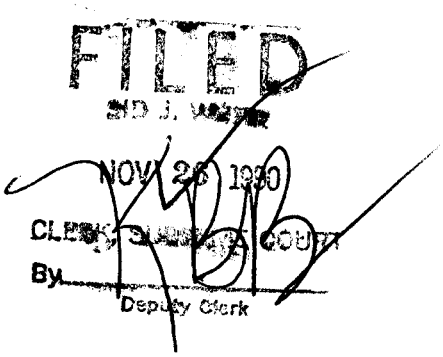
IN THE SUPREME COURT OF FLORIDA



CASE NO. 76,100

RANDY B. BROWN,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, **RANDY B. BROWN**, was the appellant in the court below and the defendant the trial court. The Respondent, **THE STATE OF FLORIDA**, was the appellee in the district court and the prosecution in the trial court. The parties will be referred to, in this brief, as they stand before this court.

The symbol "R" will be used, in this brief, to refer to the Record on Appeal before the District Court, the symbol "T" will designate the transcript of lower court proceedings which was before that court and the symbol "A" will identify the Appendix to Petitioner's Brief on the Merits. Pleadings filed in the district court will be referred to by their title. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts, although generally correct, does contain certain material omissions and argumentative statements of law. Therefore, its acceptance by the Respondent is conditioned upon the following corrections:

Regarding the habitual offender finding, the State argued in the trial court that Mr. Brown was convicted of strong-arm robbery in 1978 (T. 2232) and, thereafter, in 1980, when on probation for that crime, he committed armed robbery with a firearm, unlawful possession of a firearm while engaged in a

criminal offense and resisting an officer with violence. (T. 2232). He served a prison sentence, was paroled, and then committed the crimes involved in this case, which included Manslaughter. (T. 2233). Therefore, the State asked that the defendant be found a person who is an habitual offender because the protection of the public requires it. (T. 2233-2234). Certified copies of the convictions concerned were placed in evidence. (T. 2236).

Based on that reasoning, the court did find the defendant to be an habitual offender (T. 2242) and the State agreed to prepare the order. (T. 2242). However, it appears that no such order was entered.

The court also granted the State's Motion to Depart Upward from the recommended guidelines sentence, as follows:

> **THE COURT:** Court is going to deny the defense motion to deviate downward from the guidelines.
>
> Court is going to grant the State's motion to depart from the presumed sentencing guidelines for the following reasons:
>
> The defendant was on parole, to be followed by a probationary period, at the time that the manslaughter, attempted robbery were committed; that the defendant's commission of that manslaughter during the attempted robbery shows an escalating, continuing and persistent pattern of criminal conduct.

> And, having been on probation once before, which he violated, and being on parole here at this time of this offense, that it indicates to the Court he's not amendable to rehabilitation attempts.
>
> Also, another reason, that his juvenile record, which is reflected in the P.S.I. report, has been taken into consideration.
>
> Each one of these reasons for deviations standing alone would be just cause under the law.
>
> Is there anything else that anyone wants to say before sentencing?
>
> **MR. NOVICK:** We'll prepare an order to that effect.
>
> (T. 2263-2264).

The defendant's juvenile record was a ground which, although not originally plead, was argued by the State. (T. 2244).

It should also be noted that the first time the Petitioner asked that resentencing be required to be within the guidelines was on Motion for Rehearing. (Appellant's Initial Brief in the Third District Court of Appeals, 26; Appellant's Reply Brief in the Third District Court of Appeals, 9; A. 5-6).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL DID NOT REVERSIBLY ERR IN REMANDING THE CASE FOR RESENTENCING WITHOUT SPECIFICALLY REQUIRING THAT THE DEFENDANT NOT BE RESENTENCED AS AN HABITUAL OFFENDER AND BE SENTENCED WITHIN THE GUIDELINES. (Restated).

SUMMARY OF THE ARGUMENT

This case was decided and rehearing denied before this court's opinion in Ree v. State, 565 So.2d 1329 (Fla. 1990), which said that it was to be applied only prospectively, was issued. Where the only difference between Ree and Pope v. State, 561 So.2d 554 (Fla. 1990), upon which the Petitioner relies, are purely academic, the prospective application of Ree should preclude resentencing within the guidelines from being required in this case. This is especially true where prior opinions of this court could easily have led the district court into issuing its opinion in this case, which precisely followed the way this court had handled the same issue.

Similarly, the trial court should be given an opportunity to state any required reasons for habitualizing this defendant at resentencing, even assuming that a finding that an habitual offender sentence is necessary for the protection of the public (which was made) is somehow insufficient, where that is precisely the action that this court approved in Walker v. State, 462 So.2d 452 (Fla. 1985), relied upon by the Petitioner.

ARGUMENT

THE DISTRICT COURT OF APPEAL DID NOT REVERSIBLY ERR IN REMANDING THE CASE FOR RESENTENCING WITHOUT SPECIFICALLY REQUIRING THAT THE DEFENDANT NOT BE RESENTENCED AS AN HABITUAL OFFENDER AND BE SENTENCED WITHIN THE GUIDELINES. (Restated).

The Petitioner does not argue, nor could he, that he was not eligible for treatment as an habitual offender nor that that the reasons given for resentencing him outside the guidelines were insufficient. (T. 2232-2242, 2244, 2263-2264). Instead, he makes a classic "form governs over substance" argument that, where these findings were not properly memorialized, a defendant who should have been sentenced above the guidelines and as an habitual offender, cannot be. (Petitioner's Brief on the Merits). The Petitioner, in this case, is incorrect.

The keystone of the Petitioner's argument is that when this court stated, in Ree v. State, 565 So.2d 1329, 1331 (Fla. 1990) that, "This holding, however, shall only be applied prospectively.", it meant for the language to have no effect, whatsoever. It is respectfully submitted that the Petitioner is incorrect and that, had this court simply intended the usual "pipeline" rule to apply (Petitioner's position), it would not have addressed the issue at all. Where both the original opinion and the order on the Motion for Rehearing, in this case, were decided prior to the Ree opinion, it should not be applied to this case.

Further, there is no reason for applying Ree prospectively only and not doing the same with Pope v. State, 561 So.2d 554, 556 (Fla. 1990). Indeed, the reasons for applying Pope only on a prospective basis are even stronger than those in Ree where, prior to Pope, this court's opinions had created significant confusion on the resentencing issue. Barbara v. State, 505 So.2d 413 (Fla. 1987) specifically remanded for resentencing to permit the trial court to specify written reasons for departure where there were no prior written reasons given. Similarly, in Jackson v. State, 478 So.2d 1054, 1055 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), this Court approved "that part of the district court's decision directing a written order expressing reasons for departure" on remand to the trial court. This Court's explicit history of prior cases approving of remands to the trial court to enable the trial court to reduce the reasons for departure to writing certainly suggests that the reasons for applying Pope prospectively only are the only reasonable remedy for having implicitly misled lower courts as to the proper actions to be taken in resentencing.

The defendant, in cases such as this, is certainly not being exposed to a harsher penalty than be faced at his original sentencing and, if Pope and Ree are applied to cases such as this, the citizens of Florida are being denied the level of incarceration which should rightfully be imposed. Further, there is no practical difference between this case, in which the

departure reasons were read into the record at the time of sentencing, and the situation in Ree, in which an untimely written departure order was entered.

Virtually identical reasoning should permit the proper habitualizing of this defendant. Although the trial court may not have specifically stated his reasons, other than to state that such a finding was necessary for the protection of the public (T. 2229-2242), he obviously was approving the reasons given by the State, which were certainly more than adequate, especially when the orally - stated reasons for departure are examined. (T. 2232-2242, 2244, 2263-2264).

Indeed, the State interrupted the Judge's oral findings and offered to prepare the habitualization order (T. 2242-2243), but failed to do so. Walker v. State, 462 So.2d 543 (Fla. 1985), heavily relied upon by the Petitioner, is really of limited value to him where a reading of Walker makes it obvious that the trial court, in that case, failed to find even that the sentence was necessary for the protection of the public and where, in Walker, this court cited with approval Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983), a case in which, when the trial court failed to make the necessary finding that an habitual offender sentence was necessary for the protection of the public, the cause was remanded, "... so that the trial judge could make the necessary finding." Walker at 453. See also, McClain v. State, 356 So.2d 1256 (Fla.2d DCA 1978).

The trial judge should be permitted to make the necessary findings in this case, as well, and should also be permitted to set forth, in writing, the departure reasons that it had already announced. Therefore, the opinion of the Third District should be upheld.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Third District should be affirmed.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **ROBERT BURKE**, Assistant Public Defender, 1351 N.W. 12th Street, Miami Florida 33125 on this 21st day of November, 1990.

Charles M. Fahlbusch

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Assistant Attorney General

/gdp