSAL AND REMAND OF SENTENCES DEPARTING FROM THE GUIDELINES: POPE V. STATE, 15 F.L.W. 243 (Fla. April 26, 1990).

In Pope v. State, 15 F.L.W. 243, 244 (Fla. April 26, 1990) this court said:

Applying the principles of Jackson[, 478 So. 1054, 1055 (Fla. 1985)] and Shull[, 515 So.2d 748 (Fla. 1987)], and for the same policy reasons, 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).

In this case, the Third District acknowledged in its opinion that the trial court had "failed to give written reasons for departing from the sentencing guidelines", Slip opinion, at 1, but simply remanded for resentencing, citing a case which stood for the proposition that the trial court is authorized to provide the missing written reasons upon remand. (A. 1). The court did so despite the fact that petitioner had requested, on motion for clarification and rehearing, that the trial court be directed to resentence him within the guidelines, and despite the fact that this court's decision in Pope had been filed as a notice of supplemental authority.¹ (A. 4-9).

1.

In Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973), this court held that district courts of appeal are bound to follow case law set forth by the Supreme Court of Florida. In Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983) this court held that decisional law in effect at time of an appeal governs the case. Therefore, since Pope was in effect before Brown's appeal was finally disposed, the Third District Court of Appeal was required (Cont'd)

By failing to direct that petitioner be resentenced within the guidelines, the Third District Court of Appeal's decision in this case expressly and directly conflicts with this court's decision in Pope. Indeed, other defendants in exactly the same position as Brown, whose motion for rehearing was denied on May 22, 1990, are receiving the benefit of this court's decision in Pope. Compare, Davis v. State, 15 F.L.W. 1282, 1283 (Fla. 3d DCA May 8, 1990) (remanding for resentencing within the guidelines on the authority of Pope); Grant v. State, 15 F.L.W. 1284 (Fla. 3d DCA May 8, 1990) (same). To allow the Third District's decision to stand will deny Brown his state and federal constitutional rights to equal protection of the law.² U.S. Const. Art. IV, §1; Art. I, §§2, 9, Fla. Const. See, Mitchell v. State, 157 Fla. 121, 25 So.2d 73 (1946) (prosecution by method which denies defendant benefit of the statute of limitations while others guilty of same offense receive benefit of limitations period denies equal protection). Cf. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) (subjecting a court order to First Amendment scrutiny and affirming Rhinehart v. Seattle Times Co., 98 Wash.2d 226, 654 P.2d 673 (1982), which affirmed the

to follow Pope, grant Brown's motion for rehearing, and direct that he be resentenced within the guidelines.

2.

This petition for review is necessary, and relief for petitioner imperative, because (a) Florida Rule of Appellate Procedure 9.330(b) precludes further review of the issue by the Third District Court of Appeal, and (b) since the issue was presented and decided in the motion for rehearing, it would constitute law of the case. See, Love v. State, 15 F.L.W. 73 (Fla. February 15, 1990); see also, 3 Fla. Jur.2d Appellate Review §421 (1978).

court order on the ground that the discovery sought would infringe on constitutionally protected rights of privacy, religion, and association); South Florida Blood Service v. Rasmussen, 467 So.2d 798, 803 (Fla. 3d DCA 1985) (court orders may constitute state action subject to constitutional limitation), approved 500 So.2d 533 (Fla. 1987). Therefore, petitioner requests that this court exercise its conflict jurisdiction and review the case.

CONCLUSION

Based on the cases and authorities cited herein, the petitioner requests this court to accept jurisdiction in this cause.

Respectfully submitted,

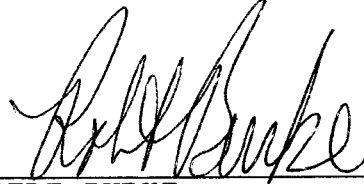
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 30 day of May, 1990.



ROBERT BURKE
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