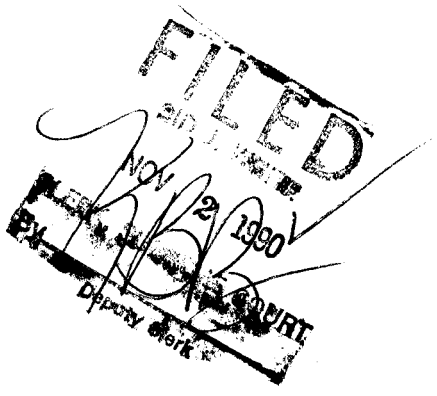
IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,100



RANDY B. BROWN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3078

ROBERT BURKE
Assistant Public Defender
Florida Bar No. 434493

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,100

RANDY B. BROWN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

INTRODUCTION

The petitioner, Randy B. Brown, was the appellant in the district court and defendant in the trial court. The respondent, the State of Florida, was the appellee in the district court and the prosecution in the trial court. In this brief, the parties will be referred to as they stand in this Court. The symbols "R.", "T." and "A." will be used to refer to portions of the record on appeal, transcripts of the lower court proceedings, and appendix attached hereto, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Randy Brown was charged by indictment with armed burglary,[1] armed robbery, first-degree murder, aggravated battery, and unlawful possession of a firearm while engaged in a criminal offense. (R. 1-3A). The jury acquitted Brown of unlawful possession of a firearm while engaged in a criminal offense. (T. 2189, R. 90). It found Brown guilty of manslaughter as a lesser offense of the first-degree murder count, "attempted armed robbery without a firearm" as a lesser offense of the armed robbery count, and battery as a lesser offense of the aggravated battery count. (T. 2188-89, R. 86-89). Brown was adjudicated guilty of manslaughter, attempted robbery,[2] and battery. (T. 91-92).

Brown's guidelines range is twelve (12) to seventeen (17) years. (R. 100-100A). The trial judge granted the State's motion to declare Brown an habitual offender (T. 2242) and the State's motion to depart from the guidelines (T. 2243) and imposed a sentence of thirty (30) years on the manslaughter count, ten (10) years on the attempted robbery count, concurrent, and one (1) year on the battery count, concurrent. (T. 2266-67, R. 96-99).

On appeal to the Third District Court of Appeal, petitioner contended that the trial court erred in sentencing him as an

---

1. The burglary count was dismissed prior to trial. (T. 58).

2. The judgment of conviction and sentencing guidelines scoresheet incorrectly characterized the attempted robbery without a weapon, a third-degree felony, as a second-degree felony. (R. 91-92, 100). The Third District Court of Appeal ordered, upon rehearing, that the judgment of conviction be corrected. (A. 10). The reduction to a third-degree felony has no impact on Brown's guidelines range. (R. 100-100A).

habitual offender without making the proper findings and in departing from the guidelines without giving written reasons. (A. 4-6). The Third District did not address the habitual offender issue in its initial opinion and denied that portion of the motion for rehearing directed to the issue. (A. 10).

While the case was pending on appeal, this court released its initial opinion in Ree v. State, 14 F.L.W. 565 (Fla. November 16, 1989), which held that the failure to provide contemporaneous written reasons for departure required reversal and a remand for resentencing within the guidelines. Petitioner filed Ree as a notice of supplemental authority on November 20, 1989. On December 5, 1989, the Third District reversed the guidelines departure, issuing an opinion 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, requesting that the Third District address the habitual offender issue and arguing, on the authority of Ree, that the remand had to be for resentencing within the guidelines. (A. 4-6). While the motion for rehearing or clarification was pending, this court issued its opinion in Pope v. State, 561 So.2d 554 (Fla. 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 on May 2, 1990. (A. 7-9). On May 22, 1990, the Third District denied the motion for rehearing. (A. 10). This court has granted review. (A. 11).

QUESTION PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED (A) IN FAILING TO REMAND FOR RESENTENCING WITHIN THE GUIDELINES, AND (B) IN FAILING TO REVERSE THE TRIAL COURT'S HABITUAL OFFENDER SENTENCE WHERE NO PROPER FINDINGS WERE MADE?

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in denying petitioner's motion for rehearing and failing to apply this court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990). Since Pope was effective before Brown's appeal was final, the application of Pope in this case would not be retroactive, but merely adherence to the general rule that cases on appeal are to be decided according to the law at the time of disposition. Even if application of Pope to this case is characterized as retroactive, such retroactive application is required by concepts of fairness and the constitutional guarantees of equal protection where Mr. Pope, and others sentenced before the Pope decision, have received the benefits of that ruling. To deny Brown, who is in the identical position, the benefit of the ruling would be unfair and unconsti-

tutional.

The Third District Court of Appeal also erred in failing to reverse Brown's habitual offender sentence because the trial court did not make explicit findings of fact showing on their face that an extended habitual offender sentence was necessary for the protection of the public.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED (A) IN FAILING TO REMAND FOR RESENTENCING WITHIN THE GUIDELINES, AND (B) IN FAILING TO REVERSE THE TRIAL COURT'S HABITUAL OFFENDER SENTENCE WHERE NO PROPER FINDINGS WERE MADE.

(I)

INTRODUCTION

The Third District Court of Appeal committed error by failing to apply this court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990) which held that an appellate court reversing a departure sentence must remand for resentencing within the guidelines range. Application of Pope to this case would either (A) not be a retroactive application, but simply adherence to the general rule that cases are to be decided according to the law at the time of appellate disposition, or (B) constitute a retroactive application which is legally required by concepts of fairness and the constitutional guarantees of equal protection of the laws.

(A)

This case is a "pipeline" case; that is, one which was not

final by trial or appeal when a controlling decision of this court, Pope, was issued. Reed v. State, 15 F.L.W. 1867 (Fla. 5th DCA July 19, 1990); Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986). See also, State v. Safford, 484 So.2d 1244 (Fla. 1986). Because pipeline cases are not final, the question of retroactivity is not implicated in application of a newly announced controlling decision. Reed. See also, State v. Castillo, 486 So.2d 565 (Fla. 1986) (application of State v. Neil, 457 So.2d 481 (Fla. 1984) to pipeline cases not a retroactive application as reference to retroactivity in Neil meant to apply to completed cases).

Generally, the "[d]ecisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since the time of trial." Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983); Accord, Castillo; Morgan v. State, 392 So.2d 1315, 1316 (Fla. 1981). That general rule has been applied to "pipeline" cases. See, Castillo; Safford; Reed. In fact, the decision in Reed involves a situation almost identical to the one in this case. There, the Fifth District Court of Appeal affirmed a guidelines departure sentence based upon its earlier decision in Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). After this court issued its decision in Pope, reversing the Fifth District, Reed timely moved for rehearing. The Fifth District granted rehearing on the authority of this court's decision in Pope, citing the general rule that Reed was entitled to the benefit of the law at the time of appellate disposition and rejecting the State's argument that such a ruling was an impermissible retro-

active application of Pope.

The same reasoning applies here. The application of Pope to this case is simply an application of the general and controlling law that cases are to be decided according to the law at the time of appeal. Petitioner Brown cited this court's initial decision in Ree v. State, 14 F.L.W. 565 (Fla. November 16, 1989) in his motion for rehearing. (A. 4-6). While that motion was pending, petitioner filed this court's decision in Pope as a notice of supplemental authority. (A. 7-9). Pope was therefore in effect and controlling while petitioner's appeal was still pending. The Third District was required to follow that law, Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973), and Brown requests that the cause be reversed and remanded with directions that he be resentenced within the guidelines.

(B)

There is authority which recognizes application of a new decision to a "pipeline" case as a retroactive application. Those cases, however, require such retroactive application based upon principles of fairness and the constitutional guarantees of equal protection. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, __ L.Ed.2d __ (1987)

In Griffith, the United States Supreme Court characterized the application of a new constitutional rule of criminal procedure to a "pipeline" case as a retroactive application. The court, however, held that retroactive application was required by "basic norms of constitutional adjudication". Id. 107 S.Ct. at 713. The court first noted that its duty to adjudicate cases and

controversies required that it apply its best understanding of the law to any case pending before it; otherwise, it would be acting not like a court but like a legislature.

Secondly, the court reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same." Id, 107 S.Ct. at 713. The court pointed out that

> [i]t "hardly comports with the ideal of 'administration of justice with an even hand,'" when "one chance beneficiary -- the lucky individual whose case was chosen as the occasion for announcing the new principle -- enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine."

Id. at 716 (citations omitted).

Mr. Pope benefited from the announcement of the rule that upon remand from a departure sentence with no written reasons, he must be resentenced within the guidelines. Moreover, this court and other appellate courts in this state, including the Third District Court of Appeal, have applied Pope to cases where sentence was imposed before the Pope decision, but appeals were pending after the Pope decision. Ferguson v. State, 15 F.L.W. 449 (Fla. September 6, 1990); Perez v. State, 15 F.L.W. 2309, 2310 (Fla. 3d DCA September 11, 1990); Smith v. State, 15 F.L.W. 1916 (Fla. 2d DCA August 8, 1990). To deny Mr. Brown the same benefit under identical circumstances is manifestly unfair and a denial of his state and federal constitutional rights to equal protection of the laws. U.S. Const. Art. IV, §1; Art I, §§ 2, 9, Fla. Const.; See, Myers v. Ylst, 897 F.2d 417, 421 (9th Cir 1990) ("[t]he equal protection clause prohibits a state from affording

one person (other than the litigant whose case is the vehicle for the promulgation of a new rule) the retroactive benefit of a [court's] ruling on a state constitution's right to an impartial jury while denying it to another"). Cf. 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); South Florida Blood Service v. Rasmussen, 467 So.2d 798, 803 (Fla. 3d DCA 1987) (court orders may constitute state action subject to constitutional limitations), approved 500 So.2d 533 (Fla. 1987). Accordingly, principles of equity and fairness, as well as the constitutional guarantees of equal protection of the laws, require that this court reverse and remand with directions that Mr. Brown be resentenced within the guidelines.

(II)

The State moved to have Brown sentenced as an habitual offender. After the prosecutor completed his argument on the motion, the trial judge simply made a general statement that the motion was granted because such action was necessary for the protection of the public. (T. 2229-2242). Such a general statement is insufficient to meet the requirement that the judge make explicit findings of fact which show on their face that an extended term is necessary for the protection of the public. Walker v. State, 462 So.2d 452, 454 (Fla. 1985); Bohannon v. State, 546 So.2d 1081 (Fla. 3d DCA 1989); §775.084(3),(4)(a),

Fla. Stat. (1985).[3] Accordingly, the Third District erred in failing to reverse Brown's habitual offender sentence and petitioner requests that this court reverse in that regard also.

CONCLUSION

Based on the cases and authorities cited herein, the appellant requests this court to reverse the judgment of the lower court.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3078

BY: Robert Burke
ROBERT BURKE
Assistant Public Defender
Florida Bar No. 434493

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 October, 1990.

Robert Burke
ROBERT BURKE
Assistant Public Defender

---

3 The offense occurred in December 1986. (R. 1-3A).