IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 77,122

BOBBY CHARLES OLIVER,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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Respondent	:	
	:	

BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

The record on appeal consists of three volumes, which includes transcripts, and which will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as Appendix A is the opinion of the lower tribunal. Attached as Appendix B is the initial brief of appellant in the lower tribunal. Attached as Appendix C is the answer brief of appellee in the lower tribunal.

STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts, with the following addition.

At sentencing immediately following the jury verdict on October 11, 1989, the state prepared a sentencing guidelines scoresheet which scored all four offenses, and contained a total of 112 points, which recommended a sentence of community control or 12-30 months (R 19; 276). The state argued that appellant should receive a departure sentence because he had been recently released from a prison sentence imposed for selling drugs (R 277-79). The court agreed and stated:

> The court finds that there are clear and convincing reasons for departing from the guidelines for the reasons stated by the -- or suggested by the state. (R 279).

A written order of departure was signed by the judge on October 23, 1989, and filed on October 25, 1989 (R 30).

On appeal, respondent argued that the departure reasons were not contemporaneous since they were filed two weeks after the sentencing hearing (Appendix B, Issue II, at 7), and so the departure sentence must be reversed on authority of Pope v. State, 561 So.2d 554 (Fla. 1990).

The lower tribunal did not cite Pope, but held that respondent was not entitled to relief under Ree v. State, 565 So.2d 1329 (Fla. 1990), because his sentencing date preceded Ree.

III SUMMARY OF THE ARGUMENT

Respondent will concede that the lower tribunal's opinion on the propriety of dual convictions for sale and possession of the same drug has been overruled sub silentio by this Court in two recent cases.

However, the inquiry does not end there. Once this Court accepted jurisdiction over the double jeopardy question upon petitioner's request, it has jurisdiction to consider the guidelines question addressed below.

The lower tribunal erroneously couched respondent's argument, that his departure sentence was invalid for the failure of the trial court to file its written reasons, in terms of Ree rather than Pope. While this Court has held that Ree is not retroactively applied to "pipeline" cases, the lower appellate courts have held that Pope must be given such retroactive application.

Although respondent may be convicted and sentenced for the duplicate charges, he cannot receive a departure sentence on them. This court must vacate the departure sentences in favor of guidelines sentences, on all counts.

IV ARGUMENT

ISSUE I
THE LOWER TRIBUNAL'S DECISION HAS BEEN OVERRULED BY THIS COURT.

Respondent concedes that this Court's recent decisions in State v. V.A.A., 16 FLW S194 (Fla. Feb. 28, 1991) and State v. McCloud, 16 FLW S194 (Fla. Feb. 28, 1991) have sub silentio overruled the lower tribunal's decisions in the instant case and in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989).

ISSUE II
THE TRIAL COURT ERRED IN IMPOSING A DEPARTURE SENTENCE WITHOUT CONTEMPORANEOUS WRITTEN REASONS.

Once this court accepted jurisdiction over the issue raised by petitioner, it has jurisdiction to address all issues in the record which were addressed below. Giblin v. City of Coral Gables, 149 So.2d 561 (Fla. 1963).

The sentencing guidelines scoresheet for all offenses called for a community control or 12-30 month sentence (R 19). While the court below did orally agree with the state on October 11, 1989 that departure was justified because of respondent's recent release from incarceration (R 279), no written order of departure appears in the record until two weeks later, on October 25, 1989 (R 30-31). Under these circumstances, reversal of the 12 year departure sentences is required, in favor of a guidelines sentence.

In Pope v. State, supra, this Court definitively held that written reasons must be filed contemporaneously with the imposition of sentence. Respondent argued Pope to the lower tribunal (Appendix B at 7). The lower tribunal misconstrued the argument, couched it in terms of Ree rather than Pope, and affirmed on a holding that Ree is not to be retroactively applied to sentencings prior to the date of its final decision.

While this Court has held that Ree is not to be retroactively applied, Lyles v. State, 16 FLW S197 (Fla. March 7, 1991), all of the appellate courts of this state have consistently held that Pope must be applied to sentencings

prior to the date of the decision, April 26, 1990, where the appeal was pending or in the "pipeline" on that date. State v. Smith, ___ So.2d ___, 15 FLW 1520 (Fla. 3rd DCA 1990), review granted, case no. 76,235; Reed v. State, 565 So.2d 708 (Fla. 5th DCA 1990); Stennis v. State, 567 So.2d 1071 (Fla. 3rd DCA 1990) (question certified); State v. Reliford, 568 So.2d 534 (Fla. 3rd DCA 1990) (question certified); Gibson v. State, 568 So.2d 977 (Fla. 1st DCA 1990); Alexander v. State, 568 So.2d 1341 (Fla. 1st DCA 1990); Crenshaw v. State, 570 So.2d 349 (Fla. 3rd DCA 1990) (question certified); State v. Northcutt, 571 So.2d 585 (Fla. 4th DCA 1990) (question certified); and Day v. State, 573 So.2d 1022 (Fla. 2nd DCA 1991).

The reason for applying Pope to sentences imposed prior to the decision is clear -- the requirement of contemporaneous written reasons has been in Fla. R. Crim. P. 3.701(d)(11) since its inception, even though many did not know it. See State v. Jackson, 478 So.2d 1054 (Fla. 1985) and State v. Oden, 478 So.2d 51 (Fla. 1985).

The written reasons filed two weeks after respondent's sentencing were hardly "contemporaneous." In Lyles, supra, this Court held that they must be filed on the date of sentencing or on the next business day.

This Court must follow Pope, apply it to respondent, who was in the "pipeline" when Pope was issued, and reverse the 12 year departure sentences and remand for entry of a guidelines sentence.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent submits that this Court must vacate the departure sentences and remand for guidelines sentences.

Respectfully Submitted,

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SECOND JUDICIAL CIRCUIT

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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Gypsey Bailey, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, #544081, P.O. Box 9, Quincy, Florida 32351, this 31st day of May, 1991.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,	:	
Petitioner	:	
v.	:	CASE NO. 77,122
BOBBY CHARLES OLIVER,	:	
Respondent	:	
	:	

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BOBBY CHARLES OLIVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 89-3236

Opinion filed November 21, 1990.

An appeal from the Circuit Court of Hamilton County; L. Arthur Lawrence, Jr., Judge.

Barbara Linthicum, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Oliver appeals from his conviction and sentencing for two counts of possession with intent to sell cocaine and two counts of sale of cocaine. The charges arise out of two separate controlled buys of narcotics. For each occurrence, the appellant was charged with both possession with intent to sell and sale. In Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), this

court held that separate convictions and punishments for both crimes arising out of a single transaction and involving the same controlled substance violated the principles of double jeopardy. We, therefore, reverse and remand to the trial court for vacation of one of the convictions as to each transaction and for appropriate resentencing.

The appellant also asserts that the trial court erred in imposing a departure sentence without providing contemporaneous written reasons for departing from the sentencing guidelines. In light of recent opinions of this court, including Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), which holds that Ree v. State, 565 So.2d 1329 (Fla. 1990), shall only be applied prospectively, we find that the procedure utilized by the trial judge was not in error. Resentencing in this case, however, will be subject to the requirements of Ree, supra.

Reversed and remanded for proceedings consistent with this opinion.

JOANOS, BARFIELD and WOLF, JJ., concur.

A-9095

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BOBBY CHARLES OLIVER,	:	
Appellant,	:	
v.	:	CASE NO. 89-3236
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR HAMILTON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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APPENDIX B

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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Appellant,	:	
v.	:	CASE NO. 89-3236
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant below, and will be referred to as appellant in this brief. A three volume record on appeal, including transcripts, will be referred to as "R" followed by the appropriate page number in parentheses. All proceedings below were before Circuit Judge L. Arthur Lawrence, Jr.

II STATEMENT OF THE CASE

By information filed July 24, 1989, appellant was charged with two counts of possession of cocaine with intent to sell and two counts of sale of cocaine (R 1-3). The cause proceeded to jury trial on October 11, 1989, and at the conclusion thereof appellant was found guilty as charged (R 18).

On October 11, 1989, appellant was adjudicated guilty of all offenses and sentenced to concurrent terms of 12 years in state prison, with credit for 73 days served (R 22-28).

On November 8, 1989, a timely notice of appeal was filed (R 32). On March 21, 1990, the Public Defender of the Second Judicial Circuit was designated to represent appellant.

III STATEMENT OF FACTS

Deputy Sheriff I.H. Belote, Jr. testified that he monitored a controlled by of narcotics by informant Vincent Bailey on June 29, 1989. At 9:58 p.m., he heard Bailey talking with appellant about buying drugs. Bailey returned to the monitoring location 20 minutes later and turned over two pieces of rock cocaine to Belote (R 188-202). The FDLE chemist verified the exhibits were rock or crack cocaine (R 212-16).

Deputy Mallory Daniels testified that he recorded the two drug buys, one at 9:59 p.m. and one at 10:00 p.m. (R 221-26). Vincent Bailey testified that he volunteered to be an undercover drug buyer. He went to appellant's trailer and asked for $20 worth of crack. Appellant sold him that, and then Bailey bought another piece for another $20. The cocaine was admitted into evidence without objection (R 239-50).

The state rested, and appellant moved for acquittal because appellant could not be charged with both sale and possession of the same cocaine, but the motion was denied without comment (R 261-63).

Appellant testified that he did not sell drugs to Vincent Bailey on June 29 (R 266-68). At sentencing immediately following the jury verdict on October 11, the state prepared a sentencing guidelines scoresheet which scored all four offenses, and contained a total of 112 points, which recommended a sentence of community control or 12-30 months (R 19; 276). The state argued that appellant should receive a departure sentence because he had been recently released from a prison sentence

imposed for selling drugs (R 277-79). The court agreed and stated:

> The court finds that there are clear and convincing reasons for departing from the guidelines for the reasons stated by the -- or suggested by the state. (R 279).

A written order of departure was signed by the judge on October 23, 1989, and filed on October 25, 1989 (R 30). This appeal follows.

IV SUMMARY OF ARGUMENT

Appellant will argue in this brief that he could not be convicted and sentenced for both sale of cocaine and possession with intent to sell, according to a recent case from this Court which is directly on point.

Appellant will further argue that his departure sentence is illegal, because the judge did not file his written reasons for departure until two weeks after the departure sentence was imposed.

V ARGUMENT

ISSUE I

THE LOWER COURT ERRED IN IMPOSING JUDGMENT AND SENTENCE ON ALL COUNTS

This point is governed by this Court's en banc opinion in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), rev. dism. 560 So.2d 235 (Fla. 1990). Appellant was adjudicated guilty of two counts of sale and and two counts of possession with intent to sell two rocks of cocaine in two undercover buys on June 29, 1989.

This was reversible error, because this Court noted that its decision that a defendant cannot be convicted and sentenced for sale and possession with intent to sell was not affected by the 1988 amendment to Section 775.021(4), Florida Statutes:

> The 1988 amendment to section 775.021, therefore, has no effect on this court's determination that the legislature intended to punish as one violation of section 893.13(1)(a) the sale, manufacture, or delivery of an illegal drug where the defendant possessed the same drug with the intent to sell, manufacture, or deliver it.

Id. at 690, emphasis in original. One conviction and sentence for sale or for possession with intent to sell with regard to each drug transaction must be reversed.

ISSUE II

THE LOWER COURT ERRED IN IMPOSING A DEPARTURE SENTENCE WITHOUT CONTEMPORANEOUS WRITTEN REASONS.

The sentencing guidelines scoresheet for all offenses called for a community control or 12-30 month sentence (R 19). While the court below did orally agree with the state on October 11 that departure was justified because of appellant's recent release from incarceration (R 279), no written order of departure appears in the record until two weeks later, on October 25 (R 30-31). Under these circumstances, reversal of the 12 year departure sentences is required, in favor of a guidelines sentence.

In Pope v. State, 15 FLW S243 (Fla. April 26, 1990), the Supreme Court definitively held:

> Applying the principles of [State v.] Jackson [,478 So.2d 1054 (Fla. 1985)] and Shull [v. Dugger, 515 So.2d 748 (Fla. 1987)], and for the same policy reasons, we hold that when an appellate court reverses a departure sentence because there were no [contemporaneous] written reasons, the court must remand for resentencing with no possibility of departure from the guidelines. Id. at S244.

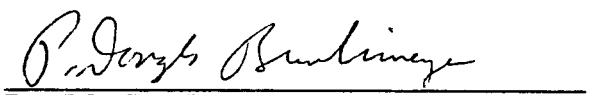
This Court must follow Pope and reverse the 10 year departure sentence and remand for entry of a guidelines sentence.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant requests that this Court reverse the judgments and sentences and remand further proceedings.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Initial Brief of Appellant has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, #544081, P.O. Box 628, Lake Butler, Florida 32054, this 1st day of August, 1990.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BOBBY CHARLES OLIVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Case No.: 89-3236

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR HAMILTON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BOBBY CHARLES OLIVER,

Appellant,

v. Case No.: 89-3236

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

Preliminary Statement

Appellee, the State of Florida, the prosecuting authority in the case below, will be referred to in this brief as the state. Appellant, BOBBY CHARLES OLIVER, the defendant in the case below, will be referred to in this brief as appellant. References to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement of the case and facts as reasonably accurate.

SUMMARY OF THE ARGUMENT

As to Issue I:

The trial court properly adjudicated appellants guilty of both possession and sale of the same cocaine. Convictions for both of these crimes do not violate double jeopardy principles because they constitute "separate" offenses as defined by Florida's legislature in recently amended Fla. Stat. §775.021(4) (Supp. 1988).

As to Issue II:

Appellant incorrectly frames this issue as involving a Pope violation. Because the trial court entered a written departure order 12 days after appellant's sentencing, the issue instead involves a Ree violation. However, because the rehearing opinion in Ree specifically states that Ree shall be applied only prospectively and appellant was sentenced before the original Ree opinion issued, appellant should not be afforded the benefit of such an argument.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY ADJUDICATED APPELLANT GUILTY OF BOTH POSSESSION WITH INTENT TO SELL AND SALE OF COCAINE.

Section 775.021(4), Florida Statutes (Supp. 1988),[1] expresses the legislature's intent regarding multiple convictions:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.

---

[1] Appellant committed the instant offenses on June 29, 1989 (R 1-2), and the amendments to this section took effect in July 1988.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

In the present case, the trial court adjudicated appellant guilty of both possession with intent to sell and sale of cocaine under Fla. Stat. §893.13(1)(a) (1989). Appellant contends that this constituted error, citing only to this court's decision in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989).

Despite the unequivocal language in amended section 775.021(4), the Wheeler court did not perform a "proper Blockburger[2] test," Williams v. State, 560 So.2d 311, 315 (Fla. 1st DCA 1990), in deciding that the trial court erroneously adjudicated the defendant guilty of both possession with intent to sell and sale of cocaine. For this and other reasons, Wheeler is unpersuasive precedent in the instant appeal.

First, in failing to examine the elements of the two statutes to discern if each crime required proof of an element that the other did not, this court essentially declined to follow the express dictates of section 775.021(4) and established Florida case law. See State v. Smith, 547 So.2d 613, 616 (Fla. 1989)[3] ("Section 775.021(4) should be strictly applied without judicial gloss."); Williams, 560 So.2d at 313 (citation omitted)

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2 Blockburger v. United States, 284 U.S. 299 (1932).

3 The Supreme Court issued this opinion in June 1989, two months prior to Wheeler.

(Florida's legislature raised the Blockburger test "in stature to become the 'controlling polestar of intent in double jeopardy analysis."). Instead, this court adopted an entirely new method of analysis which focused on whether the offenses were contained in the same or different subsections of a statute:

> The structure of section 893.13(1)(a) indicates that sale and possession with intent to sell are alternative ways of violating this particular subsection of the statute and that the legislature intended by this subsection to punish *either* the completed sale, manufacture or delivery of an illegal drug, *or* the frustrated sale, manufacture or delivery of the drug (by charging possession of the drug with the intent to sell, manufacture or deliver it), *but not both* when the same drug and the same transaction are involved. In other words, the legislature intended that in such a circumstance there has been only one violation of the subsection. It is logical to assume that if a contrary result had been intended, the legislature would have proscribed each offense in separate subsections of the statute, as it did with simple possession of a controlled substance in section 893.13(1)(e).
>
> Given this clear indication in the statute itself of a legislative intent not to punish these offenses separately, statutory construction using the Blockburger test of separate offenses and the Carawan rule of lenity becomes unnecessary.

549 So.2d at 689-90 (emphasis in original).

Second, based on this court's language that retroactivity of the 1988 amendments to section 775.021(4) was not at issue in Wheeler, it appears that Wheeler's offenses predated the

amendments. Thus, a Carawan v. State, 515 So.2d 161 (Fla. 1987) analysis applied to his offenses. See Leon v. State, 15 F.L.W. D1775 (Fla. 2d DCA 1990). Although the state disagrees with Carawan and continues to consider it erroneous, the state acknowledges that the result in Wheeler was correct in that it was mandated by Carawan and State v. Smith. In the present case, however, there is no dispute that appellant committed his offenses more than 11 months after the amendments took effect, and Carawan therefore does not apply.

Third, while the Wheeler court cited to State v. Smith, it did not note that the offenses involved in that case also occurred prior to the effective date of the 1988 amendments to section 775.021(4). Thus, the Smith Court based its holding that convictions for the sale of one rock of cocaine and possession with intent to sell that same rock violated double jeopardy principles on Carawan. 547 So.2d at 617. Because appellant committed the instant offenses after the effective date of amended section 775.021(4), Carawan does not apply.

In Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982) (citations omitted), the Supreme Court correctly postulated:

> A less serious offense is included in a more serious one if all of the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element the other does not, the offenses are separate and discrete and one is not included in the other.

As shown below, each of the offenses in the present case requires proof of an element that the other does not. Thus, convictions for both were proper.

Florida Standard Jury Instructions in Criminal Cases 219 (1987) enunciates three elements to the crime of sale. First, appellant sold a certain substance. Second, this substance was a controlled substance. And third, appellant had knowledge of the presence of the substance. Florida Standard Jury Instructions in Criminal Cases 219 (1987) also enunciates three elements to the crime of possession. First, appellant possessed a certain substance with the intent to sell it. Second, the substance was a controlled substance. And third, appellant had knowledge of the presence of the substance.

Admittedly, these two crimes share two elements, but their respective first elements are different. Because the sale of a controlled substance does not require possession of the same substance, the elements of the crime of possession with intent to sell are not subsumed by the elements of the crime of sale. See State v. Burton, 555 So.2d 1210, 1211 (Fla. 1989) ("the legislature intended the following to be separate offenses subject to separate convictions and separate punishments: the sale or delivery of a controlled substance; and possession of that substance with intent to sell."); Wheeler, 549 So.2d at 691 n.9 (it is clear that possession "is not a necessarily lesser included offense of sale because the definition of sale does not

require proof of possession."); see also Crisel v. State, 561 So.2d 453 (Fla. 2d DCA 1990) (Parker, J., concurring). In fact, in both Daudt v. State, 368 So.2d 52 (Fla. 2d DCA), cert. denied, 376 So.2d 76 (Fla. 1979) and Elias v. State, 301 So.2d 111 (2d DCA 1974), cert. denied, 312 So.2d 746 (Fla. 1975), the defendants were convicted of the sale of controlled substances even though they did not have possession of those substances.

In sum, the trial court properly adjudicated appellant guilty of both possession with intent to sell and sale of the same cocaine under Fla. Stat. §893.13(1)(a) (1989). Convictions for both crimes do not violate double jeopardy principles because they constitute "separate" offenses as defined by Florida's legislature.

ISSUE II

WHETHER THE TRIAL COURT IMPOSED A DEPARTURE SENTENCE WITHOUT PROVIDING CONTEMPORANEOUS WRITTEN REASONS IN VIOLATION OF REE.

Appellant incorrectly phrases this issue as one involving a Pope v. State, 561 So.2d 554 (Fla. 1990), reh'g pending, violation.[4] There, the Court specifically held, "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." Id. at 556. In the present case, however, the trial court orally imposed a departure sentence at appellant's October 11, 1989 sentencing, but entered a written order 12 days later (R 30-31). See Owens v. State, 15 F.L.W. D1619 (Fla. 1st DCA 1990).

Thus, the state contends that, if there is any error under this issue, it involves Ree v. State, 14 F.L.W. 565 (1989), on reh'g, 15 F.L.W. S395 (Fla. 1990), where the Court held that trial courts must provide written departure reasons at, not after, the time of sentencing. While appellant theoretically could attempt the argument that the trial court in the present case did not enter its departure order contemporaneously with

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[4] Even if this issue actually concerned a Pope violation, it is questionable whether Pope would even apply to appellant's case. The trial court sentenced appellant on October 11, 1989, and Pope did not issue until April 26, 1990. See State v. Smith, 15 F.L.W. D1520 (Fla. 3d DCA 1990) (where the Third District certified a question of great public importance to the Florida Supreme Court: Whether Pope should be applied retroactively to sentences imposed prior to April 26, 1990).

appellant's actual sentencing, the Florida Supreme Court recently put that argument to rest in its Ree rehearing opinion: "This holding . . . shall only be applied prospectively." 15 F.L.W. at S396. Because appellant's sentencing took place on October 11, 1989, and Ree issued on November 16, 1989, appellant should not be afforded the benefit of a Ree argument. See Brown v. State, Case No. 89-2430, slip op. at 3 (Fla. 1st DCA August 6, 1990).

If this court determines otherwise and finds that this case must be remanded for resentencing, the state points out that, under Owens, the trial court should not be restricted to sentencing appellant within the guidelines. After all,

> [t]he only problem here is the trial court's failure to have timely issued . . . 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 [v. Dugger, 515 So.2d 748 (Fla. 1987)], subject appellant to "unwarranted efforts to justify the original sentence" and will not result in multiple appeals and resentencings.

Owens, 15 F.L.W. at D1619.