IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,134

THE STATE OF FLORIDA,

Petitioner,

vs.

RAFAEL FONSECA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
401 N.W. 2nd Avenue N-921
Miami, Florida 33128
305-377-5441

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INTRODUCTION

The Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee before the Third District Court of Appeal. The Respondent, RAFAEL FONSECA, was the defendant before the trial court and the Appellant before the District Court. The parties will be referred to, in this brief, as they stand before this court. The symbol "R" will be used, in this brief, to refer to the Record on Appeal which was before the District Court, the symbol "SR" will identify the Supplemental Record on Appeal and the symbol "T" will designate the transcript of lower court proceedings. The symbol "App." will refer to the appendix to this brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The respondent was charged by Information with Second Degree Murder and unlawful Possession of a Firearm while engaged in a Criminal offense. (R. 3-4A).

The evidence at trial revealed that victim and the respondent were divorced, but were living together at the time of the crime. (R. 136, 143, T. 181, 410). On June 29, 1988, in the early morning hours, Mr. Fonseca ran to his neighbors, setting off the burglar alarm, and told them that somebody had shot through the window and hit Alicia, the victim (T. 172-175, 273-274, 297). One of the neighbors called the police and uniformed officers in marked police cars arrived within five (5) minutes. (T. 177).

The defendant told the police that somebody had shot through the window and hit his wife, but then said that somebody had broken in and shot her and they might still be inside (T. 187-192, 231). A search revealed no intruders and no sign of forced entry (T. 192-193, 232-233). The search did reveal the victim, who was pale, white, still and ice cold (T. 232-233). The lower part of her body had begun to turn darker, indicating that she had been there quite awhile and there were apparently dry bloodstains on the bedspread (T. 233-234). A subsequent check of the house revealed no bullet hole (T. 335-336).

When one of the officers started asking the defendant about the victim, he backed away, said that they weren't the real police, and fled (T. 194-198). An officer caught him two (2) blocks away and had to subdue him (T. 202-204). He was placed in the back of a police car and, although he was not asked questions, he first said that his wife was okay and didn't have anything wrong with her (T. 440) and then said that he and his wife had been arguing when he heard a loud noise and she collapsed. (T. 441-442).

After being read his rights, the defendant told one of the detectives that he had been asleep when he heard a "poof" sound and his wife tapped him and said, "Papito, you hit me." (T. 333). He went back to sleep (T. 333). He subsequently woke up and discovered that his wife was bleeding from a gunshot wound (T. 333). He repeated this version to another detective the following day (T. 298-302).

The detective told him that there was no evidence of intruders and that no one had entered the house, suggesting that the defendant's wife committed suicide. (T. 305). The defendant then said that his wife was a cocaine user, they were in a financial bind and his wife had been threating suicide (T. 307). He, then, gave a scenario consistant with a suicide (T. 307-308), although, during that statement, he said, "This is the worst thing I've ever done." (T. 309). When asked what he meant, he

changed it to this is the worst thing that ever happened to him (T. 309). He had said that he and his wife had made love (T. 302) but, when told that the police would check for the presence of semen, he changed and said that they didn't (T. 314).

The murder weapon turned out to be a Cobra, 9 millimeter semi-automatic machine pistol which was found beneath the defendant's bed (T. 272-273, 336-337). It was fired once at the victim from a distance of at least nineteen (19) inches, but no more than five (5) feet. (T. 272-273, 486-487). The bullet entered the left side of the victim's abdomen, slightly below the navel (T. 488-489). The medical examiner testified that it was possible for the wound to have been self-inflicted although, given the distance the gun would have to be held from the body, the angle it would have to held at and the location of the wound, it was unlikely to be suicide (T. 496, 531-533, 541-545).

The defendant had previously beaten the victim and had threatened to kill her with a machine gum. (T. 394-396, 431, 478-479).

The respondent was convicted of both counts (R. 153-154, T. 690-692).

The court, upon the State's motion, found that the defendant was an habitual offender under the applicable statutes

(R. 157, T. 699, 702-703). Certified copies of the defendant's prior convictions were provided (T. 701) and the Judge went over the defendant's record prior to sentencing. (T. 712).

The trial Judge was informed by the prosecutor, without objection, that the habitual offender statute took the sentence out of the sentencing guidelines and the Judge sentenced the respondent to life imprisonment for the murder and to a fifteen (15) year consecutive sentence on the possession charge without stating reasons for a guidelines departure. (R. 158-160, T. 714-715).

The Third District reversed the unlawful possession of a firearm charge and remanded the case for resentencing within the guidelines, certifying the following question to this court:

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

The State reserves the right to set forth additional facts in the argument portion of this brief, as appropriate.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN REQUIRING RESENTENCING WITHIN THE GUIDELINES WHERE RESPONDENT WAS SENTENCED PRIOR TO POPE v. STATE, 561 So.2d 554 (FLA. 1990) AND REE v. STATE, 565 So.2d 1329 (FLA. 1990) AND WHERE THE TRIAL COURT WAS INFORMED THAT AN HABITUAL OFFENDER FINDING REMOVED THE SENTENCE FROM THE SENTENCING GUIDELINES?

SUMMARY OF THE ARGUMENT

First, the district court erred in remanding for resentencing within the sentencing guidelines because the sentences in this case were rendered prior to this court's decisions in Pope v. State, 561 So.2d 554 (Fla. 1990) and Ree v. State, 565 So.2d 1329 (Fla. 1990). If this court's language, in Ree, that its holding is to be applied only prospectively is to have any effect, at all, then that effect should preclude this case from being remanded for resentencing within the guidelines.

However, even if that were not the case, the trial court, in this case, was under the misimpresion that finding the respondent to be an habitual offender removed the sentence from the guidelines. Although that was true of the habitual offender statute which existed at the time of the sentence, it was not true of the statute which existed at the time of the offense. However, where the court was under the mistaken impression that the sentencing guidelines did not apply, the court should be permitted to depart from the permitted guidelines range at resentencing based on rationale of Roberts v. State, 547 So.2d 129 (Fla. 1989) and Jones v. State, 559 So.2d 204 (Fla. 1990).

ARGUMENT

THE DISTRICT COURT ERRED IN REQUIRING RESENTENCING WITHIN THE GUIDELINES WHERE RESPONDENT WAS SENTENCED PRIOR TO POPE v. STATE, 561 So.2d 554 (FLA. 1990) AND REE v. STATE, 565 So.2d 1329 (FLA. 1990) AND WHERE THE TRIAL COURT WAS INFORMED THAT AN HABITUAL OFFENDER FINDING REMOVED THE SENTENCE FROM THE SENTENCING GUIDELINES.

A. Resentencing Within the Guidelines Should Not be Required Where the Respondent was Sentenced Prior to this Court's Decisions in Pope v. State, and Ree v. State:

The first fallacy which is inherent in the opinion of the Third district is the assumption that, when this court stated in Ree v. State, 565 So.2d 1329, 1331 (Fla. 1990) that, "This holding, however, shall be applied only prospectively." (emphasis added), it meant for that language to have no practical effect. It is respectfully submitted that, had this court simply intended the usual "pipeline" rule to apply, it would not have addressed the issue at all. Where the sentencing, in this case, was completed prior to either the Pope or Ree opinions, they should not be applied to this case.

Further, there is no reason for applying Ree prospectively only and not doing the same with Pope v. State,

561 So.2d 554, (Fla. 1990). Indeed, the reasons for applying Pope only on a prospective basis are even stronger than those in Ree where, prior to Pope, this court's opinions had created significant confusion on the resentencing issue. Barbara v. State, 505 So.2d 413 (Fla. 1987) specifically remanded for resentencing to permit the trial court to specify written reasons given. Similarly, in Jackson v. State, 478 So.2d 1054, 1055 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), this Court approved "that part of the district court's decision directing a written order expressing reasons for departure" on remand to the trial court. This Court's explicit history of prior cases approving of remands to the trial court to enable the trial court to reduce the reasons for departure to writing certainly suggests that the reasons for applying Pope prospectively only are the only reasonable remedy for having implicity misled lower courts as to the proper actions to be taken in resentencing.

The defendant, in cases such as this, is certainly not being exposed to a harsher penalty than he faced at his original sentencing and, if Pope and Ree are applied to cases such as this, the citizens of Florida are being denied the level of incarceration which should rightfully be imposed.

That is especially true in this case, where the habitual offender statute which was in effect at the time of the

sentencing would have removed the case from the sentencing guidelines (although that which was in effect at the time of the offense would not). F.S. §775.084 (4)(e)(1988 Supplement).

B. Resentencing Within the Guidelines Should Not be Required Where the Trial Court Was Informed Than An Habitual Offender Finding Removed the Sentence From the Sentencing Guidelines:

The defendant committed the murder concerned in this case on June 28th or June 29th 1988 (R. 3-4A). The habitual offender statute which was in effect at that time did not provide for excluding habitual offender sentences from the sentencing guidelines. F.S. §775.084 (1987).

Subsequently, effective October 1, 1988, the legislature amended the habitual offender statute so that sentences rendered under that statute were not subject to the sentencing guidelines. F.S. §775.084 (4)(e)(1988 Supplement).

Then, on September 20, 1989, almost a year after the amendment removing habitual offender sentences from the guidelines, the respondent was sentenced in this case (R. 158-160), after having been properly found to be an habitual offender (T. 699, 702-703). The trial Judge was misinformed by the prosecutor, at that time, that the habitual offender statute took the sentences our of the sentencing guidelines, without

objection (T. 714-715). No sentencing departure reasons, either written or oral, were given. (T. 712-715).

This Court dealt with a similar issue in Roberts v. State, 547 So.2d 129 (Fla. 1989), in which it held that the trial court could impose a sentence in excess of the new guidelines range, on remand for resentencing, where the original sentence was within the range of sentences reflected by the original score sheet, but that score sheet was found to be in error. See also, State v. Vanhorn, 561 So.2d 584 (Fla. 1990); Calleja v. State, 562 So.2d 395 (Fla. 5th DCA 1990). Similarly, the Third District permitted a trial court, upon remand, to supply reasons for departing below the permitted guidelines range in a youthful offender sentence where, at the time of sentencing, it believed that no such reasons were necessary. State v. Kepner, 560 So.2d 251 (Fla. 3d DCA 1990).

Indeed, in a case extremely similar to this one, this court held that the initial sentencing of the defendant as an habitual offender, without reference to the sentencing guidelines, did not constitute a bar to the subsequent enhancement of the sentence, upon remand, based on proper written reasons supporting an upward departure. Jones v. State, 559 So.2d 204 (Fla. 1990). Further, the opinion in this case directly conflicts with Whitfield v. State, 561 So.2d 22 (Fla. 1st DCA 1990), decided subsequent to Pope which held:

> We find no merit in appellant's challenges to his conviction for possession of cocaine. However, the State concedes that the trial court erroneously applied the amended habitual offender statute, chapter 88-131, Laws of Florida, to an offense committed before its effective date.
>
> The State points out that this error was not brought to the attention of the sentencing judge, who apparently considered this to be a case in which the sentencing guidelines did not apply because of the amended statute, and requests that the case be remanded to the trial court for resentencing citing Roberts v. State, 547 So.2d 129 (Fla. 1989).
>
> Appellant's conviction is AFFIRMED, but his sentence is REVERSED and the case is REMANDED to the trial court for resentencing. If the court find it appropriate, it may sentence appellant as an habitual offender under section 775.084, Florida Statutes (1987), and may impose a sentence beyond the sentencing guidelines recommended range if valid contemporaneous written reasons for departure are given. (emphasis added).

It is respectfully submitted that Whitfield provides the proper remedy for cases such as this and that it is error to require resentencing within the guidelines, as the Third District did in this case.

CONCLUSION

Based upon the foregoing reasons and authorities, the opinion of the district court, insofar as it requires resentencing within the sentencing guidelines, should be reversed and this cause remanded with directions permitting proper an contemporaneous written reasons.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CHARLES M. FAHLBUSCH
Florida Bar #0191948
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **ROBERT BURKE**, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 27th day of December, 1990.

Charles M. Fahlbusch

CHARLES M. FAHLBUSCH
Assistant Attorney General

mls/

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,134

THE STATE OF FLORIDA,)

Petitioner,)

vs.)

RAFAEL FONSECA,)

Respondent.)

_____/

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
401 N.W. 2nd Avenue N-921
Miami, Florida 33128
305-377-5441

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1990

RAFAEL FONSECA, **

Appellant, **

vs. ** CASE NO. 89-2541

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed November 27, 1990.

An Appeal from the Circuit Court of Dade County, Alfonso C. Sepe, Judge.

Bennett H. Brummer, Public Defender, and Robert Burke, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Charles M. Fahlbusch, Assistant Attorney General, for appellee.

Before JORGENSON, LEVY and GODERICH, JJ.

PER CURIAM.

The defendant, Rafael Fonseca, appeals his convictions and sentences for second-degree murder with a firearm and possession of a firearm while engaged in a criminal offense. We reverse in part, affirm in part and remand.

The defendant contends, and the State properly concedes, that the trial court erred in entering convictions for both second-degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense. See Carawan v. State, 515 So.2d 161 (Fla. 1987). Accordingly, the defendant's conviction for unlawful possession of a firearm while engaged in a criminal offense is reversed.

Additionally, the trial court erred in departing from the sentencing guidelines without providing written reasons. See Pope v. State, 561 So.2d 554 (Fla. 1990). Accordingly, this cause is remanded for imposition of a sentence within the sentencing guidelines.

As in State v. Smith, ___ So.2d ___ (Fla. 3d DCA case no. 89-3012, opinion filed June 5, 1990) [15 F.L.W. D1520], and State v. Whipple, ___ So.2d ___ (Fla. 3d DCA case no. 89-2606, opinion filed July 24, 1990) [15 F.L.W. D1916], we recognize that the defendant was sentenced prior to the issuance of the Pope decision. Since we are applying Pope retroactively, we certify the following question to the Supreme Court of Florida as a question of great public importance:

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

The defendant's remaining points raised on appeal lack merit.

Affirmed in part, reversed in part and remanded.