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D.A. 2-593

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IN THE SUPREME COURT OF FLORIDA

RICHARD MURL BOOMER, JR.

Petitioner,

vs .

Case No. 79,638

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE
SECOND DISTRICT COURT OF APPEAL

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent adopts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

Petitioner's sentence cannot be characterized as a departure when he was clearly subject to a guidelines sentence and a non-guidelines sentence. Petitioner **was** charged with separate crimes on separate dates in separate informations. It was not improper for the trial court to **make** his guidelines **sentence** consecutive to his non-guidelines sentence. If his sentence is determined to be a departure, the applicable rule is that when the sentence imposed is erroneously believed to be a guidelines sentence, the trial court **may** consider a departure sentence and valid reasons therefore an remand.

ARGUMENT

ISSUE

THE TRIAL COURT IMPOSED A **LEGAL** SENTENCE
IN MAKING THE GUIDELINES SENTENCE
CONSECUTIVE TO PETITIONER'S NON-
GUIDELINES SENTENCE.

(Restated)

At Petitioner's resentencing following remand, defense counsel stated:

The -- I think that's within the Court's discretion. I believe these two counts have to run concurrently, but I think it's within the court's discretion as to whether these run concurrent or consecutive with **the life** sentence.

(R33)

The rule is "[a] sentence must be imposed for each offense." Fla. R. Crim. P. 3.701 (d)12. Consequently, Petitioner received a guidelines sentence of nine (9) years to run consecutive to the life sentence which was not a guidelines sentence. This cannot be characterized as a departure.

Petitioner was resentenced following remand and his new sentence was exactly what the mandate required. His life sentence was not a guidelines sentence. Gresham v. State, 506 So.2d 41 (Fla. 2d DCA 1987). In resentencing, the trial court may use the capital felony as a reason for departing. Norris v. State, 502 So.2d 911 (Fla. 5th DCA 1987); Jones v. State, 571 So.2d 56 (Fla. 2d DCA 1990); Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984).

While Petitioner correctly states the purpose of the sentencing guidelines (Brief for Petitioner at 6), "it was also anticipated that from fifteen to twenty percent of the sentencing decisions routinely would fall outside the recommended range." Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984). The argument and cases cited by Petitioner regarding statutory mandatory minimum sentences are not applicable to Petitioner's sentence. Petitioner case does not involve any statutory mandatory minimums within the guidelines sentences he received.

This Court decided in Roberts v. State, 547 So.2d 129 (Fla. 1989), "that it is proper for the judge to reconsider whether a departure from the guidelines is appropriate when the corrected guidelines scoresheet is before him on remand." Id. at 131. Respondent urges that if this Court determines Petitioner's guidelines sentence to be a departure that the rationale in Roberts be adopted and the trial court allowed to consider a departure. State v. Betancourt, 552 So.2d 1107 (Fla. 1989) (The court concluded, in accordance with Roberts, that the trial judge . . . must be allowed to consider on remand whether departure is appropriate and, if so, to set forth valid reasons for departure); State v. VanHorn, 561 So.2d 584 (Fla. 1990) (Held that a departure sentence is permissible on remand if the trial court erroneously believed it was imposing a sentence falling within the guidelines' range while giving no reasons for what amounted to a de facto upward departure); Henderson v. State, 577 So.2d 653 (Fla. 1st DCA 1991); Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988); Merritt v. State, 567 So.2d 1031 (Fla. 4th DCA 1990).

The Second District Court of Appeal determined that Petitioner's sentence was not a departure and said: "We respectfully disagree with the reasoning of our sister court in Wood v. State" (Brief for Petitioner, Appendix at 3). In Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1992), the court said: "[T]he life imprisonment sentence is a departure sentence because, by being consecutive" Having made that determination, the opinion indicates that the Fifth District would not have found an improper sentence with the life sentence imposed to run prior to the habitual felony offender sentence which is also a non-guidelines sentence like the non-guidelines life sentence in Petitioner's case. In fact, on remand this alternative appears to be available in Wood.

By statute and case law the trial court clearly has the discretion to order concurrent or consecutive sentences. Fla. Stat., §775.021(4)(a) (1989). Non-guidelines sentences take **precedence**. Fla. R. Crim. P. 3.701(d)(9). Both Petitioner and the defendant in Wood, supra, were subject to two kinds of sentences. Imposing the guidelines sentences to run consecutive to the statutory sentences was not illegal.

Respondent points out that Petitioner's correctly states that "[i]f a trial judge does wish to exceed the guidelines he may do so by simply using the contemporaneous capital felony conviction as a basis for departure. Bunney v. State, 17 F.L.W. 5383 (Fla. July 2, 1992)." (Brief for Petitioner at 7). Petitioner received two (2) sentences consecutive to his life sentence of thirty (30) years and fifteen (15) years,

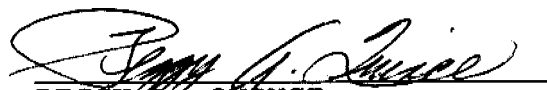
respectively, for two (2) different counts in two (2) different cases at **his** first sentencing. At his resentencing after remand, Petitioner received two (2) nine (9) year sentences concurrent with each other and again consecutive to his life sentence. "No purpose would be served to order resentencing since the court obviously intended to impose the maximum penalties permitted by law.'" Tillman v. State, 466 So.2d 20, 21 (Fla. 2d DCA 1985). This Court should determine that Petitioner's **sentence** was not a departure from the sentencing guidelines and quash **the** opinion in Wood, supra.

CONCLUSION

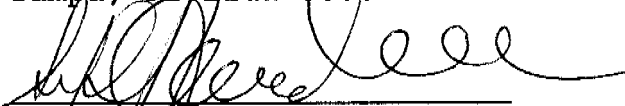
Based on the foregoing facts, arguments, and citations of authority, this Court should determine that Petitioner's sentence was not a departure and quash the opinion in Wood, supra, or in the alternative remand Petitioner's case for Consideration of valid departure reasons at his resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to CYNTHIA J. DODGE, ESQ., Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 4th day of September, 1992.



COUNSEL FOR RESPONDENT