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IN THE SUPREME COURT OF FLORIDA

CASES No. 81,881

HAZEL JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM DISTRICT COURT OPINION

****

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, Hazel Jones, was the defendant in the trial court and the Appellee in the district court of appeal. She will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State."

The following symbols will be used in this brief:

"R" = Record on Appeal

"PB" = Petitioner's Initial Brief before this Court.

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts Petitioner's Statement of the Case and Facts as given, with the following qualification and additions.

1. Petitioner's statement that, "these present charges should have been filed against Petitioner with the original set of criminal charges..." PB. at 2, is improperly argumentative and lacks a factual basis. Thus, the State objects, and submits that this statement may not be considered by this Court.

Judge Fleet did state: "This should have gone down the first time around except for the handwriting comparison." (R 8). However, Judge Fleet did not state that the state should have filed the charges before they received the results of the handwriting comparison.

2. At the sentence hearing, defense counsel stated:

> I had explained to Miss Jones that you might not accept that and that there was a chance that the State would appeal the sentence.
>
> She understands.

(R 12).

3. After Petitioner had agreed to the plea, the judge stated, sua sponte, "[i]f the State wins the appeal you will be able to take back your no contest plea and start from scratch on this case." (R 13).

SUMMARY OF ARGUMENT

POINT I

The district court of appeal correctly concluded that the holding in this case was mandated by this Court's holding in Pope v. State, 561 So. 2d 554 (Fla. 1990). Since the trial court never issued a written order stating the basis for the downward departure, the cause had to be reversed and remanded for sentencing within the guidelines, unless Petitioner successfully moves to vacate her plea.

Neither the rules requiring written contemporaneous reasons, nor any of this Court's prior decisions, distinguish between upward and downward departures. In both case, the trial court must fulfill its obligation to give serious weight to a decision to depart from the guidelines, and must provide written reasons for any such departure.

The "rule of lenity" is irrelevant to this issue, because there is no ambiguity whatsoever, in the requirement that a written order must issue. In the instant case, the trial court did not fulfill its obligation to give serious consideration to the decision to depart from the guidelines. Thus the departure could not possibly be affirmed.

Finally, all of this Court's concerns about allowing a trial court to file written reasons for departure, after remand, apply equally to upward and downward departures.

POINT II

Petitioner can not raise the issue of ineffective assistance of counsel in this court. Claims of ineffective assistance of counsel should be raised in collateral proceedings, because the lower court, where the alleged error occurred, is best suited to determine the validity of the claim. In any event, Petitioner has failed to meet either prong of the test for ineffective assistance of counsel as articulated in Strickland v. Washington, 466 U.S. 668 (1984).

POINT III

The fourth district court of appeal correctly determined that this cause must be reversed and remanded for resentencing within the guidelines pursuant to Pope. Petitioner is free to move to vacate her plea, and it is up to the trial court to determine if she should be allowed to do so.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY DETERMINED THAT THIS HONORABLE COURT'S DECISION IN POPE V. STATE, 561 SO. 2D 554 (FLA. 1990, DOES REQUIRE THAT A DOWNWARD DEPARTURE SENTENCE BE REVERSED FOR RESENTENCING WITHIN THE PERMITTED GUIDELINES RANGE WHEN THE TRIAL COURT FAILS TO FILE A WRITTEN CONTEMPORANEOUS ORDER. (Restated).

JURISDICTION

In State v. Jones, 18 Fla. L. Weekly D1316 (Fla. 4th DCA May 26, 1993), the district court reversed and remanded a downward departure sentence, pursuant to Pope v. State, 561 So. 2d 554 (Fla. 1990), because the trial court had never issued any written reasons for the departure. However, the district court certified the following question as one of great public importance:

> DOES POPE V. STATE, 561 SO. 2D 554 (FLA. 1990), REQUIRE BELOW GUIDELINES DEPARTURE SENTENCES WITHOUT CONTEMPORANEOUS WRITTEN REASONS, WHERE THE DEFENDANT IS WITHOUT FAULT IN THE SENTENCING PROCESS, TO BE REVERSED FOR RESENTENCING WITHIN THE GUIDELINES?

Petitioner filed a notice invoking this Court's discretionary jurisdiction pursuant to **Fla. R. App.** P. 9.030(a)(2)(A)(v). This Court postponed its decision on jurisdiction and ordered the parties to file briefs on the merits.

It is unnecessary for this Court to grant jurisdiction in this cause because the certified question does not involve a matter of great public importance. The Fourth District correctly concluded that their holding was mandated by this Court's opinion

in Pope. Further, Section 921.001(6), Florida Statutes (1991), Fla. R. App. P. 3.701(d)(11), as well as this Court's decisions in Pope and Smith v. State, 598 So. 2d 1063 (Fla. 1992), clearly express show that a downward departure without written reasons must be reversed and remanded for resentencing within the guidelines. Therefore, there is no important question of law which requires resolution by this Court.

ARGUMENT

Should this Court decide to proceed with review on the merits, this Court should affirm the decision of the District Court, since the result reached by the district court was mandated by the relevant statute and rule, and is consistent with the precedent provided by this Court's prior opinions.

Section 921.001(6), Florida Statutes (1991), requires that "any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge." Fla. R. Crim. P. 3.701(d)(11) provides in pertinent part:

> Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. Any sentence outside the permitted guidelines range must be accompanied by a written statement delineating the reasons for departure.
>
> (emphasis added)

The Committee Note (1988) to rule 3.701 provides:

> If a sentencing judge departs from the permitted range, reasons for departure shall be articulated at the time sentence is imposed. The written

> statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public of the reasons for departure.

In the instant case the trial judge never filed any written reasons whatsoever, nor did he give the matter serious consideration. Instead during a quick sentencing hearing, the judge stated that he was departing because

> [t]his case should have been resolved the first time around and the Defendant shouldn't be required to pay the penalty of whatever delay was occasioned in the investigation.

(R 10)

In Smith, this Court articulated the rationale for requiring contemporaneous written reasons:

> Requiring a court to write its reasons for departure at the time of sentencing reinforces the court's obligation to think through its sentencing decision, and it preserves for appellate review a full and accurate record of the sentencing decision.

Smith at 1067. If the trial court had given the matter more thoughtful consideration in a calm reasoned manner it may have determined that this reason for departure was not "clear and convincing." State v. Brown, 542 So. 2d 1371 (Fla. 4th DCA 1989).

This Court recognized in State v. Jackson, 478 So. 2d 1054 (Fla. 1985), abrogated on other grounds, Miller v. State, 482 U.S. 423 (1987), that

> [m]uch is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders...

> Lastly, the development of the law would best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing... This effort would best be served by requiring the thoughtful effort which "a written statement providing clear and convincing reasons" would produce. This, in turn, should provide a more precise, thoughtful, and meaningful review which ultimately will result in the development of better law.

Id. at 1055-56 (quoting Boynton v. State, 473 So. 2d 703 (Fla. 1983). In the present case, the trial judge departed downward because he felt that this crime should have been included, when Petitioner was sentenced for her earlier crimes, thus resulting in a lower overall guidelines sentence. Had the judge given the matter more attention and thought, he might have considered that, while the State was powerless to charge Petitioner with the instant crime before the handwriting analysis was completed, Petitioner, herself, could have stipulated that the signature was hers, and thus she could have chosen to be sentenced for this crime along with the others.

In Pope, this Court held that when an appellate court reverses a departure sentence because there are no written reasons, the court must remand for resentencing with no possibility for departure, rather than remanding for resententencing to permit the court to specify written reasons for the departure sentence. The holding in Pope applied to both upward and downward departures. In fact, this Court specifically considered the effect on downward departures by explicitly

receding from Barbera v. State, 505 So. 2d 413 (Fla. 1987), which involved a downward departure. Barbera had permitted the trial court to specify written reasons for a departure sentence upon remand, rather than requiring resentencing within the guidelines, and this Court specifically receded from that holding.

This Court also determined that the Pope holding applies to downward departures in Smith. Smith, too, involved a downward departure, and this Court stated:

> [W]e conclude that had the trial court failed to carry out its duty to order the reason for departure committed to writing at the time of sentencing, the district court would have been correct in ordering resentencing pursuant to Pope.

Id. at 1067. Thus, this Court has already clearly stated that the Pope holding absolutely applies to downward departures.

Although this Court has clearly expressed that the Pope holding applies equally to downward departures, the district court mistakenly believed that the Pope holding was based in part on the "rule of lenity," and thus should only apply when the result is to the criminal defendant's benefit. The Pope decision itself made no mention of the "rule of lenity." Moreover, the rule of lenity cannot apply because the rule should only be used when there is ambiguity in the language or application of a statute. The relevant statutes and rules are wholly unambiguous in their requirements for clearly articulated written reasons for departure. In the instant case there is no ambiguity about whether the court fulfilled its duty to give the matter of departure serious and reasoned consideration, he did not.

Finally, Petitioner requests that this Court modify its decision in Pope. Petitioner argues that one purpose "articulated for the necessity of written reasons for departure was '[t]o avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure..." Pope, 561 So. 2d at 556." Petitioner further argues that "[t]his problem of multiple appeals, multiple resentencing would not be a concern with a downward guidelines departure." PB at 18. Petitioner fails to articulate why this Court's concerns about remanding for written reasons are valid in upward departure cases and invalid in downward departure cases. In either case, this Court's concerns should be the same.

POINT II

THIS COURT CANNOT AFFIRM PETITIONER'S DOWNWARD DEPARTURE SENTENCE ON THE ALTERNATE GROUND THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER SENTENCING HEARING.

This Court need not consider Petitioner's claim of ineffective assistance of counsel, because this issue was not discussed in the district court's opinion, and consideration of this issue is not necessary for resolution of the certified question. Further, the issue of ineffective assistance of counsel is improperly before this Court, since it must be raised in the trial court through **Fla. R. Crim. P.** 3.850.

In Reaves v. State, 593 So. 2d 1150, 1151 (Fla. 1st DCA 1992), the court stated that ineffective assistance of counsel claims "must be raised in a motion for post-conviction relief." See also State v. Dist. Ct. of Appeal, First Dist., 569 So. 2d 439 (Fla. 1990). Petitioner argues that this Court should consider the issue of ineffective assistance of counsel because of dicta in State v. Salley, 601 So. 2d 309 (Fla. 4th DCA 1992). In Salley, the judge had signed a court status form stating the reasons for departure, and defense counsel had promised to prepare an appropriate order and present it later that day. No such order was ever submitted. The Fourth District concluded that the court status form constituted a sufficient writing. The court also noted, in a footnote, that

> if the failure of the defense counsel to submit the written order would be the reason for reversing and remanding for a sentence within the guidelines, we could not think of a clearer case where ineffective assistance of counsel

> would be so apparent on the face of the record as to give relief on direct appeal rather than in collateral proceedings.

Id. at 310 n.1. (citations omitted). Not only was the statement relied on by Petitioner mere dicta from a lower court, but the facts of the case were completely distinguishable from the present facts. In Salley, any error would have been wholly due to that defense counsel's inexcusable and clearly neglectful failure to prepare an order, and but for that failure, an order would have been issued. In the present case it is unclear whether there was any duty that defense counsel failed to fulfill, whether any such failure would constitute deficient performance under Strickland v. Washington, 466 U.S. 668 (1984), and if so whether the results of the proceedings would have been different if counsel had not been deficient.

Petitioner argues that defense counsel "was deficient in failing to secure a contemporaneous written downward departure order from the trial court." PB at 22. However, Petitioner has failed to show that defense counsel had reason to know that the judge was not going to issue a written order, much less that she was deficient for failing to secure one. Moreover, Petitioner cannot show that defense counsel could have secured a written order from the judge. In fact, if the judge had given this matter more than perfunctory consideration, and had taken the time to write out an order, he may well have realized that "clear and convincing" reasons for departure did not exist.

At the very least, these matters require findings of fact, thus this issue can only be raised in the trial court, by collateral attack.

POINT III

THE FOURTH DISTRICT PROPERLY DETERMINED THAT THIS CAUSE MUST BE REMANDED FOR RESENTENCING WITHIN THE GUIDELINES UNLESS PETITIONER VACATES HER PLEA. (Restated)

As the State has shown in point I, the district court properly determined that this cause must be remanded for resentencing within the guidelines, pursuant to Pope. Petitioner is free to move to vacate he plea if she so desires. However, it is the trial court who must make a factual determination of whether Petitioner has grounds to do so.

Petitioner makes certain unsupported allegations in her brief, which if true, would certainly entitle her to vacate her plea. For example, Petitioner states that "[t]he only reason Petitioner pled nolo contendere to the charges was to receive probation." PB at 24. Petitioner also implies that petitioner pled with the express understanding that if the state won the appeal she would be allowed to take back her plea and "start from scratch."

The trial judge did state that Petitioner would be allowed to withdraw her plea, and Petitioner did acknowledge that to be her understanding. However, there has been no showing that Petitioner pled because of these assurances. In fact, the judge's statement was made sua sponte after defense counsel had already stated, that Petitioner understood, that the judge might not be willing to depart and that a departure sentence might be reversed on appeal (R 12). Also, neither Petitioner nor defense counsel ever requested any assurance from the court that

Petitioner would be allowed to withdraw her plea if she lost the appeal. It is quite possible that the State had an airtight case against Petitioner, and Petitioner may have never intended to proceed to trial, but simply desired to get the best plea she could.

Thus, these matters require some factual determinations, and the trial court, where the colloquy took place, is in the best position to determine whether Petitioner should be allowed to withdraw her plea.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that this Honorable Court APPROVE the decision of the Fourth District Court of Appeal, filed May 26, 1993, REVERSING the downward departure sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by courier to: ANTHONY CALVELLO, Assistant Public Defender, Criminal Justice Building, 421 3rd Street/6th Floor, West Palm Beach, Florida 33401, this 26th day of July, 1993.

Of Counsel

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