IN THE FLORIDA SUPREME COURT

PETER N. FRASER, :

PETITIONER, :

vs. : Case No. 78,333

STATE OF FLORIDA, :

PLAINTIFF. :

_____ :

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
Assistant Public Defender
Criminal Court Building
5100-144th Avenue North
Clearwater, Florida 34620
(813) 530-6594

COUNSEL FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with delivery and possession of marijuana in Circuit Court Case No's. 8401927, 8401928, and 8401929 CFANO. (R4-5,82-83,107-108) These involved transactions with an undercover detective who was introduced to Petitioner by a confidential informant, a person petitioner knew from work. (R1-2,80,105) All three cases took place in a short period of time and were due in part to petitioner's attempts to finance a serious drug problem. Prior to this, petitioner had no criminal history. (R87)

In September 1984, Petitioner entered a plea in all three cases and was placed on four years probation. (R11-13,85-88,111-112) He completed the four years without incident, however, due to financial pressures and a bankruptcy, at the end of that time, he still owed approximately seven hundred dollars in costs of supervision. Petitioner's probation officer informed him unless

he was willing to sign a modification agreement extending the probationary term one more year, he would file an affidavit for violation of petitioner's probation. Petitioner did so. (R14-17)

It was during this additional year, petitioner committed the offenses in Circuit Case No's. 8908653 and 89013894 CFANO. (R131,148) During this entire time petitioner was laboring under an addiction to "crack" cocaine. Petitioner attributed the commission of these subsequent offenses, in part, to his being "high" on "crack" cocaine at the time. The woman whose purse he attempted to take, while admittedly shaken by the incident, was unhurt, and the auto which was stolen belonged to an acquaintance. [see October 13, 1989 change of plea hearing in supplemental record on appeal] Petitioner is currently making restitution to the owner of the auto for the damage done to it. (R155)

These two incidents prompted Petitioner to realize his drug problem had reached crisis proportions. He completed a twenty-eight day residential treatment program at Pinellas Comprehensive Alcohol Services, and subsequently joined Alcoholics Anonymous and Narcotics Anonymous, as well as becoming an active church member. [see October 13,1989 change of plea hearing in supplemental record on appeal]

In October 1989, Petitioner came before the court for a violation of probation for the three 1984 cases and disposition of the two 1989 cases. Appellant admitted the probation violations and entered a plea of guilty to the two new offenses

without the benefit of any prior plea agreement with the State Attorney's office. After hearing numerous persons testify as to how petitioner seemed to be turning his life around and getting a handle on his drug problem, Judge Farnell imposed sentences of five years imprisonment [five years and six months in the case of the unarmed robbery] suspended them, and placed petitioner on five years community control [seven years community control for the unarmed robbery]. (R52-56) This sentence was below the guideline recommended sentencing range. For some reason, although the court orally stated reasons for a downward departure at sentencing, [see October 13, 1989 change of plea hearing in supplemental record on appeal] the reasons were never reduced to writing and filed. The state appealed the sentences. (R58)

While this appeal was pending, the Florida Supreme Court issued its opinion in Pope v. State, 561 So.2d 554 (Fla. 1990), wherein they held that when the trial court fails to provide contemporaneous written reasons for an upward departure from the guidelines, on remand, the court must resentence the defendant within the guidelines. In its opinion the District Court of Appeal, Second District, cited Pope and held because the trial court failed to provide contemporaneous written reasons for departing downward, on remand petitioner must be sentenced within the guidelines. (R64-66) The permissive guideline range in petitioner's case is four and one-half to nine years incarceration.

At petitioner's re-sentencing in October 1990, after hearing

that he was adhering to the requirements of community control and still had his drug problem under control, the trial judge once more imposed the same suspended/community control sentences saying, "I don't have any question, but the defendant deserved it [the sentence he received previously]. He has indicated that to be the case." (R69-79,100-104,123-127,143-146) The trial court also provided written reasons for the downward departure. The state once more appealed petitioner's sentences. (R199) In its opinion of July 17, 1991, the Second District Court of Appeal while expressing sympathy for the trial judge in doing what he felt was the right thing under the circumstances, held that Pope, required Petitioner be resentenced within the guidelines. The court, however, certified two questions as being of great public importance: 1) Whether the holding in Pope is to be applied retroactively [as previously certified by the District Court of Appeal, Third District]; and 2) When the trial court sentences a defendant to a period of time under the Department of Corrections, pursuant to a violation of Community Control, can he be given credit for the time served on Community Control under section 921.161, Florida Statutes (1985)?

On July 23, 1991, Petitioner filed a Notice to Invoke Discretionary Review pursuant to Florida Rules of Appellate Procedure 9.030 (2)(A)(v). Petitioner's brief on the merits follows in compliance with this court's order of July 31, 1991, calling for service on or before August 26, 1991.

SUMMARY OF ARGUMENT

ISSUE I

To apply Pope retroactively in the instant case, constitutes what is in effect an "ex post facto" judicial decision and punishes Petitioner for a mistake not of his making.

ISSUE II

The trial court has the inherent discretionary authority to award Petitioner credit for the time he has spent on community control because it would be equitable under the particular circumstances of the instant case, and because Petitioner's Community Control sentence is invalid only because of a clerical error on the part of the trial court.

ISSUE I

SHOULD THE HOLDING IN POPE V. STATE, 561 So.2d 554 (FLA. 1990) APPLY RETROACTIVELY TO SENTENCINGS OCCURRING PRIOR TO APRIL 26, 1990?

AND

UNDER THE PARTICULAR CIRCUMSTANCES OF THE INSTANT CASE THE TRIAL COURT DID NOT ERR IN RE-SENTENCING PETITIONER BELOW THE GUIDELINE RANGE.

On remand for re-sentencing after the issuance of the District Court's first opinion, the trial court once again imposed a sentence(s) below the guideline recommended range. Contemporaneous with this sentencing, the court filed written reasons for the departure. These reasons were:

> "This cause coming on for re-sentencing, and the Court having reviewed the extensive material received at the time of the initial sentencing, as well as the substantial amount of material covering the defendant since the initial sentence was imposed and an updated report from his Community Control officer, and having heard from the defendant and the witnesses, and having heard arguments by counsel for the defendant and the State, does hereby re-sentence the defendant, Nunc Pro Tunc, to the sentence originally imposed for the following reasons:
>
> 1. It was clear that the defendant's underlying problem was that of drug abuse at the time of the initial sentencing, and the defendant has embarked on a course of treatment and has continued effectively to follow same to date.
>
> 2. The defendant had and still has substantial family community support to assist him in rehabilitation.
>
> 3. This sentence will assist the defendant in meeting the requirement of restitution imposed herein.
>
> 4. The defendant has never displayed the type of violence and threat to the people of the State of Florida that would justify the imposition of the sentence called for in the guidelines. This is constantly brought to this judge's attention after having spent a majority of his judicial career on the criminal

> bench and receiving on a monthly basis a printout from the Department of Corrections detailing the defendants that must be released and reflecting on the lengthy sentences that were imposed justifiably because of their dangerous and violent behavior." (R72-73)

Respondent's previous argument has been that, according to the dictates of Pope v. State, 561 So.2d 554 (Fla. 1990), petitioner must be re-sentenced within the guideline recommended range, no if's, and's, or but's, because the trial court, for whatever reason, failed to provide contemporaneous written reasons for departure, [although it orally stated the reasons at petitioner's original sentencing]. What respondent fails to recognize is that Pope directly addressed only the issue of upward departures without the benefit of written reasons, although subsequent District Court decisions have chosen to apply Pope to downward departures as well. Furthermore, to apply Pope retroactively in petitioner's case, constitutes what is in effect an "ex post facto" judicial decision. Finally, Respondent has ignored the equities involved in the instant set of circumstances.

The question is whether Petitioner should be penalized by a retroactive application of the case law in Pope. Pope held that where the trial court gave no written reasons for an upward departure, on remand the trial court must re-sentence the defendant within the guidelines. The district courts have taken this a step further by holding this also applies to downward

departures. [1] Presumably, the rationale was most downward departures are made pursuant to plea agreements, therefore, the defendant would be entitled to withdraw his plea and start again. However, in cases such as Petitioner's where there was no negotiated plea, application of the rule in Pope in essence penalizes Petitioner more harshly than would have been the case originally.

There are cases holding, where the sentencing occurred prior to the appellate decision now affecting it, some leeway must be allowed and application is to be prospective only. In Holton v. State, 573 So.2d 284 (Fla. 1990), the Florida Supreme Court held written reasons for imposing the death penalty must be made contemporaneously with the imposition of sentence, however, the holding was to be applied prospectively only. In Ree v. State, 565 So.2d 1329 (Fla. 1990), the Supreme Court held the trial court must produce written reasons for departure contemporaneously with imposing sentence. A subsequent decision has specifically held this is to apply prospectively only. see State v. Williams, 576 So.2d 281 (Fla. 1991) The Third District Court of Appeal has certified the question "Should Pope apply retroactively to sentences imposed before April 26, 1990?" [the

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[1] Petitioner would have to agree this is not an unreasonable step, in as much as the court in Pope specifically receded from its earlier holding in Barbera v. State, 505 So.2d 413 (Fla. 1987) wherein it remanded for a resentencing to permit the trial court the opportunity to prepare written reasons for a downward departure sentence.

date of the Pope opinion] [2] in State v. Smith, 562 So.2d 451 (Fla. 3rd DCA 1990); Perez v. State, 566 So.2d 881 (Fla. 3rd DCA 1990); Fonseca v. State, 570 So.2d 424 (Fla. 3rd DCA 1990); and Parrado v. State, 16 FLW 1791 (Fla. 3rd DCA July 9, 1991). The District Court of Appeal, Second District has followed suit in the instant case.

While it is clear that the ex post facto prohibition of the Federal constitution applies only to legislative acts and not to judicial decisions, it is obvious the rationale behind the ex post facto prohibition, concern for adequate notice to the defendant, is relevant in the situation where a judicial decision is applied retroactively to the disadvantage of a defendant in a criminal matter. The United States Supreme Court has held that the due process clause bars an appellate court from doing what the ex post facto clause prohibits a legislature from doing. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Petitioner entered a plea without the benefit of any prior sentencing agreement with the state. The trial court imposed a sentence below the applicable guidelines, but for some reason, the written reasons justifying the departure were never filed. This was a circumstance totally beyond Petitioner's control and was not due to any action or inaction on his part. The state chose to appeal the downward departure and while this appeal was

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[2] Appellee was initially sentenced on October 31,1989 well before the decision in Pope,supra was issued.

pending, the Florida Supreme Court issued its opinion in Pope. Prior to this opinion, appellate courts were remanding cases back to the trial court on a regular basis in order to allow the trial judge the opportunity to prepare written reasons for departure. This court itself did so in Barbera v. State, 505 So.2d 413 (Fla. 1987) wherein it remanded for resentencing so as to permit the trial court to prepare the written reasons for a downward departure that it had already stated orally at sentencing. In its opinion, the Second District Court citing Pope, held that because the trial court failed to provide contemporaneous written reasons for departing downward, on remand Petitioner must be sentenced within the guideline range. Despite the fact in the interim petitioner had not breached the trust granted him by the trial court, Petitioner now faced going to prison for at least four and one half years because of two circumstances he was not responsible for, a change in the law and the trial court's initial failure to provide contemporaneous written reasons for departure. Although not stated specifically, it is obvious the trial court felt it unjust to penalize petitioner for what was essentially a clerical mistake for which petitioner was not responsible.

The written reasons given by the trial court and set forth above, are valid justifications for a downward departure. First, Petitioner's chronic drug use during the time these offenses were committed was a major contributing factor to their commission. This reason was upheld in Stutsman v. State, 566 So.2d 880 (Fla.

3rd DCA 1990). Secondly, the fact petitioner has strong family support and is getting a handle on his drug problem was declared a valid reason in Frinks v. State, 555 So.2d 916 (Fla. 1st DCA 1990). Lastly, that a long period of probation will be necessary in order for petitioner to make restitution in his grand theft case was upheld in Norman v. State, 468 So.2d 1063 (Fla. 1st DCA 1985) and McFarland v. State, 462 So.2d 496 (Fla. 5th DCA 1984). Obviously, this is not a situation where the reasons for the trial court's departure were invalid, but were merely not reduced to writing.

In the vast majority of downward departure sentences, the defendant receives the sentence as part of a prior plea agreement with the state, where presumably the state would not appeal, irregardless of whether written reasons were filed or not. In other cases where the defendant made his plea based on an understanding with the trial court, and he received a departure sentence over the state's objections, even if the state appealed either the lack of written reasons or the validity of the reasons themselves and won a reversal, the defendant would still be entitled to withdraw his plea and start afresh. Presumably then the trial court could once again impose a departure sentence accompanied by valid written reasons. Petitioner, unfortunately is one of those few defendants, who because of their non-negotiated plea, falls through the cracks.

At first glance, it would appear that there are no distinctions to be drawn from upward or downward departures, and

the attendant case law should apply equally to both. However, this a blanket assumption for which there are or should be exceptions. For example, intoxication and drug dependency have been held not to be clear and convincing reasons for an upward departure, yet this court in Barbera, held that intoxication and drug abuse could be a clear and convincing reason for a downward departure. To apply Pope retroactively to all departure sentences, without any consideration as to the equities that might be involved in a particular case, violates all principles of fairness and due process. The certified question of the district court should be answered in the negative.

ISSUE II

WHEN THE TRIAL COURT SENTENCES A DEFENDANT TO A PERIOD OF TIME UNDER THE DEPARTMENT OF CORRECTIONS, PURSUANT TO A VIOLATION OF COMMUNITY CONTROL, CAN HE BE GIVEN CREDIT FOR THE TIME SERVED ON COMMUNITY CONTROL UNDER SECTION 921.161,FLORIDA STATUTES (1985)?

AND

PETITIONER IS, AT THE LEAST, ENTITLED TO CREDIT FOR THE TIME HE HAS SERVED ON COMMUNITY CONTROL.

Petitioner will concede at the outset there is no Florida case standing for the proposition that time spent on community control is entitled to be credited as time served. To the contrary, courts have specifically held community control is not the functional equivalent of jail.[3] Mathews v. State, 529 So.2d 361 (Fla. 2nd DCA 1988); Butler v. State, 530 So.2d 324 (Fla. 5th DCA 1988).

However, there is precedent for concluding, under the circumstances of the instant case, Petitioner is entitled to have the time he has spent on community control credited as time served. In Kronz v. State, 462 So.2d 450 (Fla. 1985), this court held a trial judge has **inherent discretionary authority** to award credit for time served in another jurisdiction while awaiting transfer to Florida, although Florida Statute 921.161 only

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[3] The undersigned disputes the blanket assumption that community control is not equivalent to time spent in the custody of the Department of Corrections. It should be noted the restrictions on the liberty of inmates placed on work release are almost identical to those placed upon persons on community control. Furthermore, inmates on work release are awarded additional gain time incentives over and above that given to their more restrictively confined cohorts.

requires the trial judge to award credit for time served in Florida county jails pending disposition of criminal charges. Hinging upon the words, "inherent discretionary authority", Petitioner argues the trial judge should be able to award credit for time spent on community control when, depending on the circumstances, it would be the equitable thing to do.

Even assuming one believes a judge's discretionary authority does not stretch so far, there are cases which clearly hold that when a prisoner is released from prison by mistake, unless interrupted by some fault of the prisoner, the sentence continues to run even while the prisoner is at liberty and his remaining sentence must be credited with that time. Carson v. State, 489 So.2d 1236 (Fla. 2nd DCA 1986); Sutton v. Department of Corrections, 531 So.2d 1009 (Fla. 1st DCA 1988). In Carson, the defendant was released early due to a clerical error in his judgment and sentence. Although the appellate court held the trial court had the authority to correct a purely clerical error at any time, it also held defendant could not be recommitted if his sentence would have expired had he remained in confinement; and if it would not have expired, he was entitled to credit for time served for the time he had been at liberty.

Petitioner has spent almost two years on a sentence of community control which has been held invalid only because of a clerical error on the part of the trial court. If the trial court had imposed the minimum guideline sentence of four and one-half years, reference to the Department of Corrections chart

calculating release dates, shows petitioner would have already been released after having served ten months and one day. Petitioner contends his situation is the functional equivalent of the defendant's in Carson, therefore, he too, must be awarded credit for the time he has already spent on community control. The certified question of the district court should be answered in the affirmative.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully requests that this Honorable Court answer the certified questions in Argument I in the negative and Argument II in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **David R. Gemmer**, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, Florida 33607, and to Peter Fraser, 12767 - 102nd Circle North, Largo, Florida 34643, this **20th** day of August, 1991.

RESPECTFULLY SUBMITTED,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Allyn Giambalvo
ALLYN GIAMBALVO
Assistant Public Defender
Criminal Court Building
5100-144th Avenue North
Clearwater, Florida 34620
Florida Bar No: 239399

IN THE FLORIDA SUPREME COURT

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Petitioner,	:	
vs.	:	Case No. 78,333
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Respondent.	:	
_____	:	

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

PETER N. FRASER,

Appellee.

CASE NO. 90-03185

Opinion filed July 17, 1991.

Appeal from the Circuit Court
for Pinellas County;
Crockett Farnell, Judge.

Robert A. Butterworth,
Attorney General, Tallahassee,
and David R. Gemmer,
Assistant Attorney General,
Tampa, for Appellant.

James Marion Moorman,
Public Defender, Bartow,
and Allyn Giambalvo,
Assistant Public Defender,
Clearwater, for Appellee.

HALL, Judge.

The state appeals for the second time the downward departure sentence imposed on the appellee, Peter Fraser. The state's first appeal resulted in a remand by this court for

resentencing within the guidelines because of a lack of contemporaneous written reasons. Upon remand, the trial court again imposed a downward departure sentence, nunc pro tunc to the original sentencing date of October 31, 1989, but contemporaneously submitted written reasons in support thereof. Those reasons include the appellee's effectively following a course of treatment for his drug abuse problem, which the trial court found to be the appellee's underlying problem, and the appellee's substantial community and family support. While we may be sympathetic with the trial court, we are constrained by the law of this case and by prior case law requiring resentencing within the guidelines upon remand of a departure sentence for failure to submit written reasons in support thereof. Pope v. State, 561 So. 2d 554 (Fla. 1990).

We note that the Third District has certified to the supreme court the question of whether Pope applies retroactively. State v. Smith, 562 So. 2d 451 (Fla. 3d DCA 1990); Perez v. State, 566 So. 2d 881 (Fla. 3d DCA 1990). Since the appellee was sentenced prior to April 26, 1990, the date Pope was rendered, we also certify that question as its answer would determine whether the appellant must be resentenced within the presumptive guidelines range.

Because the appellant has been confined under community control since October 31, 1989, we further certify the following question:

WHEN THE TRIAL COURT SENTENCES A DEFENDANT TO A PERIOD OF TIME UNDER THE DEPARTMENT OF CORRECTIONS, PURSUANT TO A VIOLATION OF COMMUNITY CONTROL, CAN HE BE GIVEN CREDIT FOR TIME SERVED ON COMMUNITY CONTROL UNDER SECTION 921.161, FLORIDA STATUTES (1985)?

Remanded with directions consistent herewith.

FRANK, A.C.J., and PATTERSON, J., Concur.