IN THE SUPREME COURT OF FLORIDA

ROBERT DAVID DOMBERG, JR.,

Petitioner,

v. CASE NO. 83,954

THE STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW

JURISDICTIONAL BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF FLORIDA

ROBERT DAVID DOMBERG, JR.,

Petitioner,

v. CASE NO. 83,954

THE STATE OF FLORIDA,

Respondent.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The Petitioner seeks to invoke the discretionary powers of review of this Court based upon conflict jurisdiction.

STATEMENT OF THE CASE AND FACTS

The historical facts as established by the February 18, 1994 Opinion of the First District Court of Appeal are as follows:

> On October 26, 1984, petitioner, Domberg was convicted of kidnapping, conspiracy to commit murder, and violation of the Florida RICO Act. Domberg elected to be sentenced in accordance with the sentencing guidelines; the recommended guideline sentencing range was fifteen years. The trial court imposed a sentence in excess of the recommended guideline sentence and provided written reasons for the departure . . .
>
> One of the issues raised on appeal was the question of the contemporaneity, as well as the validity, of the reasons provided by the trial court for the departure sentence. . .
>
> In the instant petition filed November 12, 1992, Domberg contends the trial court lacked jurisdiction to enter written departure reasons, because the notice of appeal was filed before the

> departure reasons were filed, thereby divesting the trial court of jurisdiction. Domberg further contends his appellate counsel was ineffective for failing to raise the jurisdictional issue on appeal.
>
> . . . The sentencing transcript in this case reflects that ten days prior to the sentencing hearing, the state provided petitioner's trial counsel with a copy of aggravating factors which the state had filed with the trial court as grounds for a departure sentence. The transcript further reflects that the reasons for a departure were discussed at sentencing, and implicitly adopted by the trial court when it announced that a departure sentence would be imposed. Since the petitioner was furnished written notice of the aggravating factors well in advance of the sentencing hearing, and was apprised fully of the reasons for departure at the sentencing hearing, we decline to place form over substance for the purposes of invoking appellate jurisdiction. We find the departure reasons were contemporaneous with the pronouncement of sentence for purposes of petitioner's notice of appeal. In essence, the order filed December 3, 1984, setting forth the aggravating factors, was redundant. Since the petitioner was provided with actual written notice of the reasons for departure prior to sentencing, and the transcript reflects the written reasons were referred to by respective counsel at the sentencing hearing, Domberg was not prejudiced in the prosecution of his appeal, and his appellate lawyers cannot be viewed as ineffective.

SUMMARY OF ARGUMENT

Petitioner may not properly invoke the powers of discretionary review of this Court as he is unable to show express and direct conflict between this case and another case which is factually on all fours and which applies the same principle of law to yield different results.

ARGUMENT

STANDARD OF REVIEW

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(2)(A)(iv), this Court may review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of another district court or with a decision of the Supreme Court on the same question of law. In determining whether conflict jurisdiction exists, this Court is limited to the facts as set forth within the four corners of the opinion, Reaves v. State, 485 So. 2d 829 (Fla. 1986), and must look at the decisions involved rather than a conflict in the opinions. Niemann v. Niemann, 312 So. 2d 733 (Fla. 1975). Conflict jurisdiction exists only in those instances in which the same principle of law is applied to identical facts to reach different results. Wilson v. Southern Bell Telephone and Telegraph, 327 So. 2d 220 (Fla. 1976).

ISSUE I

JURISDICTION DOES NOT LIE BASED UPON AN ALLEGED CONFLICT CREATED BY THE LOWER COURT'S PURPORTED FAILURE TO RECOGNIZE THE "PIPELINE DOCTRINE."

Petitioner contends that conflict resulted when the First District failed to apply the "pipeline doctrine" to determine whether he received ineffective assistance of appellate counsel based upon counsel's failure to raise the absence of contemporaneous written reasons to support entry of a departure sentence.

He asserts this case is in direct conflict with Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990); Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986); Wigfals v. Singletary, 624 So. 2d 320 (Fla. 2d DCA 1993); Jones v. Singletary, 621 So. 2d 760 (Fla. 3d DCA 1993); Wilson v. Singletary, 601 So. 2d 311 (Fla. 4th DCA 1992); Disinger v. State, 574 So. 2d 268 (Fla. 5th DCA 1991); and Hernandez v. State, 501 So. 2d 163 (Fla. 1987). These cases, however, are factually distinguishable from the case at bar.

In Hill, the Court rejected a claim that appellate counsel was ineffective for failing to raise the alleged improper exercise of peremptory challenges by the state against black jurors. Fitzpatrick dealt with the claim that appellate counsel was ineffective for failing to argue that the trial court erred in allowing the state to present evidence rebutting the existence of a statutory mitigating factor even though the defense had not, and represented it would not, rely upon that factor. In Wigfals, the

defendant claimed appellate counsel was ineffective for failing to anticipate the Whitehead[1] decision which held habitualization was not a valid basis for departure. Jones held that appellate counsel's failure to raise sentencing errors[2] was not ineffective where the state of the law was in flux and the issue should properly be raised by a Rule 3.800 motion. Wilson presented a case in which appellate counsel was not ineffective for failing to argue that temporal proximity was an invalid reason for departure based upon the state of the law at that time. Disinger dealt with appellate counsel's failure to raise a confrontation issue in a child sexual battery case. Finally, Hernandez was a case in which a trial court entered a departure sentence without ever setting forth written reasons in support of its sentence.

As the foregoing recitation of facts establish, none of the cases relied upon by the petitioner are factually on all fours with this case, since none involve the identical factual scenario which is before this Court. Because the cases are distinguishable on their facts, this Court must discharge the writ. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983). Jurisdiction does not lie where the petitioner contends that the decision of the lower court conflicts with a principle of law rather than a specific decision.

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[1] Whitehead v. State, 498 So. 2d 863 (Fla. 1986).

[2] These errors dealt with enhancement based upon the use of a firearm where use of said firearm was an essential element of the crime and entry of conviction for two crimes on the basis of double jeopardy.

ISSUE II

CONFLICT DOES NOT EXIST BECAUSE THE LOWER COURT FOUND THAT THE TRIAL COURT HAD EXPLICITLY ADOPTED REASONS URGED BY THE STATE IN JUSTIFICATION OF ENTRY OF A DEPARTURE SENTENCE.

The petitioner contends that the decision below creates conflict by holding that the trial court implicitly adopted the reasons urged by the state in support of entry of a departure sentence when "no oral and effectively no written reasons for departure" were set forth.

The petitioner relies upon Barbera v. State, 505 So. 2d 413 (Fla. 1987); Wilson v. State, 485 So. 2d 42 (Fla. 5th DCA 1986); and Gaynor v. State, 479 So. 2d 246 (Fla. 2d DCA 1985), which are factually distinguishable from the instant case. In Barbera, the trial court orally adopted defense counsel's alternative plan for a guidelines departure, but did not enter a written order setting forth the points contained in the plan. Wilson is also distinguishable since the court improperly delegated authority to the prosecutor by writing on the scoresheet that the prosecutor was to file an addendum setting forth reasons for departure without any independent consideration by the court. Also see: Gaynor. Thus, none of these cases present instances in which the same legal principle is applied to identical factual circumstances to this case to achieve different results. Discharge of the writ is required. Department of Revenue v. Johnston, supra; Wilson v. Southern Bell Telephone and Telegraph, supra.

Petitioner also claims that the lower court misapprehended State v. Lyles, 576 So. 2d 706 (Fla. 1991), and thus created conflict. This again is not a valid basis for conflict jurisdiction. Had he believed that the court misapplied that case, the proper remedy would be a motion for rehearing. Petitioner misapprehends the holding in Lyles. That case stands for the proposition that where written reasons are entered after the court orally pronounces entry of a departure sentence, no prejudice results to the defendant who is on notice regarding the reasons for departure. The issue is resolved by this Court's ruling in Blair v. State, 598 So. 2d 1068 (Fla. 1992), in which the Court held that Ree v. State, 565 So. 2d 1329 (Fla. 1990), modified, State v. Lyles, 576 So. 2d 706 (1991), applied prospectively only and also applied to those cases which were not yet final at the time the mandate in Ree issued in which it was raised. Here, the appellate counsel cannot be said to be ineffective for failing to anticipate the changes in law which began with Ree I and ended with Blair. Furthermore, as noted by the lower court, the rationales announced therein do not apply in this case as they are limited to cases involving direct appeals.

ISSUE III

THE OPINION BELOW DOES NOT CONFLICT WITH THE HOLDINGS OF WILSON, SMITH, GREEN, AND WILLIAMS.

Petitioner contends that the opinion below conflicts with cases which hold that when a notice of appeal is filed, the trial court is divested on jurisdiction to enter a written order. The cases he relies upon are distinguishable. Wilson is a case in which a trial court changed the sentence from prison to probation after the sixty day period of jurisdiction for the modification or reduction of sentence had passed and the defendant had filed his notice appealing the prison term imposed. See also: Wolfson v. State, 437 So. 2d 174 (Fla. 2d DCA 1983). Smith, also addressed the same issue. State v. Williams, 515 So. 2d 1051 (Fla. 3d DCA 1987), is also distinguishable as it involves a case on direct appeal, rather than an appeal from the denial of an extraordinary writ. It was also decided prior to the time that Ree was decided. In Green v. State, 527 So. 2d 277 (Fla. 2d DCA 1988), the trial court merely stated that it would articulate reasons to justify the departure at some future date without reference to previously articulated bases for departure. Green also possesses the distinguishing factors present in Williams. Thus, the cases are distinguishable and the writ must be discharged.

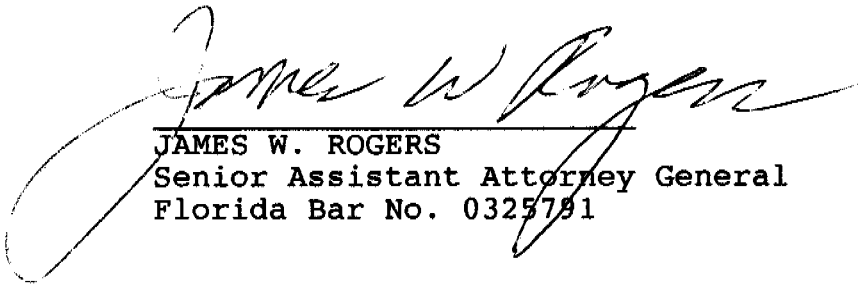
As to the remaining arguments presented by petitioner, the State would note that these are policy arguments which are no recognized bases upon which to invoke the discretionary review of this Court.

CONCLUSION

Based upon the foregoing argument which establishes that petitioner has failed to set forth any case which directly and expressly conflicts with the lower court's decision, the respondent, **THE STATE OF FLORIDA**, respectfully requests that the instant petition for discretionary review be discharged.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to **MR. BRADLEY R. STARK**, Esquire, 2910 New World Tower, 100 Biscayne Boulevard, Miami, Florida 33132, this 4th day of August, 1994.

Giselle Lylen Rivera
GISELLE LYLEN RIVERA
Assistant Attorney General

AG

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

92-112562TK

ROBERT DAVID DOMBERG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO: 92-3833

CORRECTED p. 3

MAILED 2/21/94

BY JT

Opinion filed February 18, 1994.

Petition for Writ of Habeas Corpus-Original Jurisdiction.

Bradley R. Stark, Miami, for Appellant.

Robert A. Butterworth, Attorney General, and Gypsy Bailey Assistant Attorney General, Tallahassee, for Appellee.

Docketed
2-22-94
Florida Attorney General

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FEB 22 1994
Criminal Appeals
Dept. of Legal Affairs

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DEPT. OF LEGAL AFFAIRS
Division of General Legal Services

JOANOS, J.

Robert David Domberg petitions this court for a writ of habeas corpus based upon claims that the trial court lacked jurisdiction to file written reasons for a sentence in excess of the recommended guideline sentencing range, and ineffective assistance of appellate counsel. We deny the writ.

On October 26, 1984, petitioner Domberg was convicted of kidnapping, conspiracy to commit murder, and violation of the Florida RICO Act. Domberg elected to be sentenced in accordance

with the sentencing guidelines; the recommended guideline sentencing range was fifteen years. The trial court imposed a sentence in excess of the recommended guideline sentence and provided written reasons for the departure. A more detailed recitation of the underlying facts is set forth in this court's opinion of January 15, 1988. See Domberg v. State, 518 So. 2d 1360 (Fla. 1st DCA), review denied, 529 So. 2d 693 (Fla. 1988).

One of the issues raised on appeal was the question of the contemporaneity, as well as the validity, of the reasons provided by the trial court for the departure sentence. The opinion addressed the sentencing disposition briefly, noting that the departure sentence was supported by written departure reasons, some of which were valid, and affirmed the judgment and sentences in all respects. 518 So. 2d at 1362.

In the instant petition filed November 12, 1992, Domberg contends the trial court lacked jurisdiction to enter written departure reasons, because the notice of appeal was filed before the departure reasons were filed, thereby divesting the trial court of jurisdiction. Domberg further contends his appellate counsel was ineffective for failing to raise the jurisdictional issue on appeal. The state responds that although the issue raised on appeal was cast in terms of a failure to provide contemporaneous written reasons for departure, the issue was the same as that presented in this petition. If this court concludes the precise issue was not raised on direct appeal, the state maintains that habeas corpus is not available, because the matter could have been

raised on direct appeal, or challenged in a postconviction motion. As to the claim of ineffective assistance of appellate counsel, the state maintains petitioner cannot meet the first Strickland v. Washington[1] requirement to show that counsel's performance was deficient.

The threshold requirement for filing a notice of appeal is the existence of a written, signed judgment filed by the clerk for recording. Fla.R.App.P. 9.020(g); Williams v. State, 324 So. 2d 74, 76 (Fla. 1975); Owens v. State, 579 So. 2d 311, 312 (Fla. 1st DCA 1991); Miller v. State, 564 So. 2d 259, 261 (Fla. 1st DCA 1990). That is, the time for appeal from a departure sentence "begins to run from the date the sentencing judgment is filed, not the written reasons." State v. Lyles, 576 So. 2d 706, 708 (Fla. 1991). This is because "[t]he sentence, rather than the written reasons for departure, constitutes the final order appealed." Fox v. District Court of Appeal, Fourth District, 553 So. 2d 161, 163 (Fla. 1989). Once a notice of appeal has been filed from a properly rendered judgment, a trial court is without jurisdiction to file written reasons for departure. Davis v. State, 606 So. 2d 470 (Fla. 1st DCA 1992); Wright v. State, 617 So. 2d 837, 841 (Fla. 4th DCA 1993); Vara v. State, 575 So. 2d 306, 307 (Fla. 2d DCA 1991); State v. McCray, 544 So. 2d 313 (Fla. 2d DCA 1989), approved, 557 So. 2d 33 (Fla. 1990); Hawryluk v. State, 543 So. 2d 1318 (Fla. 5th DCA 1989); State v. Ealy, 533 So. 2d 1173, 1174 (Fla. 2d DCA 1988).

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[1]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In the instant case, the portions of the record furnished by the parties establish that the subject judgment and sentences were rendered October 26, 1984. The notice of appeal was filed timely on November 21, 1984, at which point jurisdiction vested in this court. In somewhat analogous circumstances, this court observed that claims such as those raised in Domberg's petition require the court to "turn back the appellate clock," to determine whether an absence of contemporaneous written departure reasons was cognizable error in 1984 when the petitioner was sentenced. See Frazier v. Singletary, 622 So. 2d 88 (Fla. 1st DCA 1993). The matter was not settled definitively until 1990, with the issuance of Ree v. State, 565 So. 2d 1329 (Fla. 1990), holding that written reasons for departure must be produced at the sentencing hearing. The Ree opinion also instructed that the decision applied prospectively only.

In view of the unsettled state of guidelines sentencing law in 1984, particularly with respect to guidelines departure sentences, we conclude petitioner's appellate lawyers were not outside the range of professionally acceptable representation in failing to challenge the departure sentence on the jurisdictional grounds asserted in Domberg's petition. A further basis to reject petitioner's claim of ineffective assistance of appellate counsel is found in State v. Lyles, 576 So. 2d 706, 707-708 (Fla. 1991), in which the court clarified Ree, stating:

> when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change on the same date,

> the written reasons for the departure sentence are contemporaneous, in accordance with Ree. To adopt a contrary view would be placing form over substance. The ministerial act of filing the written reasons with the clerk on the next business day does not, in our view, prejudice the defendant in any respect.

Although Ree is not applicable to this case, we find the Lyles rationale to be particularly relevant. The sentencing transcript in this case reflects that ten days prior to the sentencing hearing, the state provided petitioner's trial counsel with a copy of aggravating factors which the state had filed with the trial court as grounds for a departure sentence. The transcript further reflects that the reasons for departure were discussed at sentencing, and implicitly adopted by the trial court when it announced that a departure sentence would be imposed. Since the petitioner was furnished written notice of the aggravating factors well in advance of the sentencing hearing, and was apprised fully of the reasons for departure at the sentencing hearing, we decline to place form over substance for purposes of invoking appellate jurisdiction. We find the departure reasons were contemporaneous with the pronouncement of sentence for purposes of petitioner's notice of appeal. In essence, the order filed December 3, 1984, setting forth the aggravating factors, was redundant. Since the petitioner was provided with actual written notice of the reasons for departure prior to sentencing, and the transcript reflects the written reasons were referred to by respective counsel at the sentencing hearing, Domberg was not prejudiced in the prosecution

of his appeal, and his appellate lawyers cannot be viewed as ineffective.

Accordingly, the petition for writ of habeas corpus is denied.

MINER and KAHN, JJ., CONCUR.