OA 6-1-93

IN THE SUPREME COURT OF FLORIDA

ANTONIO TROUTMAN,

Petitioner,

v.

CASE NO. 80,495

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner in this brief. Attached hereto as an appendix is the split decision of the lower tribunal, which has been reported as Troutman v. State, 603 So. 2d 608 (Fla. 1st DCA 1992). A one volume record on appeal will be referred to as "R." A one volume sentencing transcript will be referred to as "T."

II STATEMENT OF THE CASE AND FACTS

Petitioner, age 16, was charged by amended information with kidnapping to facilitate a felony, grand theft auto, and aggravated assault with a deadly weapon (R 16-17). Subsequently, he pled nolo contendere to the offense of false imprisonment and grand theft (T 3; Appendix at 1).

The predisposition report noted that petitioner had never been supervised by the Department of Health and Rehabilitative Services (R 22). It recommended that petitioner be treated as a juvenile rather than as an adult, by adjudication of delinquency and a term of community control with specified conditions (R 23-24A).

The sentencing judge stated his intention to treat petitioner as an adult:

> He has no prior record, but I think this is a very serious case. ... I'm concerned about the ability of juvenile sanctions in this case to impress upon Mr. Troutman the results of this type of action. So I am going to sentence him as an adult (T 8-9).

Adjudication of guilt was withheld, and the judge placed petitioner on probation for three years (R 28). In doing so, the judge cautioned petitioner that a violation of probation would result in an adjudication of guilt, and thus a criminal record (T 9). A written order articulating the rationale for imposing adult sanctions was filed three days later:

> 1. The primary charge in this case, false imprisonment, was committed in a premeditated and willful manner and was extremely serious, given that the defendant perpetrated the false imprisonment with the use of a scissors, which could be

> considered a deadly weapon. The defendant is just shy of his seventeenth birthday; however, he demonstrates a certain street sophistication beyond his chronological age.
>
> 2. The defendant has only one prior contact with the juvenile authorities, which was not a serious offense.
>
> 3. The period of time available to impose juvenile sanctions is insufficient to adequately protect the community and to afford the defendant sufficient counseling to ensure his rehabilitation.
>
> 4. The imposition of juvenile sanctions are insufficient to impress upon the defendant the seriousness of this type of action. (R 26-27; Appendix at 2, footnote 1).

On appeal, petitioner argued this written order was insufficient, because it did not address each and every one of the six enumerated criteria contained in Section 39.059(7)(c), Florida Statutes (1991). The majority of the lower tribunal disagreed:

> Application of the six enumerated criteria to the trial court's written order setting forth reasons for imposing adult sanctions indicates that in this case the court considered each factor, albeit not in the express language of the statute [emphasis added]. ... We conclude that a reading in pari materia of the sentencing transcript and the written order demonstrates sufficient, as opposed to rote, compliance [emphasis added] with the requirements of section 39.059(7)(c). Appendix at 2.

Judge Zehmer, in dissent, noted that the predisposition report had recommended that petitioner be sentenced as a juvenile, and would have strictly construed the statute.

Appendix at 3. He further observed the majority decision was contrary to a recent decision of the same court. Id.

On February 15, 1993, this Court granted discretionary review, ordered merit briefs, and scheduled oral argument.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the majority opinion of the lower tribunal is incorrect. The statute allowing a juvenile to be sentenced as an adult contains six criteria which must be addressed by the judge to justify adult sanctions. The statute absolutely requires the judge to render a written order addressing each and every criteria.

The requirement of a written order, and one which addresses each one of the statutory criteria, is included in the statute. A comparison of this statute with other sentencing schemes demonstrates the wisdom of the statute, for one of its purposes is to facilitate appellate review.

Cases construing this statute, and its predecessor, uniformly hold that the failure to comply with the statutory requirements constitutes reversible error. The decision of the lower tribunal, which allows substantial compliance with the statute to be sufficient, is erroneous and must be reversed.

IV ARGUMENT

THE DECISION OF THE LOWER TRIBUNAL, THAT A JUDGE WHO SENTENCES A JUVENILE AS AN ADULT NEED NOT ADDRESS EACH OF THE STATUTORY CRITERIA IN WRITING, IS IN ERROR AND MUST BE REVERSED BY THIS COURT.

Petitioner was a 16 year old juvenile with no prior record when he stood before the court for sentencing as an adult for two third degree felonies. He should have been protected from the imposition of adult probation by Section 39.059(7)(c), Florida Statutes (1991), which provides:

> Suitability or nonsuitability for adult sanctions shall be determined by the court before any other determination of disposition. The suitability determination shall be made by reference to the following criteria:
>
> 1. The seriousness of the offense to the community and whether the protection of the community requires adult disposition.
>
> 2. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner.
>
> 3. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.
>
> 4. The sophistication and maturity of the child.
>
> 5. The record and previous history of the child, including:
>
> a. Previous contacts with the department, the Department of Corrections, other law enforcement agencies, and courts;
>
> b. Prior periods of probation or community control;

c. Prior adjudications that the child committed a delinquent act or violation of law; and

d. Prior commitments to institutions.

6. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to services and facilities for delinquent children.

The requirement of a written order is found in Section 39.059(7)(d), Florida Statutes (1991):

> Any decision to impose adult sanctions shall be in writing and in conformity with each of the above criteria. The court shall render a specific finding of fact and the reasons for the decision to impose adult sanctions.

The majority of the lower tribunal held the order under review demonstrated "sufficient, as opposed to rote, compliance" with the requirements of Section 39.059(7)(d).

To the contrary, sufficient or substantial compliance is not enough; the legislature intended rote compliance. The statute clearly requires that the written order make specific findings as the <u>each and every</u> one of the criteria.

The legislature's use of the term "in writing" is self-explanatory. The legislature's use of the term "such order" is further evidence of its intent that the findings be in written form.

The legislature's choice of the term "render" is most telling. This legal term has a particular meaning which requires a written document, because rendition of an order is defined as:

> the filing of a signed, written order with the clerk of the lower tribunal.

Fla. R. App. P. 9.020(g). Without a written order, there is nothing to appeal. Billie v. State, 473 So. 2d 34 (Fla. 2nd DCA 1985). If the legislature had used the term "recite" or "make" or "enter," then petitioner might agree the findings could be oral in part. But that is not the case here, due to the legislature's choice of the term "render."

Moreover, compare the above statutes with the one on habitual offender sentencing:

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

Section 775.084(3)(d), Florida Statutes (1991). Here the legislature did not use the terms "in writing" or "render" or "such order," and so the statute has been construed to allow oral findings. Parker v. State, 546 So. 2d 727, 728-29 (Fla. 1989):

> Parker argues that "almost every Florida scheme permitting extraordinary sentencing requires findings of fact and reasons justifying the sentence to be in writing." In this regard, he relies on our decisions and the applicable statute or rule which require written findings to (1) justify the death sentence, (2) sentence a juvenile as an adult, and (3) impose a sentence which departs from the prescribed sentencing guidelines. Parker argues that the same rule should apply to habitual offender sentencing. We disagree. The applicable statute or rule in the three instances relied on by Parker specifically requires the underlying reasons for the sentence to be in writing. To the contrary, section 774.084 contains no such

requirement. (footnotes omitted; emphasis added).

In State v. Rhoden, 448 So. 2d 1013, 1016-17 (Fla. 1984), this Court held:

> It is abundantly clear that the purpose of this legislation requiring the trial court to place in writing its findings of fact and reasons for imposing an adult sentence on a juvenile is to facilitate an intelligent appellate review of such a sentence.
>
> * * *
>
> The juvenile justice statutory scheme, as adopted by the Florida Legislature, grants to juveniles the right [emphasis in original] to be treated differently from adults. The legislature has emphatically mandated that trial judges not only consider the specific statutory criteria pertaining to the suitability of adult sanctions, but that they also reduce to writing their findings of fact and reasons for imposing an adult sentence on a juvenile [emphasis added]. A written order is necessary in order to make effective the right of sentence review granted to juveniles by the legislature. See section 39.14, Florida Statutes (1981). This right of sentence review is not provided to adults.

In State v. Cain, 381 So. 2d 1361, 1367 (Fla. 1980), this Court noted, in holding constitutional the statute allowing state attorneys to file direct informations against juveniles:

> [E]ven when a juvenile is convicted in adult court he is still given special treatment as a juvenile. Before imposing judgment, the trial court must conduct a disposition hearing to determine whether juvenile or adult sanctions are appropriate.

Appellate review of the reasons for adult sanctions is not facilitated if the appellate court must comb the record of the

sentencing hearing to determine if the judge orally addressed each and every criteria in the statute.

Other district courts of appeal have held that failure to address all of the criteria in writing required reversal under the predecessor to this statute, Section 39.111(6) and (7), Florida Statutes (1989). Meyers v. State, 593 So. 2d 609 (Fla. 5th DCA 1992); Flowers v. State, 546 So. 2d 782 (Fla. 4th DCA 1989); and Gooden v. State, 536 So. 2d 392 (Fla. 4th DCA 1989).

Other district courts of appeal have held that failure to address all of the criteria in writing requires reversal under the present statute. Bell v. State, 598 So. 2d 203 (Fla. 4th DCA 1992); Horne v. State, 593 So. 2d 309 (Fla. 5th DCA 1992); Riley v. State, 588 So. 2d 1035 (Fla. 4th DCA 1991); and Kohler v. State, 588 So. 2d 689 (Fla. 4th DCA 1991). The majority's holding, that oral comments at the sentencing hearing can substitute for a written order, and that "rote" compliance with the statute is not necessary, is incorrect.

Moreover, an order containing findings, but which merely states conclusions and tracks the statutory language, is insufficient. Youngblood v. State, 560 So. 2d 409 (Fla. 5th DCA 1990); Ervin v. State, 561 So. 2d 423 (Fla. 3rd DCA 1990); and Jackson v. State, 588 So. 2d 1085 (Fla. 5th DCA 1991). The decision to place juveniles in the same system with hardened adult criminals cannot be taken lightly; it must require serious judicial labor.

Similarly, the legislature has required that reasons for departure from the guidelines be in written form:

> The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial judge.

Section 921.001(6), Florida Statutes (1991). This requirement is mandatory, and oral reasons do not satisfy the statute. Pope v. State, 561 So. 2d 554 (Fla. 1990). The reasons for requiring a comprehensive written order are obvious -- the imposition of adult sanctions on a juvenile is a serious sentencing decision, and the judge must justify his decision in writing. These are the same policy reasons which moved this Court to require contemporaneous written departure orders in Ree v. State, 565 So. 2d 1329, 1332 (Fla. 1990):

> We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

Exposing a juvenile to the horrors of adult prison is also an "extraordinary punishment" which requires a "serious and thoughtful" written order addressing each statutory criteria.

The majority of the lower tribunal has made the same mistake in the instant case that court did in the sentencing guidelines departure case of Casteel v. State, 481 So. 2d 72 (Fla. 1st DCA 1986). There the lower tribunal approved three out of five written reasons for departure. It looked beyond the written reasons and to the record and wrote a lengthy footnote with the facts of the crime. These facts, not recited

by the judge in his written departure order, were used by the court to find the "particular circumstances of the offenses," and "the heinous, repugnant manner of commission," id. at 74, and to justify affirmance.

The view that portions of the record not cited by the sentencing judge in his written order could be used to uphold the sentence was renounced by this Court:

> An appellate court must look only to the reasons for departure enumerated by the trial court and must not succumb to the temptation to formulate its own reasons to justify the departure sentence.

Casteel v. State, 498 So. 2d 1249, 1252 (Fla. 1986). The same is true with regard to a written order imposing adult sanctions.

The majority inexplicably ignored its previous decision in Taylor v. State, 593 So. 2d 1147 (Fla. 1st DCA 1992), which held that the written order must address all of the criteria.[1] Thus, the majority said that substantial compliance with the statute is all that is necessary, if the oral remarks and written order, when read together, address each of the statutory criteria. But that is not what the statute says; its plain terms require the written order to address all criteria, without regard to what was said at sentencing. The statute's

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[1]Curiously, the same panel reversed an adult sentence imposed on another juvenile on the same date by the same sentencing judge (T 8) in Hill v. State, 605 So. 2d 514 (Fla. 1st DCA 1992), for failure of the written order to address each criteria.

requirements are clear, and the lower tribunal had no power to rewrite it. State v. Barnes, 595 So. 2d 22 (Fla. 1992).

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the majority opinion of the lower tribunal and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Initial Brief of Petitioner has been furnished to Wendy S. Morris, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, #295 Scott Drive, Monticello, Florida 32344, this 8th day of March, 1993.

P. DOUGLAS BRINKMEYER

court that he did not meet the criteria for being sentenced as a habitual felony offender. Because the trial court failed to attach to the order portions of the record that conclusively refute this claim, we reverse and remand with directions to reconsider the issue and either attach those portions of the record that conclusively refute McClendon's allegations or, if the record does not conclusively refute those allegations, conduct an evidentiary hearing on this issue. *Van Meter v. State*, 527 So.2d 306 (Fla. 1st DCA1988).

We affirm the trial court's denial of the remaining grounds as such grounds are legally insufficient to support a claim for post-conviction relief.

AFFIRMED in part, REVERSED in part, and REMANDED.

ZEHMER, WOLF and KAHN, JJ., concur.

Antonio TROUTMAN, Appellant,

v.

STATE of Florida, Appellee.

No. 92-298.

District Court of Appeal of Florida, First District.

July 29, 1992.

Rehearing Denied Sept. 14, 1992.

Juvenile pled nolo contendere to offenses of false imprisonment and grand theft. The Circuit Court for Jefferson County, Kevin P. Davey, J., determined that juvenile would be treated as an adult, withheld adjudication of guilt, and placed juvenile on probation for three years, and juvenile appealed. The District Court of Appeal, Joanos, C.J., held that the trial court sufficiently complied with the statute requiring consideration of six criteria before imposing adult sanctions on a juvenile.

Affirmed.

Zehmer, J., dissented and filed an opinion.

1. Infants ⇐69(6, 8)

The decision to impose adult sanctions on a juvenile must be supported by written order or transcript containing the requisite findings of fact and reasons for imposing adult sanctions; failure to address even one of the statutory criteria requires reversal and remand. West's F.S.A. § 39.059(7)(c).

2. Infants ⇐69(8)

Juvenile was not entitled to reversal of imposition of adult sanctions for failure to consider all of the statutorily required factors, where a reading *in pari materia* of the sentencing transcript and the written order demonstrated sufficient, if not rote, compliance with the requirements of the statute. West's F.S.A. § 39.059(7)(c).

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Wendy S. Morris, Asst. Atty. Gen., Tallahassee, for appellee.

JOANOS, Chief Judge.

Appellant seeks reversal of the imposition of adult sanctions, on grounds that the trial court failed to consider all of the factors enumerated in section 39.059(7)(c), Florida Statutes (1991). We affirm.

Appellant was charged initially with kidnapping to facilitate a felony, grand theft auto, and aggravated assault with a deadly weapon. Subsequently, he pled nolo contendere to the offenses of false imprisonment and grand theft. These charges arose from an incident in which appellant approached the victim as she was entering her vehicle. He detained the victim with a question, then brandished a large pair of scissors, and informed her that he was going with her. Appellant forced his way

into the victim's vehicle, and took her keys. As he attempted to start the vehicle, the victim eluded him and sought help. Appellant was observed fleeing the scene, and was later contacted at his home.

At the sentencing proceeding, the victim provided the court with an account of appellant's conduct since the charged offenses. This account indicated that appellant was enjoying the notoriety generated by his actions, including the nickname "Scissorhands" applied by his peers. The assistant state attorney recited the statutory requirements when imposing adult sanctions in a juvenile proceeding, addressed the serious nature of the instant offense with reference to those requirements, and noted the similarity of the offense in this case to an encounter between appellant and another woman which had taken place the day before this incident.

The trial court noted that appellant had no prior record, but in view of the serious nature of appellant's conduct, the court was persuaded that juvenile sanctions were inadequate to impress upon him the consequences of his actions. The court announced its intention to treat appellant as an adult. Adjudication of guilt was withheld, and the trial court placed appellant on probation for three years. In so doing, the court cautioned appellant that a violation of probation would result in an adjudication of guilt, and thus a criminal record. A written order articulating rationale for imposing adult sanctions was filed three days later.

[1] Prior to a determination whether adult sanctions should be imposed upon a juvenile, the trial court is required to consider the six criteria enumerated in section 39.059(7)(c), Florida Statutes (1991). *See State v. Rhoden*, 448 So.2d 1013 (Fla.1984). The decision to impose adult sanctions must be supported by a written order or a transcript containing the requisite findings of fact and reasons for imposing adult sanctions. *Hodgson v. State*, 590 So.2d 33 (Fla. 1st DCA 1992); *Martin v. State*, 547 So.2d 998, 999–1000 (Fla. 1st DCA 1989); *Stickles v. State*, 579 So.2d 878, 879 (Fla. 2d DCA 1991). Failure to address even one of the criteria requires reversal and remand. *Taylor v. State*, 593 So.2d 1147, 1148 (Fla. 1st DCA 1992).

[2] Application of the six enumerated criteria to the trial court's written order setting forth reasons for imposing adult sanctions indicates that in this case the court considered each factor, albeit not in the express language of the statute.[1] Rather, the factors were addressed briefly but appropriately in the written order with reference to the factual context of this case. For example, factor three, pertaining to whether the offense was against persons or property, was addressed in the court's oral remarks at sentencing and in the written order, by a reference to the premeditated and willful manner in which the primary charge, false imprisonment, was perpetrated. We conclude that a reading *in pari materia* of the sentencing transcript and the written order demonstrates sufficient, as opposed to rote, compliance with the requirements of section 39.059(7)(c).

Accordingly, the imposition of adult sanctions is affirmed.

ALLEN, J., concurs.

ZEHMER, J., dissents with opinion.

1. The trial court's reasons for the imposition of adult sanctions were stated thusly:

> The Court imposed adult sanctions in lieu of juvenile sanctions in this case for the following reasons:
>
> 1. The primary charge in this case, false imprisonment, was committed in a premeditated and willful manner and was extremely serious, given that the Defendant perpetrated the false imprisonment with the use of a scissors, which could be considered a deadly weapon. The Defendant is just shy of his seventeenth birthday; however, he demonstrates a certain street sophistication beyond his chronological age.
>
> 2. The Defendant has only one prior contact with the juvenile authorities, which was not a serious offense.
>
> 3. The period of time available to impose juvenile sanctions is insufficient to adequately protect the community and to afford the Defendant sufficient counseling to ensure his rehabilitation.
>
> 4. The imposition of juvenile sanctions are insufficient to impress upon the Defendant the seriousness of this type of action.

ZEHMER, Judge (dissenting).

The trial court determined to sentence this sixteen-year-old juvenile delinquent as an adult pursuant to his nolo contendere plea to having committed the offenses of false imprisonment and grand theft. The court withheld adjudication and placed appellant on adult probation. Appellant had no prior criminal record and the predisposition report recommended that he be handled as a juvenile and placed on community control. Section 39.059, Florida Statutes (1991), contains specific requirements that must be strictly followed before sentencing a juvenile as an adult. Subsection 39.059(7)(c) lists the six criteria that must be referenced in making such adjudication, and subsection 39.059(7)(d) requires that the "decision to impose adult sanctions shall be in writing and in conformity with each of the above criteria," and that the "court shall render a specific finding of fact and the reasons for the decision to impose adult sanctions." Failure of the written order to comply with these requirements requires reversal. *E.g., Taylor v. State*, 593 So.2d 1147 (Fla. 1st DCA 1992). I am unable to join in the majority's decision to affirm because the order under review does not address each of the mandatory criteria and thus does not comply with the statutory requirements.

COMMERCIAL UNION INSURANCE COMPANY, Appellant,

v.

Jamie Edward FALLEN and Joseph Wenzel, Appellees.

No. 91-2363.

District Court of Appeal of Florida, Fifth District.

July 31, 1992.

Rehearing Denied Aug. 31, 1992.

Employees who had received workers' compensation benefits obtained judgment for related injuries against third-party tort-feasor. Employees and carrier failed to agree on whether carrier was entitled by virtue of its lien against judgment to post-judgment interest accrued on carrier's pro rata share. The Circuit Court, Orange County, W. Rogers Turner, J., denied interest to carrier, and carrier appealed. The District Court of Appeal, Peterson, J., held that postjudgment interest on judgment against third-party tort-feasors was to be included in award of pro rata share of proceeds of the judgment for compensation and medical benefits paid by employer or employer's carrier.

Reversed and remanded.

1. Workers' Compensation ⇐2252

"Judgment" within meaning of statute concerning employer's or workers compensation carrier's lien against third-party recovery includes all of the rights created by the judicial order and there are no words in statute limiting the lien to only principal portion of judgment. West's F.S.A. § 440.39(3)(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation ⇐2252

Statute providing for lien against third-party recovery imposes lien in favor of employer or its compensation carrier upon judgment or settlement recovered and not upon portions of it. West's F.S.A. 440.39(3)(a).

3. Workers' Compensation ⇐2252

Lien of employer or its workers' compensation carrier against employees' judgments against third-party tort-feasors attaches when amount is liquidated through judgment or settlement; right to distribution of proceeds is after funds are collected and employees and carrier either agree on pro rata share due the carrier or court awards pro rata share. West's F.S.A. § 440.39(3)(a).