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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,379

JOSEPH FREDERICK CAPUZZO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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I.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of a decision of the Fifth District which held that a felon may be sentenced in absentia after voluntarily absenting himself from the sentencing hearing. Capuzzo v. State, 578 So.2d 328 (Fla. 5th DCA 1991). The pertinent facts are as follows:

Petitioner was charged by information with trafficking in cocaine and carrying a concealed weapon. (R.18-22)[1] The original information was filed in 1982, and subsequently three amended informations were filed in 1985. (R.18-22) Petitioner was arrested and incarcerated for failure to appear for trial on or about June 17, 1988. (R.30) Prior to his arrest, he had been working with the Drug Enforcement Agency ("DEA") on a drug deal, pursuant to a voluntary undertaking on his own behalf. (R.31-32) On or about July 13, 1988, Petitioner entered into a plea agreement in order to obtain his release from jail, which would enable him to conclude the drug deal he had been working on for the DEA. (R.23;33-34) The plea agreement contained a requirement of substantial assistance by Petitioner. (R.36)

A sentencing hearing based on Petitioner's guilty plea of

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1. "R" refers to the Record on Appeal.

July 13 was scheduled for November 7, 1988. (R.23) On November 7, however, after being advised by his counsel that the State would oppose a continuance of the sentencing hearing to permit Petitioner to finalize the DEA drug deal, he absconded and failed to appear at the sentencing hearing. (R.36-37) The trial judge sentenced Petitioner in absentia to a 15 year minimum mandatory prison term.(R.37).

Petitioner filed his motion to vacate sentence on May 10, 1990 on the grounds that, under Fla.R.Crim.P. 3.180 and applicable case law, the defendant's presence is required for sentencing in felony cases, citing Quarterman v. State, 506 So.2d 50 (Fla.2d DCA 1987), approved on other grounds, 527 So.2d 1380 (Fla.1988), and Wagner v. State, 519 So.2d 751 (Fla. 4th DCA 1988). [Updated citation for Quarterman added.]

A hearing on Petitioner's motion to vacate sentence was held before the trial court on July 3, 1990. (R.1-17) Counsel for Petitioner and the State argued primarily about whether the case law requires the presence of the defendant at a sentencing hearing, or whether the defendant's right to be present can be waived. (R.3-9) Argument was heard regarding a decision of the Fifth District Court of Appeal which appears to conflict with the holdings of the Quarterman and Wagner cases regarding whether the defendant's right to be present at the sentencing hearing can be waived. (R.3-8) That case, Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986), contains a footnote which states as follows:

> Roseman escaped from custody between the time the trial concluded and sentencing. His contention that the sentencing was therefore improper, since he was not present, is without merit, as he voluntarily waived any right to be present by the escape. In any event, the resentencing ordered by this opinion renders this point moot.

Id. at 987 (f.n.1.). There was also discussion regarding the fact that Fla.R.Crim.P. 3.180, which authorized the trial court to proceed up to judgment without the defendant's presence, does not speak to the issue of whether the court can conduct a sentencing hearing without the presence of the defendant. (R.4-5)

The trial court concluded that, although Rule 3.180 does not deal with the issue of whether the defendant must be present during sentencing,

> [t]hat does not persuade me to believe...that the presence of the accused is so essential that sentencing cannot proceed without the accused being present. And I believe...the requirements can be waived notwithstanding some language that was in Quarterman just as...can the waiver of a fundamental constitutional right...be waived. And waiving like this can be recognized not just in misdemeanor cases but also in serious felony cases like this.

(R.11) The trial court also went on to find, "as a matter of fact, that [Petitioner] did voluntarily absent himself from the scheduled sentencing in this case..." (R.11)

The court went on to orally pronounce further findings of

fact regarding Petitioner's absence during the sentencing hearing. According to those findings of the court, Petitioner had been present in the court earlier during the day of the sentencing hearing at which time he was engaged in negotiations regarding his substantial assistance agreement with the State. (R.12) However, Petitioner absconded when it became apparent that he would not obtain a continuance of the sentencing hearing. (R.12-13) In any event, when the court was informed that Petitioner had absconded, the court proceeded to sentence Petitioner in absentia. (R.13) In the words of the trial court, Petitioner "chose not to be here for his own reasons. And that non-appearance for that sentencing procedure was completely voluntary. And I think those circumstance [sic] authorize the Court to proceed with sentencing of [Petitioner] in absentia." (R.13-14)

The trial court's order denying Petitioner's motion to vacate sentence was rendered on July 3, 1990. (R.61) An appeal timely ensued to the Fifth District. (R.71)

The Fifth District affirmed based upon its earlier decision in Roseman. The Fifth District acknowledged that its opinion created a direct conflict with the decisions of the Second and Fourth Districts in Quarterman and Wagner and stated as follows:

> We do not agree with our sister courts in Wagner or Quarterman. Our opinion in Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986) was correct and in conformity with the majority rule in this country in respect to waiver of

> the right to be present at sentencing by reason of the defendant's voluntary flight.

Capuzzo, 578 So.2d 328.

Petitioner timely filed his motion for rehearing en banc on April 12, 1991 which was denied by the Fifth District on May 2, 1991. On August 5, 1991 Petitioner filed his petition for review with this Court and a verified motion to accept notice to invoke discretionary jurisdiction as timely filed. By Order of August 8, 1991 this Court postponed its decision on jurisdiction and instructed Petitioner to file his brief on the merits.

II.

POINT ON REVIEW

WHETHER THE FIFTH DISTRICT ERRED IN HOLDING THAT A FELON MAY BE SENTENCED IN ABSENTIA AFTER VOLUNTARILY ABSENTING HIMSELF FROM THE SENTENCING HEARING?

III.

SUMMARY OF ARGUMENT

The Fifth District reasoned that a felon may be sentenced in absentia based upon a voluntary absence from the sentencing hearing. For the reasons that follow, such reasoning is er-

roneous since the right to be present at felony sentencing is a fundamental right which cannot be waived except where the defendant has expressly waived his right to be present either by sworn affidavit or in open court for the record. The right to be personally present is underscored by important policy considerations applicable to both the State and the felony defendant which are peculiar to sentencing as against other stages of the criminal process.

IV.

ARGUMENT

Contrary to the ruling of the order on appeal, both the Second and the Fourth District Courts of Appeal have clearly held that the defendant's right to be present at the sentencing hearing is fundamental and cannot be waived. Wagner v. State, 519 So.2d 751 (Fla. 4th DCA 1988); Quarterman v. State, 506 So.2d 50 (Fla. 2d DCA 1987), approved on other grounds, 527 So.2d 1380 (Fla. 1988).

In Wagner, the defendant had absconded during trial and was convicted and sentenced in absentia. The Fourth DCA reversed the denial of the defendant's motion to vacate sentence. In so doing, the court rejected the State's argument that a defendant who voluntarily absents himself from the sentencing hearing waives his right to be present. The court stated:

> Rule 3.180(b) of the Florida Rules of Criminal Procedure provides for the completion

> of a trial and rendering of a verdict where the defendant has absconded during a trial. However, the rule clearly stops short of authorizing sentencing to proceed in the defendant's absence...A trial court has no authority to impose sentence for a felony in absentia.

Id. at 752.

In Quarterman, the defendant had negotiated a reduced sentence in return for a guilty plea. Prior to entering into the plea, the defendant had requested a few days continuance to enable him to visit his hospitalized sister. One of the conditions of the plea agreement was that if the defendant failed to return for the sentencing hearing the court would be free to impose the maximum sentence. The defendant did not, however, appear for the scheduled sentencing hearing and the trial court sentenced him in absentia. The Second DCA reversed and remanded for resentencing, stating:

> Sentencing is a critical step in a criminal proceeding and the defendant must be present. (Waiver is recognized only in regard to misdemeanors.) Thacker v. State, 185 So.2d 202 (Fla. 3rd DCA 1966); Fla.R.Crim.P. 3.180. While Rule 3.180(b) makes provision for a trial to proceed to verdict if a defendant voluntarily absents himself after having been present at the beginning of the proceedings, it makes no such provision in regard to the pronouncement of judgment or the imposition of sentence for felony offenses. We, therefore, conclude that in regard to the imposition of sentence for felonies, the presence of the defendant is essential.

Id. at 52.

The distinction made by the court between felonies and misdemeanors is presumably based on Rule 3.180(c),

Fla.R.Crim.P., which provides that "Persons prosecuted for misdemeanors may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid." By contrast, Rule 3.180(b) provides that a felony trial may proceed up through the verdict without the presence of a defendant who has voluntarily absented himself during the trial or before the verdict is returned.

The Fifth District's reliance on footnote 1 in Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986) is misplaced. The statement made by that Court regarding the defendant's waiver of his right to be present at sentencing admittedly conflicts with the holdings in Wagner and Quarterman. However, that statement in Roseman is clearly dicta. Although the Roseman court could have decided the case on the waiver issue, it instead vacated the sentence on other grounds. In footnote 1, the court stated that "the resentencing ordered by this opinion renders this point moot." Id. at 987 (f.n.1.)

Another recent opinion of the Fifth District states, in dicta, that "...a felony sentence may not be imposed in the absence of the defendant," citing Wagner and Quarterman. See, Gelsey v. State, 565 So.2d 876 (Fla. 5th DCA 1990). Although the issue in Gelsey concerned the defendant's absence during trial, and did not involve sentencing in absentia, and the court did not consider the waiver issue, the quoted statement and the citations to Wagner and Quarterman would appear to indicate that this Court would follow the precedent of the

Second and Fourth DCAs on the issue of whether the defendant's right to be present during sentencing can be waived. In any event, the statement in Gelsey is no more or less binding than the footnote in Roseman.

There are cases concerning a defendant's right to be present during resentencing which support the holdings in Wagner and Quarterman. See State v. Scott, 439 So.2d 219 (Fla. 1983); Keller v. State, 432 So.2d 672 (Fla. 5th DCA 1983); Thacker v. State, 185 So.2d 202 (Fla. 3rd DCA 1966). In Thacker, the court stated that "Sentencing is a critical step in the criminal proceeding, and in felonies it is necessary that the defendant be present..." Id. at 203. The court noted that the resentencing was not merely to correct a clerical error or mistake, but instead the new sentence contained almost a year of additional imprisonment over that originally imposed. Id. Both Scott and Keller hold that a defendant being resentenced under a post-Villery sentence correction is entitled to be present at the resentencing hearing to the same degree as when initially sentenced. Although the opinion in Keller hints that the defendant's right to be present at resentencing can be waived, Id., at 673, this statement may simply reflect the fact that the considerations for resentencing differ from those during the original sentencing. In any event, the case cited in the Keller opinion for the proposition that the right to be present during resentencing may be waived, Walker v. State, 284 So.2d 415 (Fla. 2d DCA 1972), is

a Second DCA opinion which has either been overruled or considered to be distinguishable by that court by virtue of its Quarterman decision.

Rule 43, Fed.R.Crim.P., like Rule 3.180 of the Florida Rules of Criminal Procedure, requires the defendant's attendance at the imposition of sentence. In U.S. v. Turner, 532 F.Supp. 913 (N.D.Cal. 1982), the district court concluded that different policy considerations apply to a waiver of the right to be present at sentencing as against trial. As the court stated:

> Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation of his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.
>
> However, there is an additional and perhaps more fundamental justification for the right to be personally present. Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of liberty. It shows a lack of fundamental

> respect for the dignity of a man to sentence him in absentia. The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.
>
> Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv.L.Rev. 821, 831 (1968). See also, United States v. Curtis, 523 F.2d 1134, 1135 (D.C.Cir. 1975). These important policy considerations, which are peculiar to sentencing, militate against a rule allowing presence at sentencing to be waived.

U.S. v. Turner, 532 F.Supp. 915-16.

A similar conclusion was reached in U.S. v. Brown, 456 F.2d 1112 (5th Cir. 1972), wherein the Fifth Circuit noted:

> ...While it is not error, in some circumstances, for a defendant to be absent during trial, see, e.g., Illinois v. Allen, 1970, 397 U.S. 337, 90 S.Ct. 1057, 26 L.Ed.2d 353, and Rule 43, F.R.Crim.P., a defendant must be present at sentencing. Only in the most extraordinary circumstances, and where it would otherwise work an injustice, should a court sentence a defendant in absentia, and then only under appropriate safeguards, as where the defendant has expressly waived his right to be present either by sworn affidavit or in open court for the record. See, e.g., United States v. Boykin, D.Md. 1963, 222 F.Supp. 398.

U.S. v. Brown, 456 F.2d 1112, 1113.

In Capuzzo, the Fifth District relied, in part, on Golden v. Newsome, 755 F.2d 1478 (11th Cir. 1985), as constituent case law for the waiver proposition. Capuzzo, 578 So.2d 328, 330. However, that case concerned a federal habeas corpus

review of a Georgia state court conviction. The Eleventh Circuit did not discuss the applicable state procedural rule which mandated the defendant's presence at sentencing but focused instead on right to counsel issues.

Sub judice, Rule 3.180, Fla.R.Crim.P., provides "in all prosecutions for crime the defendant shall be present...(9) at the pronouncement of judgment and the imposition of sentence." Use of the word "shall" in normal usage makes such provision mandatory. Florida Tallow Corp. v. Bryan, 237 So.2d 308 (Fla. 4th DCA 1970). Additionally, failure of a defendant to be present at sentencing prevents the trial court from properly complying with Florida law regarding felony judgments. Section 921.241, F.S., requires that the defendant's fingerprints be place "affixed beneath the Judge's signature" on such judgment. This provision further requires a certification that the fingerprints of the defendant were placed on the judgment in open court in the presence of the trial judge.

The obvious purpose of the statute is to insure that the felony judgment properly identifies the person against whom it was entered. The Florida Legislature in drafting statutes and the Florida Supreme Court in drafting rules of procedure are entitled to afford protection to defendants in excess of that mandated by the Constitution. Here, a rule of criminal procedure and a statute mandate the presence of the felony defendant at the time of sentencing. It was error for the Fifth District to hold that a felony defendant who voluntarily ab-

sents himself from the sentencing hearing may be sentenced in absentia.

V.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that the decision of the Fifth District and the trial court denying petitioner's motion to vacate his sentence imposed in absentia should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 3rd day of September, 1991 to Belle B. Turner, Esquire, Office of the Attorney General, 125 North Ridgewood Avenue, Daytona Beach, FL 32114.

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