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FILED
SID J. WHITE
JUL 24 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

EUGENE N. BUCHANAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,153

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

In a two count Information filed in Orange County, Florida, Petitioner was charged with dealing in stolen property, and petit theft. (R 26, 27).

Pursuant to negotiations, Petitioner entered a plea of nolo contendere to the charge of dealing in stolen property, in exchange for the State's entry of a nolle prosequi as to the charge of petit theft. (R 41, 42, 46). Petitioner was adjudicated guilty of dealing in stolen property, and on August 28, 1990, was sentenced to serve a two year term of community control, followed by a five year term of probation. (R 12 - 15, 46 - 50). This constituted a downward departure from the applicable guidelines ranges. (R 12, 46).

The State filed a timely Notice of Appeal (R 53), and following submission of briefs by the parties, as well as Petitioner's motion for rehearing, the Fifth District Court of Appeal issued an Opinion in this case on June 13, 1991, reversing the judgment and sentence of the trial court, certified conflict with a decision of the First District Court, and certified the following question as being one of great public importance:

> IS A TRIAL COURT REQUIRED TO GIVE CONTEMPORANEOUS WRITTEN REASONS IN DEPARTING DOWNWARD FROM THE GUIDELINES, SINCE FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) ALLOWS A COURT IN SOME CRIMINAL CASES UPON RECEIPT OF A TIMELY MOTION TO REDUCE OR MODIFY A SENTENCE WITHOUT EXPRESSLY REQUIRING THE COURT TO GIVE CONTEMPORANEOUS WRITTEN REASONS?

Petitioner filed a timely Notice to Invoke this Court's

jurisdiction, and on June 25, 1991, this Court issued an Order postponing a decision as to jurisdiction, but establishing a schedule for briefs upon the merits of this cause. This brief is submitted in compliance with the aforesaid Order of this Court.

STATEMENT OF THE FACTS

The plea agreement entered by Petitioner and the State, specified that the State would make no recommendation as to sentencing, leaving the imposition of sentence to the discretion of the trial court. (R 5, 6, 41).

The trial court announced reasons for the downward departure, but made no contemporaneous written record of same. (R 11 - 13, 46). The conditions of Petitioner's community control included completion of a specified drug rehabilitation program, and service of fifty-one weeks in the county jail (with credit for one hundred sixty-nine days time served), prior to entry and completion of the drug rehabilitation program. (R 12, 13, 51, 64).

SUMMARY OF ARGUMENT

Petitioner submits that it is not contrary to the intent of the sentencing guidelines to permit a downward departure absent contemporaneous written reasons, since the Rules of Criminal Procedure specifically provide trial judges with the discretion to impose downward departure sentences without any reason, upon the defendant's timely motion.

In the instant case, valid reasons for departure were announced in open court, at the time of sentencing. Moreover, the State, as a part of the plea agreement in this case, expressly deferred to the discretion of the trial court in the determination of an appropriate sentence.

Therefore, Petitioner respectfully requests that the question certified by the Fifth District Court of Appeal in this case be answered in the negative.

ARGUMENT

IS A TRIAL COURT REQUIRED TO GIVE CONTEMPORANEOUS WRITTEN REASONS IN DEPARTING DOWNWARD FROM THE GUIDELINES SINCE FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) ALLOWS A COURT IN SOME CRIMINAL CASES UPON RECEIPT OF A TIMELY MOTION TO REDUCE OR MODIFY A SENTENCE WITHOUT EXPRESSLY REQUIRING THE COURT TO GIVE CONTEMPORANEOUS WRITTEN REASONS?

The question presented is whether a downward departure from the sentencing guidelines is invalid absent contemporaneous written reasons, despite the trial court's discretion to impose the same departure sentence, absent any reason(s), pursuant to a timely defense motion under Florida Rule of Criminal Procedure 3.800. Petitioner respectfully submits that the answer to the aforesaid question should be in the negative.

The guidelines permitted range in Petitioner's case was five and one-half to twelve years incarceration. Rule 3.988(f), Fla.R.Crim.P.; (R 46) The trial judge imposed a two year term of community control, with a consecutive five year term of probation, for a total of seven years supervision by the Department of Corrections. This departure downward was not accompanied by written reasons, but a valid reason for departure was announced contemporaneous with rendition of the order imposing sentence. (R 11 - 13). The stated reason for departure, the necessity of treatment for substance abuse, and a demonstrated amenability to rehabilitation, can be a valid basis for a downward departure. Herrin v. State, 568 So.2d 920 (Fla. 1990).

The requirement for written departure reasons, is intended to ensure that the parties, as well as the public, are informed of the basis for the departure. See, Committee Note to Fla.R.Crim.P. 3.701(d)(11). The sentencing guidelines, although intended to promote uniformity, and reduce subjectivity in the interpretation and application of offense and offender-related criteria, were never intended to usurp the trial court's discretion in arriving at a just sentence. Fla.R.Crim.P. 3.701(b)(6). Indeed, under Rule 3.800(b), as the Fifth District Court has acknowledged, there is no express limitation of the discretion to reduce a sentence absent any articulated reasons, upon a timely defense motion. See, State v. Whiddon, 554 So.2d 651 (Fla. 1st DCA 1989), [Cited by the Fifth District court sub judice as apparent authority for trial court to reduce a sentence absent written reasons, pursuant to Rule 3.800(b)]. But see, State v. Allen, 553 So.2d 176, 177 (Fla. 4th DCA 1989), [Rule 3.800(b), authorizes downward departure if, pursuant to defendant's timely motion to mitigate, trial court lists valid reason(s) for departure].

Petitioner submits that where, as in the instant case, the trial court so clearly indicates a valid reason for departure at the time of sentencing, and omits only written memorialization of same, it neither offends nor subverts the purpose of the sentencing guidelines to allow the sentence to stand, when the Rules of Procedure provide an alternative means for imposition of the same sentence upon a timely defense motion. It can hardly be

said that the parties or the public were not informed of the reasons for departure in this case. Moreover, the Respondent, in its briefs before the Fifth District Court, never disputed the trial court's authority to impose via Rule 3.800(b), the same sentence the State argues as having been illegal under the guidelines. The State's insistence upon adherence to the letter of the law ignores the basic tenet of criminal justice which affords every defendant the most lenient interpretation of the penal statutes. §775.021(1), Fla.Stat. (1990).

In Ree v. State, 565 So.2d 1329, 1332 (Fla. 1990), this Court stated that contemporaneous written reasons for departure were necessary for the benefit of the accused "when the state has urged a departure sentence", because "a departure sentence is an extraordinary punishment" requiring careful consideration by the trial court. The trial court in the instant case obviously gave careful consideration to the imposition of sentence. However, here, the Respondent did not seek an upward departure sentence, it deferred to the trial court's discretion. This court's concern, expressed in Ree, supra, that defendants be spared capricious imposition of extraordinary punishment, is not a consideration in the instant case, or in any case where the State has not sought an enhanced penalty, but where the trial court sue sponte chooses to depart downward. Rather, the Respondent here seems to argue that having deferred to the trial court's discretion, it should nevertheless be permitted to recall the accused for imposition of a more onerous penalty, simply because

the trial court's exercise of its discretion, in hindsight, does not meet with the State's approval. The prosecution maintains this argument without disputing the trial judge's authority under Rule 3.800, to ultimately prevail by imposing the very sentence originally announced.

Petitioner recognizes that his arguments before this Court may not represent the prevailing view, but asks this Court to resolve the apparent discrepancy between Florida Rules of Criminal Procedure 3.701(d)(11), and 3.800(b), that has been articulated by the Fifth District Court in its Opinion sub judice, and by the First and Fourth District Courts. See, Whiddon, and Allen, supra.

CONCLUSION

BASED UPON the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that the question certified by the Fifth District Court be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Eugene Buchanan, (Genesis Program), P.O. Box 4970, Orlando, FL 32802, this 22nd day of July, 1991.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER