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IN THE SUPREME COURT OF FLORIDA

JAMES C. OWENS, :

Appellant/Petitioner, :

vs. : CASE NO. 76,516

STATE OF FLORIDA, :

Appellee/Respondent. :

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATE OF FLORIDA, :

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______________________________/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

References to the record before the Florida First District Court of Appeal shall be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

By information dated July 14, 1988, Petitioner was charged with aggravated battery, which was alleged to have taken place between June 12, 1988, and June 13, 1988. (R-278).

Petitioner proceeded to jury trial and on November 4, 1988, was found guilty as charged. (R-268).

On December 20, 1988, Petitioner was sentenced to 10 years in prison followed by 5 years of probation, with restitution to be determined by a later hearing. (R-429; 474-476).

Petitioner was sentenced outside of the Guidelines at his sentencing hearing. (R-474). The oral reason for departure was that Petitioner was released from prison on March 24, 1988, and the crime in this case was committed by Petitioner on June 12 or 13th, 1988. (R-474).

The trial court's written departure order was not entered until January 19, 1989, or almost a month after the sentencing hearing. (R-435).

Petitioner appealed his conviction and sentence to the Florida First District Court of Appeal and on June 18, 1990, that Court issued its opinion (appendix). The First District refused to require the circuit court to sentence Petitioner within the Guidelines for failure to contemporaneously issue written departure reasons.

Petitioner sought rehearing based on this Court's decisions in Pope v. State, 561 So.2d 554 (Fla. 1990) and Ree v.State, 565 So.2d 1329 (Fla. July 19, 1990) ("Ree II") and

requested the First District to certify the following question as one of great public importance:

> When a trial court gives contemporaneous oral departure reasons but fails to render contemporaneous written reasons, must an appellate court remand with instructions that a guidelines sentence be entered?

On July 23, 1990, the First District stubbornly refused to certify this question, denied the motion for rehearing, and contented itself with hiding behind the jurisdictional shield to this Court which Petitioner now attempts to pierce.

Notice to invoke discretionary jurisdiction was filed on or about August 20, 1990. By written order dated December 13, 1990, this Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF THE ARGUMENT

After both Pope and Ree, it is clear that oral reasons contemporaneously announced at a sentencing hearing are insufficient to support a guidelines departure if contemporaneous written reasons are not also rendered. Here, the written reasons were not rendered until approximately a month after Appellant's sentencing hearing. In a recent case issued by this Court, written reasons were not simultaneously rendered with the contemporaneous oral reasons, resulting in a remand by this Court to the district court with instructions to remand to the trial court in order that a guidelines sentence would be imposed. Appellant is entitled to the same relief.

ARGUMENT

ISSUE: THE FLORIDA FIRST DISTRICT COURT OF APPEAL ERRED WHEN IT REMANDED APPELLANT'S SENTENCE WITH THE INSTRUCTIONS THAT THE LOWER COURT COULD STILL DEPART FROM THE GUIDELINES EVEN THOUGH THE DEPARTURE REASON WAS ORALLY ANNOUNCED BUT NOT CONTEMPORANEOUSLY RENDERED IN WRITING.

This case presents the now all too common issue of whether a guidelines sentence is required when a trial court fails to issue contemporaneous written reasons for departure where it did announce the same oral reason for departure at the time of sentencing.

Here, on December 20, 1988, Appellant was sentenced and the oral reason for departure was announced. However, the trial court's written departure order was not issued until January 19, 1989, or almost a month after the sentencing hearing. (R-435).

Appellant believes that this issue has been answered in his favor, and as such, will not belabor the Court with a long-winded argument.

Shull v. Dugger, 515 So.2d 748 (Fla. 1987), Pope v. State, 561 So.2d 554 (Fla. 1990), and Ree v. State, 565 So.2d 1329 (Fla. 1990), together stand for the proposition that when contemporaneous written departure reasons are not issued at the sentencing hearing, an appellate court must remand for resentencing within the guidelines. The First District's opinion in this case expressly and directly conflicts with this holding by allowing the trial court another shot at departure.

This principle has recently been illustrated by this Court in Robinson v. State, 15 FLW S612 (Fla. 1990). When Robinson was originally sentenced, the trial court gave two oral reasons for departure but failed to give contemporaneous written reasons for departure.

On appeal, the Third District Court of Appeal reversed his sentence and (incorrectly) observed that the trial court could again depart but must issue written contemporaneous reasons for doing so. Again, the trial court departed and gave contemporaneous oral reasons, but failed to issue contemporaneous written reasons (it did enter written reasons seven months later).

This Court ordered that Robinson be resentenced within the recommended guidelines, relying upon Pope.

The only difference between this case and Robinson (and it is not significant) is that in this case the trial court took "only" a month to render its written order and in Robinson it took the trial court seven months to do so. In both cases, the intent and spirit of Pope was contravened.

Finally, Appellant senses that the State might try to toss in the red herring of prospectivity (Ree is to be applied "prospectively").

This was a "pipeline case" and is fully entitled to relief under Ree, as well as Pope. [For the State's education, a "pipeline case" is one ". . . in which a conviction is not final by trial or appeal at the time a controlling decision is

issued by the supreme court." Reed v. State, 565 So.2d 708 (Fla. 5th DCA 1990).]

CONCLUSION

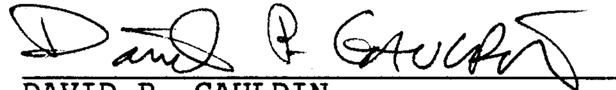
Based on the foregoing arguments and authorities, Appellant is entitled to be resentenced within the guidelines.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy has been mailed to James C. Owens, 815 Bay Avenue, Panama City, Florida 32401 this 4th day of January, 1991.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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IN THE SUPREME COURT OF FLORIDA

JAMES C. OWENS,	:	
Appellant/Petitioner,	:	
vs.	:	CASE NO. 76,516
STATE OF FLORIDA,	:	
Appellee/Respondent.	:	

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JAMES C. OWENS,	*	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	*	DISPOSITION THEREOF IF FILED.
v.	*	CASE NO. 89-189.
STATE OF FLORIDA,	*	
Appellee.	*	
	*	

RECEIVED
JUN 18 1990
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

Opinion filed June 18, 1990.

Appeal from the Circuit Court for Bay County.
W. Fred Turner, Judge.

Michael E. Allen, Public Defender, and David P. Gauldin, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, and William A. Hatch, Assistant Attorney General, Tallahassee, for appellee.

BARFIELD, J.

Appellant challenges his conviction for aggravated battery, asserting that the trial court abused its discretion in allowing the state to use for demonstration purposes a "butterfly" knife that was not the actual weapon used to commit the offense. He also challenges his departure sentence, arguing that the trial court improperly issued its written departure order a month after the sentencing hearing.

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 resentencings. 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 664 (Fla. 1987).[1] 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.[2]

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[1] In Jackson, the court had found that the absence of written reasons for departure "necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for reasons utilized by the trial courts," that the reasons thus "plucked from the record" by the appellate court might not have been the reasons intended by the trial judge, and that "the development of the law would best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing." Id. at 1056.

[2] Justice Shaw, concurring in Pope, stated that the result "is consistent with our decision in Stewart v. State, 549 So.2d 171 (Fla. 1989), [petition for cert. filed, No. 89-6298 (Dec. 15, 1989)] wherein we ruled that if a trial court fails to give contemporaneous written reasons for imposing the death penalty, no reasons may be provided on remand." 15 F.L.W. at S244.

The conviction is AFFIRMED. The sentence is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

BOOTH and JOANOS, JJ., CONCUR.

In Stewart, the court remanded a death sentence so that the trial court could provide written findings, noting:

> Prior to, or contemporaneous with, orally pronouncing a death sentence, courts are now required to prepare a written order which must be filed concurrent with the pronouncement. Grossman [v. State, 525 So.2d 833 (Fla. 1988), cert. denied, Grossman v. Florida, ___ U.S. ___, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989)]. Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence. Because Stewart's sentencing occurred prior to Grossman and because the trial court followed the jury recommendation of death and dictated its findings into the record, we remand for written findings. Cave v. State, 445 So.2d 341 (Fla. 1984).

In Grossman, the court had explicitly established a procedural rule, prospective in application, "that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." 525 So.2d at 841.

We find in Ree no such explicit establishment of a prospectively applied procedural rule, nor any subsequent indication from the supreme court that upon remand for failure to issue the written reasons contemporaneously with the sentencing, the trial court would be required to resentence within the guidelines. In Ree, the supreme court relied in part upon State v. Oden, 478 So.2d 51 (Fla. 1985), in which it approved this court's decision in Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984). In that case, we found reversible error in the trial court's departing from the guidelines "without providing a contemporaneous written statement of the reasons therefor at the time each sentence was pronounced" and remanded for resentencing with the proviso that the trial court could again depart from the guidelines if it followed the requirements of Jackson.

We do not find that Pope, Grossman or Stewart mandate restricting the trial court on remand to sentencing within the guidelines.