IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,235

RHODA SMITH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is the initial brief on the merits of petitioner Rhoda Smith on discretionary review of the following certified question from the Third District Court of Appeal:

> SHOULD POPE v. STATE BE APPLIED RETROACTIVELY TO SENTENCES IMPOSED PRIOR TO APRIL 26, 1990?

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The petitioner was charged by indictment in Circuit Case No: 86-8694 on September 9, 1986, with the first degree murder of her son in violation of §782.04, Fla. Stat. (1985), and aggravated child abuse in violation of §827.03(1). (R: 2-3) On June 22, 1987, the petitioner pled nolo contendere to the reduced crime of manslaughter and to aggravated child abuse. (R: 23) She was adjudicated guilty and sentenced pursuant to the sentencing guidelines on each count to 7 years in prison to be followed by 5 years probation, each count to run concurrently. (R: 22-27)

On November 13, 1989, while on the probation imposed in the first case, the petitioner was charged by information in Circuit Case No: 89-41575 with the new offense of child abuse in violation of §827.04, Fla. Stat. (1987). (R: 44) An affidavit of violation of probation was also filed in her first case. (R: 33-34)

A plea hearing was held on these two cases on December 1,

1989. (R: 29) During the hearing, Joe Clark, the drug counselor at TASC, the court system's drug abuse center, reported to the judge that he had examined the petitioner and that she had a severe drug problem. (R: 32) His recommendation for her was a residential drug treatment program. (R: 32) Mr. Clark and the petitioner's attorney, Vincent Dunn, arranged for her to enter the residential drug treatment program at Spectrum in south Dade County. (R: 33-34) The judge agreed with this program. (T: 33-34) The petitioner entered her plea of nolo contendere as charged to child abuse in her second case and admitted the violation of probation in her first case. (R: 37, 50) The sentencing guidelines scoresheet on the second case scored out to a recommended sentence of $3\frac{1}{2}$-$4\frac{1}{2}$ years in prison. (R: 33, 54) The court departed downward from the recommended guidelines range and placed the petitioner on probation for four years concurrent with the continued probation of four years in the first case, with the special condition that the petitioner enter and successfully complete the Spectrum drug treatment program. (R: 34, 38, 52-53)

The state objected to the trial judge's downward departure sentence and appealed the departure to the Third District Court of Appeal. (R: 38, 57)

On June 5, 1990, the Third District issued its opinion, holding that since the trial court failed to provide contemporaneous written reasons for departure, the case would be reversed and remanded pursuant to Pope v. State, 561 So.2d 554 (Fla. 1990), for imposition of a sentence within the sentencing

guidelines. (A: 1-2) However, the Third District noted that the practice in most districts, and the remedy in the Supreme Court's decision in Barbera v. State, 505 So.2d 413 (Fla. 1987), a case similar to the present case which was relied upon by petitioner as authority for the departure, was to remand downward departures with valid but unwritten reasons to the trial court for the entry of a written order placing the oral reasons in writing. (A: 2) The Third District then certified the following question regarding the retroactive application of Pope to this Court for discretionary review:

> SHOULD POPE v. STATE BE APPLIED RETROACTIVELY TO SENTENCES IMPOSED PRIOR TO APRIL 26, 1990?

SUMMARY OF ARGUMENT

The petitioner submits the certified question should be answered in the negative and that the decision of the Third District Court of Appeal should be quashed with the case remanded to the Third District. This Court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990), should be given prospective application only, as this Court held in the similar case of Ree v. State, ___ So.2d ___, 15 FLW 395 (Fla. July 19, 1990). Both Ree and Pope involve situations where there were no written reasons for departure filed contemporaneously with the pronouncement of sentence; Ree concerned the situation where the written order was filed late and Pope concerned the situation where no written order was filed. Applying Pope retroactively to defendants, as the petitioner here, who were sentenced prior to this Court's issuance of Pope would be highly unfair, as defendants state-wide have relied upon the decisions of the district courts of appeal, sanctioned by this Court, that routinely remanded such cases back to the trial courts to place the oral reasons for departure into a written order. A retroactive application would also violate the ex post facto law, as the judicial decision in Pope operates like an ex post facto law that the Constitution forbids, and would violate equal protection, as similarly situated defendants have benefited from the remand.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT HOLDING THAT THIS COURT'S DECISION IN POPE V. STATE, 561 SO.2D 554 (FLA. 1990), SHOULD BE GIVEN RETROACTIVE APPLICATION SHOULD BE QUASHED, WHERE SUCH RETROACTIVE APPLICATION WOULD VIOLATE PETITIONER'S RIGHT AGAINST EX POST FACTO LAW AND RIGHT TO EQUAL PROTECTION AND WHERE PETITIONER RELIED ON LONG-STANDING LAW PERMITTING SUCH CASES TO BE REMANDED FOR PLACING THE ORAL REASONS FOR DEPARTURE INTO WRITING.

The issue before this Court is whether this Court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990), is to be given retroactive application to sentences imposed prior to April 26, 1990, the date of Pope.

Pope involved an upward departure sentence in which the trial court gave oral reasons for the departure at the sentencing hearing, but never provided a written order outlining the reasons in writing. The Fifth District vacated the sentence due to the trial court's failure to provide written reasons pursuant to State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and remanded the case to the trial court for the opportunity to provide written reasons justifying the departure. Upon conflict review of the district court's decision, this Court quashed the opinion of the district court and remanded the case for resentencing within the guidelines with no possibility of departure. This Court reasoned that since Jackson said "oral reasons were invalid and required resentencing," and Shull v. Dugger, 515 So.2d 748 (Fla. 1987), said "invalid reasons, even if

written, must be remanded only for a guidelines sentence," then at the point of remand, "no valid reasons for departure existed under the guidelines." Pope v. State, supra at 555. This Court then 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."

In the present case, the petitioner was given a sentence departing downward from the recommended guidelines sentence. As in Pope, the trial judge gave oral reasons for imposing the departure sentence at the sentencing hearing, but never provided a written order listing these reasons in writing. The Third District reversed the sentence and remanded the case for resentencing within the guidelines in accordance with this Court's decision in Pope. However, the Third District certified the question regarding the retroactive application of Pope to cases such as this in which the defendant had been sentenced prior to the date of the Pope decision.

The petitioner submits that Pope should be given prospective application only. This Court recently issued its revised opinion in Ree v. State, ___ So.2d ___, 15 FLW 395 (Fla. July 19, 1990), in which this Court held that Ree should be given prospective application only. Ree is similar to the present case. In Ree, this Court held that when a trial court departs from the guidelines, the written reasons for departure must be issued contemporaneously with the departure sentence at the time of the sentencing. This Court agreed with the Fourth District that a

written order citing the reasons for departure that was filed five days after the sentencing hearing was not contemporaneous with the pronouncement of sentence and required reversal of the case for resentencing. This Court specifically stated that this holding "shall only be applied prospectively."

Under Ree, it does not matter whether the written reasons were filed a day late, five days late, 25 days late, or weeks or months after the pronouncement of sentence. See Lyles v. State, 559 So.2d 370 (Fla. 1st DCA 1990) review pending (Fla.S.Ct. Case No: 75,878) (written reasons filed three days after pronouncement of sentence); Holmes v. State, 556 So.2d 1224 (Fla. 4th DCA 1990) (written reasons filed 17 days after sentence); Owens v. State, ___ So.2d ___, 15 FLW 1619 (Fla. 1st DCA, June 18, 1990) (written reasons filed a month after pronouncement of sentence); Hayes v. State, ___ So.2d ___, 15 FLW 1678 (Fla. 2d DCA, June 20, 1990) (written reasons filed two months after sentence). The result is the same: the written reasons are not filed contemporaneously with the pronouncement of sentence and the sentence must be reversed for resentencing. Also, presumably under Ree, it is no longer permissible for an appellate court to relinquish jurisdiction in a case to the trial court for the entry of an order listing the written reasons because again, the written reasons would not be issued contemporaneously with the pronouncement of sentence. See Elkins v. State, 489 So.2d 1222, 1224, n.2 (Fla. 5th DCA 1986). The critical point outlined in Ree is the contemporaneous issuance of written reasons and pronouncement of sentence.

The logical extension of this, of course, is that under Ree, it does not matter whether written reasons are ever even filed at all: the result is the same. In other words, since it does not matter how late the written reasons are filed - they are invalid regardless of the length of passage of time - then it does not matter whether written reasons were ever even filed at all. Both late-filed-reasons and no-filed-reasons have the same underlying fault: they are not issued contemporaneously with the pronouncement of sentence as expressly required by Ree and the sentencing guidelines.

Indeed, this Court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990), again 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), expressly states that when no written reasons at all are given for a departure sentence, the case must be remanded for resentencing within the guidelines. Since this Court has already determined that the resentencing required for late written reasons in Ree is prospective only, the resentencing required for no written reasons under Pope must also be found to be prospective only.

Certainly, this is the only logical and fair result. As this Court recognized in Pope, many district courts of appeal routinely remanded cases for the entry of a written order when the trial court provided oral reasons for departure but failed to place those reasons in writing. Daughtry v. State, 521 So.2d 208 (Fla. 2d DCA 1988); State v. Simmons, 539 So.2d 40 (Fla. 3d DCA 1989); State v. Wayda, 533 So.2d 939 (Fla. 3d DCA 1988); State

v. Adams, 528 So.2d 548 (Fla. 3d DCA 1988); State v. Wilson, 523 So.2d 178 (Fla. 3d DCA 1988); State v. Richardson, 536 So.2d 1193 (Fla. 4th DCA 1989); State v. Chaney, 514 So.2d 436 (Fla. 4th DCA 1987); Boynton v. State, 473 So.2d 703, 707 (Fla. 4th DCA 1985). In this case, the Third District acknowledged it routinely remanded such cases for the trial court to reduce its oral reasons to a written order. (A: 2) Indeed, in the very case relied upon by the petitioner here in her response to the state's direct appeal in the district court, Barbera v. State, 505 So.2d 413 (Fla. 1987), this Court remanded for resentencing to permit the trial court to place the drug dependency and rehabilitation reasons for departure into a written order. See also State v. Oden, 478 So.2d 51 (Fla. 1985) (approving Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984), in which the district court remanded for resentencing to permit trial court to place reasons for departure, if any, in writing). Thus, there was a long-standing practice in the district courts of appeal, sanctioned by this Court, to remand cases to the trial courts to place valid oral reasons for departure into a written order. The petitioner here has, as have many defendants state-wide, relied upon this long-standing practice and should not now be forced to suffer the most severe sanction possible - sentencing within the guidelines - for her reliance on these appellate decisions.

In addition, permitting Pope to be applied retroactively would operate to the petitioner's disadvantage in the same way a retroactive application of a law would be ex post facto. As this Court itself recognized in Pope, its holding constitutes a

substantial change in the law as it was previously interpreted by this Court and other district courts of appeal. This Court acknowledged that many district courts of appeal remanded such cases to the trial court for the entry of a written order, and further, in Pope, this Court specifically receded from its earlier holding in Barbera v. State, 505 So.2d 413 (Fla. 1987), remanding for written reasons, to the extent it was inconsistent with Pope. By overruling the previously condoned practice, Pope constitutes a new judicial interpretation of law that may not be applied retroactively to the petitioner as it clearly operates to her disadvantage. See Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), in which the United States Supreme Court held that an unforeseeable judicial change in a criminal statute, applied retroactively, operates precisely like an ex post facto law that the Constitution forbids. See also United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), where the Court declared that a rule of criminal procedure that was "a clear break with the past" was almost invariably found to be nonretroactive.

Moreover, by applying Pope retroactively, the district court is denying the petitioner her state and federal constitutional right to equal protection of the law. Article IV, Section 1, United States Constitution; Article I, Sections 2 and 9, Florida Constitution. Other defendants in the same position as the petitioner receive the benefit of this Court's decision in Ree holding its decision nonretroactive, and the benefit of other decisions from this Court and other district courts of appeal

permitting them to have their cases remanded for the placement of valid oral reasons into a written order. Treating petitioner differently denies her the right to equal protection under the law. See Mitchell v. State, 157 Fla. 121, 25 So. 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 denied 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., 654 P.2d 673 (Wash. 1982), which affirmed the 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).

Consequently, Pope should not be applied retroactively to defendants who were sentenced prior to this Court's decision in Pope. Since the petitioner here was sentenced long before Pope was issued, the decision of the Third District Court of Appeal should be quashed.[1] See Stewart v. State, 549 So.2d 171, 176

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[1] The decision of the Third District does not address the merits of the reason for the trial court's downward departure. However, a review of the record shows the departure sentence was reasonably justified by the reasons given at the sentencing hearing and that the downward sentence should be affirmed.

The record demonstrates the petitioner had a long-term drug problem which formed the underlying basis for the crimes which she had committed: child abuse in the present case and manslaughter by child abuse in her previous case. (R: 32) Even the prosecutor acknowledged the petitioner's crimes were due to her drug dependency. (R: 38) Joe Clark, the drug counselor at (Cont'd)

(Fla. 1989) (where defendant was sentenced prior to issuance of decision holding that failure to provide contemporaneous written reasons for imposing death penalty required reversal of death penalty and resentence to life imprisonment, defendant's case would be remanded to trial court for entry of written reasons).

TASC, the court's drug abuse center, examined the petitioner and informed the court his recommendation for her severe drug problem was a residential drug treatment program at Spectrum in south Dade County. (R: 32-34)

The record further shows that no drug program and no drug treatment had been given the petitioner at her sentencing for her first offense. That sentence was seven years in prison to be followed by five years probation. (R: 34-35) When the petitioner was released from prison and entered her probationary period, she still had her drug problem and this drug problem was again a basis for her commission of the same type of child abuse in this second offense. (R: 38) It was not until the present sentencing for this second offense that the court afforded the petitioner a definite drug treatment program in an effort to curb this cycle of drug abuse and child abuse. Rather than place the petitioner back in prison, which had clearly given her no drug treatment before, the court placed her on probation for four years with the special condition she enter and successfully complete the Spectrum drug treatment program, the first extensive and comprehensive drug treatment she had ever received.

This is a valid reason for departing downward from the guidelines. Barbera v. State, 505 So.2d 413 (Fla. 1987) (drug dependency may be valid reason for departure downwards); State v. Wilson, 523 So.2d 178 (Fla. 3d DCA 1988) (same); State v. Whitten, 524 So.2d 1114 (Fla. 3d DCA 1988) (same); State v. Fink, 557 So.2d 129 (Fla. 3d DCA 1990) (defendant's drug addiction and amenability to rehabilitation proper bases for downward departure); State v. Bledsoe, 538 So.2d 94 (Fla. 3d DCA 1989) (same); State v. Forbes, 536 So.2d 356 (Fla. 3d DCA 1988) (same); State v. Salony, 528 So.2d 404 (Fla. 3d DCA 1988) (defendant's chronic drug abuse problem which caused him to commit instant crime and prior offenses valid reason for downward departure); State v. Daughtry, 505 So.2d 537 (Fla. 4th DCA 1987) (drug addition and use of drugs during commission of crime valid reason for downward departure); see also Rule 3.701(b)(2), Fla.R.Crim.P. (although primary purpose of sentencing is to punish, rehabilitation continues to be a goal of the criminal justice system); Rule 3.701(b)(7), Fla.R.Crim.P. (because the capacities of state and local correctional facilities are finite, the "sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence"); §948.01(3), Fla. Stat. (1989) (allows court in its discretion to place defendant on probation); §921.187(a), Fla. (Cont'd)

CONCLUSION

For the foregoing reasons, the petitioner requests this Court to quash the decision of the Third District Court of Appeal and to hold that this Court's decision in Pope is not to be applied retroactively to persons who were sentenced prior to the issuance of Pope.

Respectfully submitted,

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Stat. (1989) (provides that a court may place defendant on probation as an alternative to sentencing in a manner which will "provide the opportunity for rehabilitation"); §§397.12, Fla. Stat. (1989) (the court may in its discretion require the person charged or convicted of drug crimes to participate in a licensed drug treatment program "to provide a meaningful alternative to criminal punishment for individuals capable of rehabilitation as useful citizens through techniques and programs not generally available in state or federal prison systems").

Consequently, it cannot be said that the trial judge abused his discretion in adopting the TASC rehabilitation plan and placing the petitioner in a residential drug treatment program. The trial court properly departed from the guidelines and upon remand, the court should be permitted to place these proper reasons into a written order.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, 401 NW 2nd Avenue, Miami, Florida 33128, this 27th day of July, 1990.

By: Marti Rothenberg
MARTI ROTHENBERG #320285
Assistant Public Defender

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1990

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 89-3012
RHODA SMITH a/k/a RHODA MAGDALENE SMITH,	**	
Appellee.	**	

Opinion filed June 5, 1990.

An Appeal from the Circuit Court of Dade County, Martin D. Kahn, Judge.

Robert A. Butterworth, Attorney General, and Monique T. Befeler, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellee.

Before COPE, GERSTEN and GODERICH, JJ.

PER CURIAM.

The trial court's failure to provide contemporaneous written reasons for departure from the sentencing guidelines requires that this cause be remanded for imposition of a sentence within

APPENDIX: 1

the guidelines with no possibility of departure from the guidelines. See Pope v. State of Florida, (Fla., Case No. 74,163, opinion filed April 26, 1990)[15 FLW S243]. Upon remand, the trial court must sentence the defendant, Rhoda Smith, within the guidelines. However, if the defendant entered her plea of guilty to the child abuse charge as a result of a plea agreement, the defendant should be allowed to withdraw her guilty plea and proceed to trial.

Although we follow Pope, we note that the sentencing at issue in the present case occurred on December 1, 1989, prior to the supreme court's decision in Pope. Pope acknowledges "that in Barbera v. State, 505 So.2d 413 (Fla. 1987), we remanded for resentencing to permit the trial court to specify written reasons for a departure sentence. We recede from Barbera to the extent that it is inconsistent with this opinion." Pope, 15 FLW at 244. The opinion also acknowledges that the practice in some districts, including this one, has been to remand in order for the trial court to reduce its oral reasons to a written order, id.; see also, e.g., State v. Evans, (Fla. 3d DCA, Case No. 88-1936, opinion filed Jan. 16, 1990)[15 F.L.W. 206]; State v. Gavins, (Fla. 3d DCA, Case No. 89-1490, opinion filed Jan. 16, 1990)[15 F.L.W. 200]; Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984), aff'd 478 So.2d 51 (Fla. 1985), and Pope effectively overrules those decisions. Although we follow Pope as announced, we certify to the Florida Supreme Court the following question of great public importance:

SHOULD POPE V. STATE BE APPLIED RETROACTIVELY TO SENTENCES IMPOSED PRIOR TO APRIL 26, 1990?

We vacate the current sentence and remand for proceedings consistent herewith.

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