IN THE SUPREME COURT OF FLORIDA

BOBBY MURRAY,

Petitioner,

VS.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,201

INITIAL BRIEF ON THE MERITS

On Discretionary Review of a Decision of the District Court of Appeal, Fourth District of Florida.

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Gary Caldwell
Assistant Public Defender
Florida Bar No. *256919*

Counsel for Appellant

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STATEMENT OF THE CASE

Bobby Murray was found guilty of grand theft at a non-jury trial in the Fifteenth Judicial Circuit.

Only two persons testified at trial: Thomas Stephens for the state, and Mr. Murray on his own behalf. It was undisputed that, around 1:30 p.m. on the day in question, Mr. Stephens was in possession of an automobile owned by a Deatrice or Beatrice Barns. Mr. Stephens could not get the car started, and Mr. Murray, an acquaintance who happened by, agreed to help him by steering the car while Mr. Stephens pushed it to get it going. R 8. At this point, the stories diverge. Mr. Stephens testified that, rather than stopping the car once the engine was running, Mr. Murray drove away. R 8. Ten minutes later, Mr. Stephens reported the car stolen. Id.

Mr. Murray testified, however, that when the car engine started he told Mr. Stephens that he would go get a new battery from his home, and set off in the car on this errand. R 19. A police officer stopped him about a block from his home because the license plate was hanging. Id. Learning that Mr. Murray did not have his driver's license, the officer forbade him from driving the car. R 19-20. Mr. Murray had had the car for only about 20 or 30 minutes. R 20. The officer gave him several tickets and, when told about Mr. Stephens, agreed to contact him about the car. R 19-21.

After finding Mr. Murray guilty, the trial court found him to be an habitual offender and sentenced him to five years of imprisonment to be followed by two years of service in a community

control program. The trial court failed to make specific findings on the record pursuantto sections 775.084(1)(a) and 775.084(3)(d), Florida Statutes (1989) to support the habitual offender sentence.[1]

On appeal, the District Court of Appeal, Fourth District of Florida, reversed the sentence:

> We affirm appellant's conviction but reverse the sentence. On remand, the trial court shall make specific findings on the record pursuant to sections 775.084(1)(a) and 775.084(3)(d), Florid Statutes (1989), to support the habitual offender sentence. See Walker v. State, 462 So.2d 452 (Fla.1985) (failure to object in trial court to habitual offender sentence without statutory findings does not bar defendant from raising issue on direct appeal from sentence); King v. State, 580 **So.2d 169** (Fla. 4th **DCA** 1991) (en banc) (upon remand from defective habitual offender sentence, trial court is free to re-impose habitual offender sentence upon compliance with requirement for statutory findings); Van Bryant v. State, no. 91-2057 (Fla. 4th DCA May **27**, 1992) (same).

Appendix, 1.

Judge Farmer dissented, writing that the result was contrary to Shull **v.** Dugger, **515** So.2d 748 **(Fla.1987)** and Pope v. State, 561 **So.2d 554 (Fla.1990).**

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[1] The trial court's entire findings at sentencing were:

> 1. Apparently referring to Mr. Murray's criminal record: "It's terrible, you know, extensive is --" R 40.
>
> 2. Again referring to his criminal record: "Going back through all this with the exception of a couple of robberies and with gun, one, you know, none of them seem to be particularly earth shaking, Mr. Murray, Mr. Mason, I am sorry." R 41.
>
> 3. "Mr. Murray, this Court, having found you guilty and having adjudicated you to be guilty as you were charged, does not, hear [sic] by **declare** you to be a habitual offender and I am going to give you a split sentence, okay." R 42.

Mr. Murray timely filed his notice of intent to seek discretionary review, and this cause follows.

SUMMARY OF THE ARGUMENT

The lower court erred by giving the state a "second bite at the apple" at resentencing. The court should have remanded for resentencing under the sentencing guidelines.

ARGUMENT

Where the trial court has failed to make required findings before sentencing a defendant, the trial court may not make such findings on remand. See Shull v. Dugger, 515 So.2d 748 (Fla.1987) (sentencing guidelines), Christopher v. State, 583 So.2d 642 (Fla.1991) (death sentence). The policy behind the rule is that failure to make findings precludes meaningful appellate review and that continual remands for further findings unnecessarily multiply judicial review by creating "yo-yo" appeals.

Accordingly, in Robinson v. State, 519 So.2d 703 (Fla. 2d DCA 1988) the court found error where the trial court failed to make written findings supporting its determination that Carl Robinson was an habitual offender, and failed to give written reasons for sentencing him outside the recommended guidelines range. The court remanded for sentencing within the recommended guidelines range pursuant to Shull. The Fourth DCA reached the same result in Pollard v. State, 561 So.2d 29 (Fla. 4th DCA 1991), but later overruled Pollard without explanation in King v. State, 580 So.2d 169 (Fla. 4th DCA 1991) (en banc).

In Shull, this Court held that, where the trial court has failed to render contemporaneous written reasons for a guidelines departure sentence, the sentence must be reversed and the defendant sentenced within the recommended guidelines range.

At bar, the Fourth District's decision giving the state a "second bite at the apple" is contrary to Robinson and Shull. Hence, this Court should reverse its decision and remand with

instructions that Mr. Murray be sentenced within the sentencing guidelines.

CONCLUSION

This Court should reverse the decision of the lower court and remand with instructions that the trial court sentence Mr. Murray pursuant to the sentencing guidelines, or grant such other relief as may be appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) **355-7600**

Garv Caldwell
Assistant 'Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Elisha Newton **Dimick** Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier on October 20, **1992**.

Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1992

BOBBY MURRAY,

Appellant,

v. CASE NO. 91-1450.

STATE OF FLORIDA,

Appellee.

Opinion filed June 17, 1992

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

Appeal from the Circuit Court for Palm Beach County, Walter N. Colbath, Judge.

Richard L. Jorandby, Public Defender, and Gary Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melynda Melear, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We affirm appellant's conviction but reverse the sentence. On remand, the trial court shall make specific findings on the record pursuant to sections 775.084(1)(a) and 775.084(3)(d), Florida Statutes (1989), to support the habitual offender sentence. See Walker v. State, 462 So.2d 452 (Fla. 1985) (failure to object in trial court to habitual offender Sentence without statutory findings does not bar defendant from raising issue on direct appeal from sentence); King v. State, 580 So.2d 169 (Fla. 4th DCA 1991) (en banc) (upon remand from defective habitual offender sentence, trial court is free to re-impose habitual offender sentence upon compliance with requirement for statutory findings); Van Bryant v. State, no. 91-2057 (Fla. 4th DCA May 27, 1992) (same).

We also adopt the question certified in Van Bryant as one of great public importance.

CONVICTION AFFIRMED; SENTENCE REVERSED AND REMANDED WITH DIRECTIONS.

ANSTEAD and WARNER, JJ., concur.
FARMER, J., specially concurs with opinion.

FARMER, J., specially concurring.

If I were writing on a clean slate, and I recognize that I am not, I would instruct the trial court on remand that appellant's sentence must be limited to one within the guidelines and in no event greater than the one provided by law for his conviction. I thus disagree with our decision in King v. State, 580 So.2d 169 (Fla. 4th DCA 1991) (en banc), in which we held that, after an invalid attempt *to* impose a habitual offender sentence, the trial court is free to reimpose the same habitual offender sentence so-long as it complies with the statutory requirements for *express* findings as to two previous qualifying offenses, one of which was final within the preceding 5 years, and which were not pardoned or set aside later.

To reach the result in King, we had to recede from our decision in Pollard v. *State*, 561 So.2d 29 (Fla. 4th DCA 1990). Pollard was based on Shull v. Dugger, 515 So.2d 748 (Fla. 1987), where the court held that, after a habitual offender sentence had been reversed because it was based on invalid reasons, the resentencing is limited to the guidelines. More recently, in Pope V. State, 561 So.2d 554 (Fla. 1990), the court held that resentencing after a defective guidelines departure is also limited *to* a sentence within the guidelines.

In Shull, the court explained:

> We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons for the original departure sentence have been reversed by an appellate court.

515 So.2d at 750. This reasoning is no less applicable to a departure through habitual offender treatment. Although the universe of factual reasons for habitual offender departure is smaller than for simple guidelines departure, it is not the pure number of available reasons for departure that governs, so much as it is the rejection of seriatim appeals from defective sentences until the state finally gets it right.

Our King decision, like Van Bryant, is based on the premise that habitual offender departure sentences are qualitatively different from guidelines departure sentences, at least for purposes of resentencing after a defective attempt to impose a departure sentence. Even if that conclusion were possible as a matter of first impression, and I don't believe it is, surely it is impossible on grounds of stare decisis after Shull. It was precisely a failed habitual offender sentence that was reversed on appeal in Shull.

Because *Xing* was an en banc decision, reconsideration of the same issue en banc is pointless. I am bound to follow it, so I concur with the majority, both as to that issue and the affirmance of the conviction. I write this opinion only to

suggest the need for supreme court review to correct our en banc error.

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I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier on October 20, 1992.

Of Counsel