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IN THE SUPREME COURT OF FLORIDA

KENNETH RICHARD CUMBIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,216

FILED
 JUL 6 1990
 DEPUTY CLERK

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant/appellant below, and will be referred to as petitioner in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T". An appendix containing the decision of the court below will be referred to as "A".

II STATEMENT OF THE CASE AND FACTS

The petitioner was charged with capital sexual battery and convicted of the lesser included offense of attempted capital sexual battery (R 1). The petitioner was originally sentenced to twenty years in prison followed by twelve years probation, as a guidelines departure. On appeal the First District Court of Appeal remanded the case for resentencing, as the sentence was beyond the statutory maximum. Cumbie v. State, 539 So.2d 538 (Fla. 1st DCA 1989).

On April 25, 1989, petitioner was resentenced to twenty years prison followed by ten years probation (R 3-7). The trial court stated:

This exceeds the recommended guidelines range but I will incorporate my previous order for departure from the guidelines sentence into the record and this was done on October 9, 1987, and filed in the record of this court (T 6).

The previous order stated that the departure was based on the fact that:

...the defendant took advantage of his position of familial authority and trust over the victim, his five year old step-daughter, to commit his criminal act. This unemployed defendant provided the primary care for the child-victim during the day-time when this activity occurred, while the child's mother attended school to become trained for job opportunities.

Trial testimony also showed that the defendant has had a "parental" type relationship with this child since shortly after her birth. The defendant by his own admission at trial indicated that he had "baby-sat" the child since she was a little baby.

This Court, therefore, finds that this defendant, KENNETH RICHARD CUMBIE, was the

only parental authority the child knew since birth and he abused his position of familial authority and trust and violently failed to provide "protection and sanctuary from such vile conduct." (citation omitted)

The petitioner appealed the new sentence to the First District Court of Appeal, raising two issues. The petitioner asserted that the trial court had erred in departing from the sentencing guidelines based upon abuse of familial authority and trust and in failing to provide contemporaneous written reasons for the departure sentence.

The First District Court of Appeal affirmed on both issues, but certified the following question as one of great public importance:

Whether abuse of a position of familial authority over a victim may constitute a clear and convincing reason justifying the imposition of a departure sentence for a conviction of attempted capital sexual battery? (A 2).

The petitioner filed a notice to invoke the discretionary jurisdiction of this Court on June 21, 1990.

III SUMMARY OF ARGUMENT

1. The petitioner was convicted of attempted capital sexual battery. The trial court's departure sentence was based on abuse of familial authority and trust. This is an invalid reason for departure where, as here, the offense is one which by its nature is directed toward children and, often, within the family setting. The existence of an abuse of trust in the commission of this offense does not sufficiently distinguish the petitioner's conduct from the "typical" commission of this offense in order to justify a departure sentence. The trial court's reasons for departure were impermissible and petitioner should be resentenced within the guidelines.

2. The written reason for departure was not provided contemporaneously with the imposition of the sentence. This is error and the case should be remanded for the imposition of a guidelines sentence.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE BASED UPON ABUSE OF FAMILIAL AUTHORITY AND TRUST WHERE THE OFFENSE WAS ATTEMPTED SEXUAL BATTERY.

This is an appeal from the District Court's affirmance of the petitioner's departure sentence. Cumbie v. State, 15 F.L.W. D1618 (Fla. 1st DCA, June 18, 1990). The departure was based upon abuse of familial authority and trust (R 77). The District Court's opinion certified the question of the validity of this departure reason, as it had in Wilson v. State, 548 So.2d 874 (Fla. 1st DCA 1989). Wilson also acknowledged conflict with Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987) and is currently pending before this Court. Wilson v. State, Case No. 74,872. This Court should answer the certified question in the negative, in that abuse of a position of familial authority is not a valid reason for imposition of a departure sentence for a conviction of attempted capital sexual battery.

In the original 1987 departure order the trial court cited four cases in support of its departure sentence. Since that time, however, this Court has decided Hall v. State, 517 So.2d 692 (Fla. 1988). Hall was charged with aggravated child abuse. The trial court departed, in part, because the crime was committed by the victim's natural parents, who were in a special position of trust within the family unit. This Court rejected familial authority as a reason for departure where the

offense is, by its nature, committed only against children and, often, within the family setting, stating:

There are, of course, some cases of child abuse which occur outside the family unit. However, since the use of familial authority exists in so many cases, its adverse effect may have been taken into consideration in the setting of the guideline range for that offense. In any event, to permit a built-in basis for departure in so many child abuse cases would be contrary to the purpose and spirit of the sentencing guidelines.

Id., at 695.

The same rationale would apply to sexual offenses against children, especially in the instant case, where the offense is expressly designed to protect children less than twelve years old. F.S., section 794.011 (2).

In Laberge, supra, the offense was lewd assault upon a child. The defendant was a teacher's aide at a school for emotionally and mentally handicapped children, which the victim attended. Departure from the sentencing guidelines was based in part upon the defendant's violation of a public and private trust resulting from the defendant's custodial control over the child victim. The District Court disapproved of this departure reason, stating:

Everyone in society is vulnerable and must trust others to not harm or hurt or steal. Everyone who breaks a criminal law violates this trust. Being naturally innocent in sexual matters, all children are especially vulnerable to the physical, mental, and emotional harm that can result from exposure to gross adult lewd acts. To protect children from that harm is the very purpose for section 800.04, Florida Statutes, which prohibits lewd acts on, or

in the presence of, children. While, of course, some such acts are committed by strangers to the children, unhappily experience shows that such statutes are most commonly violated by persons who take advantage of a trust position involving the care, custody, teaching, and training of children, such as educational, religious, social, and child care workers, relatives, step-parents, and babysitters (a true one to one trust relationship). Because it is only a difference in degree that all children are vulnerable to being victimized by lewd acts and because all who violate this statute also violate some degree of trust, departure from the recommended guidelines sentence for the basic offense of lewd acts on or in the presence of a child (section 800.04, Florida Statutes), should not be based on [this factor].

Id., at 417. See also Note, Are Children Competent Witnesses?:

A Psychological Perspective, 63 Wash. U.L.Q. 815, 821-22

(1985):

Identification of a perpetrator in sexual abuse cases is not a crucial issue because the perpetrator is usually a close friend or relative of the victim.⁴¹

⁴¹In a three-year study of New York City sexual abuse cases, concluded in 1971, researchers found that in 75% of the cases reported, the offender was a member of the child's own household, a relative not living in the neighborhood, a neighbor, a friend, or a person in the community with whom the child had frequent contact. Undeutsch, Courtroom Evaluation of Eyewitness Testimony, 33 Int'l Rev. of Applied Psychology 51 (1984); accord Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40:2 J. of Soc. Issues, 125, 126 (1984).

The Fifth District reasoned:

. . . the supreme court in Lerma v. State, 497 So.2d 736, 739 (Fla. 1986) stated that "emotional hardship" can never constitute a

clear and convincing reason to depart because nearly all sexual battery cases inflict emotional hardship on the victim. We understand Lerma to hold that any factor, though not an element of the offense, that is commonly appurtenant to the offense, . . . should not be used to authorize a departure sentence because, contrary to the intent of the guidelines sentencing, a departure sentence, rather than the recommended sentence, could be authorized in most cases.

Laberge, 508 So.2d at 417. Applying this analysis to the facts then before the court, the Fifth District reasoned that "vulnerability" and "breach of trust" are common factors in child molestation cases, and if these factors were to authorize departure sentences, the "exceptional case" would become the rule, and departure sentences, rather than recommended sentences, would be authorized in a large percentage of all sentences based on violations of section 800.04, Florida Statutes. Id. at 417-18. See also, Odom v. State, 15 F.L.W. D1347 (Fla. 5th DCA May 17, 1990); Graham v. State, 557 So.2d 669 (Fla. 5th DCA 1990).

As the courts acknowledged in Hall and Laberge, the child's vulnerability, and abuse of trust or of familial authority are factors common to most child abuse and child sex offense cases. Under the rationale of Hall and Laberge, factors common to the majority of cases cannot justify departure because such factors are insufficient to distinguish the extraordinarily severe case from the "typical" case. Because they are typical of the offense, petitioner's familial authority and

abuse of that trust does not justify departure in the instant case.

A second argument against departure is that the phrase "familial authority" refers to an offense of which petitioner was not convicted. **F.S.**, section 794.041. An offense which did not result in conviction cannot be used to justify departure. Rule **3.701(d)(5)**, Fla.R.Crim.P.

The reason which the First District approved below is an invalid basis for departure. This Court should answer the certified question in the negative and remand this case for imposition of a guidelines sentence.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO PROVIDE
CONTEMPORANEOUS WRITTEN REASONS FOR THE
DEPARTURE SENTENCE.

At the sentencing hearing the trial court "incorporated" its 1987 departure order as the reason for its present departure sentence. In Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989), this Court held that a written departure order shall be rendered contemporaneously with the sentence. The Court approved the language of the First District Court of Appeal in Oden v. State, 463 So.2d 313, 314 (Fla. 1st DCA 1984), in which it stated:

{I}t was reversible error for the trial court to depart from the guidelines without providing a contemporaneous written statement of the reasons therefor at the time each sentence was pronounced.

(Emphasis supplied in Ree). This Court held that the sentencing guidelines and rules do not allow a trial court to decide a sentence before giving counsel an opportunity to make argument:

Fundamental principles of justice require that decisions restricting a person's liberty be made only after a neutral magistrate gives due consideration to any argument and evidence that are proper. However, we are equally persuaded that the statutes and rules that create the sentencing guidelines require written reasons for departure that are "contemporaneous", Oden. To be "contemporaneous", reasons must be issued at the time of sentencing.... We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

Ree, at 566. These concerns apply equally to sentencing of the petitioner after remand by the District Court. The trial court expressly did not just reduce the amount of probation, but instead, imposed a new, complete sentence (T 3-5). Written reasons justifying the departure should have been provided contemporaneously with the imposition of the new sentence.

The only remedy which makes the Ree opinion meaningful is to sentence the petitioner within the guidelines, (9-12 years) in accordance with Shull v. Dugger, 515 So.2d 748 (Fla. 1987). Ree lists this as one of the three options open to the trial court when imposing sentence. The other two options are not applicable here. The trial court has already failed to handwrite the reasons at the time of the sentence. The other option of having a separate hearing to determine if departure is appropriate is not feasible here since the trial court has already made this determination. To allow the trial court to now go back and simply restate departure reasons in a "contemporaneous" writing would make meaningless this Court's stern warning to trial courts that a departure sentence is an extraordinary punishment which should be given serious and thoughtful attention.

This conclusion is supported by this Court's recent decision in Pope v. State, No. 74,163 (Fla. April 26, 1990). In Pope, this Court, relying on State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and Shull v. Dugger, 515 So.2d 748 (Fla. 1987), remanded for the imposition of a

guidelines sentence where the trial court had failed to provide written reasons for departure. Jackson requires compliance with Florida Rules of Criminal Procedure, Rule 3.701(d)(11), which mandates that departure sentences be "accompanied by a written statement delineating the reasons for departure". Orally stated reasons are invalid.

Shull held that where the initial reasons for departure are later held to be invalid, the case must be remanded for imposition of a guidelines sentence. This result avoids multiple appeals, multiple sentencings, and unwarranted efforts to justify an original departure. Pope, at **S244**. This Court held:

Effectively, Jackson and Shull both determined that at the point of remand no valid reasons for departure existed under the rule. Jackson said oral reasons were invalid and required resentencing. Shull said invalid reasons, even if written, must be remanded only for a guidelines sentence.

Applying the principles of Jackson and Shull, and for the same policy reasons, we hold that when an appellate court reverses a departure sentence because there are no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines.

Pope, at **S244**. Applying the principles of Jackson, Shull, Ree, and Pope to the instant case results in resentencing with no possibility of departure.

There are a number of criteria which a departure sentence must meet in order to be valid. The sentence must be (1) accompanied by contemporaneous, (2) written reasons for departure. Ree, Jackson, Rule 3.701(d)(11). The departure

sentence must be, (3) based on circumstances which reasonably justify the departure and, (4) the facts supporting the departure must be shown by a preponderance of the evidence. F.S. section, 921.001(5). The departure reasons, (5) must not include factors relating to prior arrests without convictions, or, (6) factors relating to the instant offense for which convictions have not been obtained. Rule 3.701 (d)(11). None of these criteria can be said to be any more or less important than the others. All of the criteria must be met for there to be a valid departure sentence. If the sentence fails to meet any of the criteria, it is an invalid departure sentence.

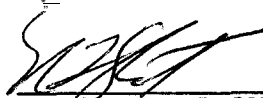
Here, the untimely written reasons are invalid. Ree. Thus, since no valid reasons for departure existed at the time of remand, under the principles of Pope, this case should be remanded with instructions to impose a guidelines sentence.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Petitioner requests that this Court reverse his sentence and remand for imposition of a guidelines sentence.

Respectfully submitted,

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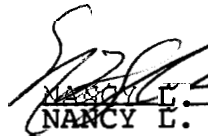


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand delivery to Carolyn Mosley, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, KENNETH RICHARD CUMBIE, #352167, Polk Correctional Institution, Post Office Box 50, Polk City, Florida, 33868-9213, this 6th day of July, 1990.


NANCY L. SHOWALTER
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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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