

IN THE SUPREME COURT OF FLORIDA

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JAMES C. OWENS,

Petitioner,

76,516

v.

CASE NO.: 90-0189

STATE OF FLORIDA,

Respondent.

_____ /

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Owens v. State, 15 F.L.W. 1619 (Fla. 1st DCA June 18, 1990).

Petitioner was the appellant in the district court and the defendant in the circuit court, and will be referred to as Petitioner. Respondent was the appellee in the District Court and the prosecutor in the circuit court, and will be referred to as Respondent or the State.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Since the argument herein is within the page limitation for summaries of argument, a formal summary of the argument will be omitted.

ARGUMENT

ISSUE I

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION IN THIS CAUSE.

In its opinion below, the First District Court of Appeal affirmed Petitioner's conviction but remanded the cause for resentencing pursuant to Ree v. State, 14 F.L.W. 565 (Fla. November 16, 1989) because written reasons for Petitioner's guidelines departure sentence were issued subsequent to the sentencing hearing. The district court stated:

We affirm the conviction, but reverse the sentence and remand this case to the trial court for resentencing in accordance with Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989). Since the trial court has already heard the evidence relating to sentencing, it may comply with Ree by issuing its written reasons for departure at the hearing on remand at which sentence is imposed.

Appellant argues that on remand the trial court should be restricted to resentencing him within the sentencing guidelines, citing Shull v. Dugger, 515 So.2d 748 (Fla. 1987). In that case, the supreme court held that when all the departure reasons have been reversed, the sentencing judge may not enunciate new reasons for a departure sentence on remand. The court found that to hold otherwise "may needlessly subject the defendant to unwarranted efforts to justify the original sentence" and could result in multiple appeals and resentencing. *Id.* at 750.

In Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990), the supreme court recently held that when an appellate court reverses a sentence due to the trial court's failure to provide written reasons for departure, it "must remand for resentencing with no possibility of departure from the

guidelines," applying the principles and policy reasons enunciated in Shull v. Dugger and in State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 665 (Fla. 1987). The court stated:

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 guideline sentence.

We find the holding in Pope distinguishable from the situation involved in the case at issue, where at the point of remand valid written reasons for departure do exist. The only problem here is the trial court's failure to have timely issued those written reasons for departure at the sentencing hearing. Allowing the trial court on remand to reimpose the departure sentence based on these same written reasons will not, as in Shull, subject appellant to "unwarranted efforts to justify the original sentence" and will not result in multiple appeals and resentencings. The problems articulated in Jackson, regarding the confusion engendered when no written reasons for departure have been issued, are simply not involved in this type of case.

Owens v. State, 15 F.L.W. D1619 (Fla. 1st DCA June 18, 1990).

Petitioner contends that the opinion below conflicts with this Court's decisions in Pope v. State, 561 So.2d 554 (Fla. 1990), Shull v. Dugger, 515 So.2d 748 (Fla. 1987). The State will show that no conflict exists and that Petitioner's reliance on the two cases cited above is misplaced and does not form a basis for this Court to assume "conflict" jurisdiction.

Petitioner first argues that the opinion below in this case conflicts with Shull v. Dugger, supra. wherein the Florida Supreme Court stated:

Generally, when all reasons stated by the trial court in support of departure are found invalid, resentencing following remand must be within the presumptive guidelines sentence.

Shull v. Dugger, supra. at 749. It is clear that this language refers to the situation where no reasons for departure found by the trial court are valid. In the opinion below in this case, the departure reasons were found to be valid. Consequently, there is no conflict, as the two opinions address different situations.

Petitioner next argues that the opinion below in this case conflicts with Pope v. State, wherein the Florida Supreme Court stated:

. . . 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.

Pope v. State, supra. at 556. It is clear that this language refers to the situation where no written reasons for departure are given by the trial court. In the instant case, written reasons for departure were issued by the trial court, albeit subsequent to the sentencing hearing. Consequently, there is no conflict, as the two opinions address different situations.

The cases cited by Petitioner are so dissimilar factually with the instant case that they afford this Court no basis for assuming "conflict" jurisdiction.

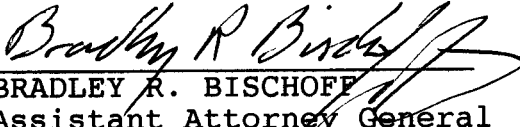
Petitioner urges as a further reason for accepting jurisdiction the fact that this Court has accepted jurisdiction in three other cases on the issue presented here. The State questions this reasoning as it appears that it is not in the best interest of this Court or the taxpayers of this state to assume jurisdiction of a potentially vast number of cases in order to decide the same legal issue. A motion to stay proceedings pending resolution of the issue in the three cases mentioned would, if granted, have the same ultimate effect and would result in a more economical use of judicial resources.

CONCLUSION

Due to the fact that the cases cited by Petitioner seeking to establish conflict jurisdiction in this Court are predicated on a set of factual circumstances not present in the instant case, Respondent respectfully requests that this Honorable Court decline to accept jurisdiction over the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

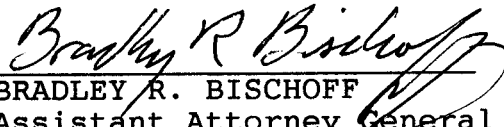

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to DAVID P. GAULDIN, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 17th day of September, 1990.


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Assistant Attorney General