IN THE SUPREME COURT OF FLORIDA

JAMES C. OWENS,

Appellant/Petitioner

v. CASE NO.: 76,516

STATE OF FLORIDA,

Appellee/Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, James C. Owens, Defendant/Appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, Appellee below, will be referred herein as "Respondent". References to the record on appeal will 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 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 entered on January 19, 1989, less than a month after the sentencing hearing (R 434,435), but prior to his appeal.

Petitioner appealed his conviction and sentence to the District Court of Appeal, First District of Florida and on June 18, 1990, that Court issued its opinion (Appendix, Brief of Petitioner). The First District properly refused to require the circuit court to resentence Petitioner within the guidelines for failure to instantaneously issued 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) 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 wisely refused to certify this question and denied the motion for rehearing.

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

SUMMARY OF ARGUMENT

The District Court below properly directed the trial court to reimpose a departure sentence upon remand for failure to enter simultaneous written reasons where neither Shull v. Dugger nor Pope v. State mandate a guidelines sentence on remand in such a situation. Even so, Ree v. State may not be applied to this case retroactively as this is not a "pipeline" case.

Respondent also notes its continuing opposition to this Court's assumption of jurisdiction in this case.

ARGUMENT

ISSUE I

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN REMANDING PETITIONER'S SENTENCE WITH INSTRUCTIONS THAT THE TRIAL COURT COULD AGAIN DEPART FROM THE GUIDELINES BECAUSE THE WRITTEN REASON FOR DEPARTURE WAS ISSUED SUBSEQUENT TO THE ORAL IMPOSITION OF SENTENCE.

JURISDICTION

As a preliminary matter, Respondent would point out that review was improvidently granted in this case. Petitioner incorrectly stated that the above issue is presently before this Court in State v. Williams, Case No. 75,880, and Blair v. State, Case No. 75,937 (petitioner's jurisdictional brief p. 5). The question certified in Williams and Blair did not involve the issue presented in this case, but rather whether the issuance of written departure reasons soon after oral pronouncement of sentence was harmless error, to wit:

> WHETHER A SENTENCE MUST BE REVERSED AND REMANDED FOR RESENTENCING PURSUANT TO THE OPTIONS PROVIDED IN REE V. STATE, 14 F.L.W. 565 (FLA. NOV. 16, 1989), WHEN THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THE REASONS FOR DEPARTURE FROM THE GUIDELINES WHICH WERE ORALLY PRONOUNCED AT THE IMPOSITION OF SENTENCE AND THE WRITTEN REASONS WHICH WERE ENTERED THE SAME DAY OR WITHIN A FEW DAYS OF THE IMPOSITION OF SENTENCE?

Robinson v. State, 15 F.L.W. S612 (Fla. November 29, 1990), involved the situation where the trial court initially issued no

written reasons for departure whatsoever. Robinson is thus distinguishable and provides no basis for "conflict" jurisdiction. Pope v. State, 561 So.2d 554 (Fla. 1990), also was based on the situation where no written reasons were ever issued by the trial court, unlike the present case. Shull v. Dugger, 515 So.2d 748 (Fla. 1987), also cited as conflicting, was expressly based on the situation where the trial court's reasons for departure are found to be invalid by the appellate court. Ree v. State, 565 So.2d 1329 (Fla. 1990), held simply that written reasons must be issued at the time of sentencing, and that Ree shall only be applied prospectively.

Petitioner's position that the above cases expressly and directly conflict with the instant case is thus erroneous, and Respondent invites this Honorable Court to revisit the question of jurisdiction in this case. A court may at any time consider questions pertaining to its own jurisdiction. Live v. Carlsberg, 592 F.2d 846 (11th Cir. 1979).

ARGUMENT

It is important to note that this Court held in Ree v. State, 565 So.2d 1329 (Fla. 1990), that the rule that written reasons for departure from the sentencing guidelines must be produced at the sentencing hearing shall only be applied prospectively. Despite Petitioner's claim that this is a "pipeline" case to which a subsequently-announced rule of

procedure should be applied, Ree must not be applied to this case.

Petitioner relies exclusively on Reed v. State, 565 So.2d 708 (Fla. 5th DCA 1990), for the proposition that the instant case in a "pipeline" case. Beyond the fact that Reed is not controlling precedent vis a vis this Court, Reed does not support Petitioner's position. In Reed, the Fifth District stated:

> 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. *Smith v. State*, 496 So.2d 983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. *Thibodeau v. Sarasota Memorial Hospital*, 449 So.2d 297 (Fla. 1st DCA 1984). Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the *Pope* rule at this time.

Reed, supra at 709.

Respondent would point out that mandate was issued in the instant case on June 18, 1990 (Exhibit A, attached hereto), one month prior to this Court's issuance of Ree v. State on July 19, 1990. Thus the appellate process was completed in this case on June 18, 1990, and subsequently-announced rules of procedure may not be applied (the instant case is not before this Court on appeal, but on discretionary review), especially where retroactive application is expressly prohibited.

In Jackson v. State, 502 So.2d 409 (Fla. 1986), this Court stated that the sentencing procedure at issue in that case was only to be applied prospectively. In further elucidating the meaning of prospectivity, this court stated that "(p)ast failures of trial courts to follow this procedure will not be considered reversible error". Jackson, supra at 413.

This Court should apply the unshakable logic of that holding in this case. Clearly, it would make no sense to penalize a trial court for failing to follow a procedural rule that did not even exist at the time, thereby overturning a trial court's studied determination regarding the relative merits of a defendant's sentence.

Further, the holding in Ree was merely an evolutionary refinement of the law relating to the sentencing guidelines and not a major constitutional change in the law affecting substantive rights. McCuiston v. State, 534 So.2d 1144 (Fla. 1988). Consequently, the rule announced in Ree v. State may not be applied to the instant case.

Petitioner's position before this Court is that he should only receive a guidelines sentence because his sentence was remanded due to the trial court's failure to issue a written reason for departure at the sentencing hearing. It is clear that the departure reason was memorialized in writing subsequent to the sentencing hearing.

Petitioner cites as controlling precedent cases which hold that where no written reasons for departure were ever issued, or the stated reasons are invalid, a guidelines sentence must be given on remand. Certainly, where no valid reason for departure exists, a departure sentence cannot be imposed. These cases, however, do not apply to the instant situation.

In Pope v. State, 561 So.2d 554 (Fla. 1990), this Court stated that the policy reason for requiring written reasons for departure was so that appellate courts would not have to ". . . cull through the sometimes extensive sentencing colloquy in search of "reasons" supporting departure, thereby making possible results that are imprecise and unintended by the trial court." Pope, supra at 555, 556. In the case at bar, however, that problem does not exist, as the written reason for departure was included in the record on appeal (R 434, 435) and was plainly subject to easy access and review. To apply such a policy to this case would defy logic. As the First District stated below, "(a)llowing the trial court on remand to reimpose the departure sentence based on these same written reasons will not . . . subject appellant to "unwarranted efforts to justify the original sentence" and will not result in multiple appeals and resentencings." Owens, slip opinion at 3.

Petitioner represents that there is no significant difference between the instant case and Robinson v. State, 15 F.L.W. S612 (Fla. November 29, 1990). Petitioner, however,

overlooks a major difference. Robinson was originally given a departure sentence with no written reasons, in contrast to the Petitioner here, whose case came to the appellate court along with the trial court's valid written reason for departure.

This Court properly applied Pope, supra, in Robinson, as the trial court in Pope also failed to provide any written reasons at all. It is clear that this case is not controlled by Shull v. Dugger, 515 So.2d 748 (Fla. 1987), where this Court held that when the departure reasons given by the trial court are invalid that a defendant must be sentenced under the guidelines. Nor is Pope controlling, as Pope addressed the situation where no written reasons are ever given.

Consequently, it is evident that the First District properly held below that the trial court may reimpose the same valid departure reason on remand, as Petitioner will suffer no prejudice therefrom, and the policy reasons precluding departure on remand do not apply in this case.

CONCLUSION

Based on the foregoing argument and citations of legal authority, Respondent urges this Honorable Court to revisit the issue of jurisdiction and deny review. In the alternative, Respondent urges this Court to affirm the opinion issued by the District Court below.

Respectfully submitted,

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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, this 24th day of January , 1991.

BRADLEY R. BISCHOFF
Assistant Attorney General

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APPENDIX "A"

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COUNSEL FOR RESPONDENT

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Circuit Court for Bay County

WHEREAS, in that certain cause filed in this Court styled: _____

STATE OF FLORIDA

-vs-

JAMES C. OWENS

AKA JAMES HOWARD LOCKHART

Case No. 89-189

Your Case No. 88-1114

The attached opinion was rendered on June 18, 1990,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable Douglass B. Shivers

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this

9th day of August, 1990.

DISTRICT COURT OF APPEAL [SAT CITO SI RECTE] FIRST DISTRICT STATE OF FLORIDA

Sondra Joyner, Deputy
Clerk, District Court of Appeal of Florida,
First District