IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO: 83,954

1ST DCA CASE NO: 92-3833

ROBERT DAVID DOMBERG, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF ON THE MERITS OF PETITIONER ROBERT DAVID DOMBERG

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TABLE OF CONTENTS

LAW OFFICES BRADLEY R. STARK, 2910 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33132 • TELEPHONE (305) 372-1223

TABLE OF CITATIONS

LAW OFFICES BRADLEY R. STARK, 2910 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33132 • TELEPHONE (305) 372-1223

LAW OFFICES BRADLEY R. STARK, 2910 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33132 • TELEPHONE (305) 372-1223

Other Authorities

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STATEMENT OF THE CASE AND FACTS

I

Judgment and conviction were entered in the Second Judicial Circuit in and for Leon County, Florida after a change of venue from the Third Judicial Circuit in Columbia County, Florida. The guidelines score sheet reflects a recommended range of 15 years incarceration. The trial court departed upward and sentenced Domberg to 110 years.[1] Domberg appealed his conviction and the First District Court of Appeal affirmed. *Domberg v. State,* 518 So. 2d 1360 (Fla. 1st DCA), *rev. denied*, 529 So. 2d 693 (Fla. 1988).[2] On November 10, 1992 Domberg filed a Petition for Writ of Habeas Corpus for Ineffective Assistance of Appellate Counsel. The First District Court of Appeal in *Domberg v. State,* 636 So. 2d 527 (Fla. 1st DCA 1994) denied relief.[3] The Petition for Rehearing was denied and Domberg filed a Notice to Invoke Discretionary Jurisdiction on July 6, 1994. This court accepted jurisdiction on November 4, 1994.

II

The Sentencing

Domberg elected to be sentenced under the new guidelines. On October 26, 1984, the day of sentencing, Domberg first elected to be sentenced under the guidelines. R-10882. The state then provided Domberg with a list of the aggravating factors it intended to argue to the court as justification for an upward departure.[4] R-

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1 Domberg was charged in a four count amended indictment on April 1, 1983 with murder in the first degree, kidnapping, and violations of the Florida Racketeer Influenced and Corrupt Organizations Act ("RICO"). Domberg was acquitted of the charge of murder and convicted of the three other charges.

2 The direct appeal is referred to as *Domberg I.*

3 The second opinion of the First District Court of Appeal is referred to as *Domberg II.*

4 There was no presentence investigation of Domberg. Contrary to the codefendants who had a presentence investigation, the state did not give Domberg its list of aggravating factors, which it intended to argue at sentencing, as part of the presentence investigation. R-10912. After electing to be sentenced under the guidelines during the sentencing hearing the state announced that it "now feels at this time the list of aggravating circumstances" advanced during the presentence investigation of the codefendants was applicable to Domberg. R-10912. Thus contrary to the codefendants, the list of aggravating factors of the state was provided to Domberg on the day of sentencing. R-10912. The court in *Domberg II* was mistaken about this fact and erroneously held that "(s)ince the petitioner was furnished written notice of the aggravating factors well in advance of the sentencing hearing, we decline to place form over substance for purposes of invoking appellate jurisdiction." *Domberg II* at 529.

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10912.

At the conclusion of argument by the state and defense, the court stated "that it is necessary to depart from the guidelines..." and imposed consecutive statutory maximum sentences totalling one hundred and ten years. R-(10918-19). Appendix A. The court informed the defendant that "you have the right to appeal by filing Notice of Appeal within 30 days from the date herein." R-10919. The court then took a fifteen minute recess. R-10919. No reference was made by the court, in any manner, as to the reasons for departure.

There is no mention of a departure sentence on the Guidelines Score Sheet, Judgment, R-12921, or the Sentencing Order. R-(12923-27). Appendix B. The Guidelines Score Sheet reflects a guidelines sentence of fifteen years. R-12927. The only notation on the Judgment and Sentence Order is a handwritten note that states "defendant is sentenced pursuant to the Sentencing Guidelines." R-12926.

On November 21, 1984, Domberg filed a Notice of Appeal. R-12932. Both the docket sheet, Appendix C, and the order of the court reflect the filing of Written Reasons for Departure on December 3, 1984, twelve days after the filing of the Notice of Appeal. Thus the Written Reasons for Departure were filed thirty eight days after the sentencing hearing and twelve days after the filing of the Notice of Appeal.

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SUMMARY OF ARGUMENT

I

NO WRITTEN REASONS FOR DEPARTURE

There were no written reasons for the departure sentence of 110 years from the guideline sentence of 15 years. The court must apply the law as it existed at the time of appeal not at the time of sentencing. At the time of appeal, it was clear that because there were no oral or written reasons for departure filed prior to the filing of a notice of appeal and the trial court being divested of jurisdiction, as a matter of law there were no written reasons for departure. The written reasons filed after divestment of jurisdiction were a nullity.

II

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate counsel rendered ineffective assistance of counsel because he did not raise on direct appeal the issue of the lack of written reasons for departure because the court was divested of jurisdiction when written reasons were filed.

III

FUNDAMENTAL ERROR

A lack of jurisdiction is fundamental error and may be raised at any time.

IV

SENTENCING UPON REMAND

Domberg is entitled to a new sentencing and as a matter of law must receive a sentence within the guidelines without possibility of departure. Because there were no written reasons for departure this was true both at the time of the direct appeal and now at the time of this proceeding.

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ARGUMENT

I

NO WRITTEN REASONS FOR DEPARTURE

Fla. Stat. § 921.001(6) requires that "contemporaneous" written reasons for departure be filed at the time the departure sentence is imposed. As a matter of law there were no oral or written reasons for departure because the filing of written reasons thirty eight days after the imposition of sentence and twelve days after the notice of appeal was filed were a nullity because the court was divested of jurisdiction.

A.

The Court Must Apply The Law As It Existed At The Time Of Appeal In Determining The Effectiveness Of Appellate Counsel

The application of the law as it exists at the time of appeal rather than the time of the error in the trial court is known as the "pipeline doctrine". This phrase was coined in *Smith v. State,* 496 So. 2d 983 (Fla. 3d DCA 1986), as this court noted in *Smith v. State*, 598 So. 2d 1063 (Fla. 1992).[5]

In prior ineffective assistance of appellate counsel cases courts applied the law as it existed at the time the appeal was decided, not as it existed at the time the error occurred in the trial court. *Hill v. Dugger,* 556 So. 2d 1385 (Fla. 1990); *Dougan v. State*, 470 So. 2d 697, 701 (Fla. 1985); *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 (4th DCA 1992); *Disinger v. State,* 574 So. 2d 268 (Fla. 5th DCA 1991).[6] These cases involve ineffective assistance of appellate counsel for the failure to raise issues regarding

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[5] *Smith* is a comprehensive discussion of the "pipeline doctrine" as it applies to many different areas of law. Although the term "pipeline doctrine" was adopted in 1986, the rule of law that the term describes is not new and was the rule of law both at the time of sentencing and when *Domberg I* became final. *E.g.,* Lowe v. State, 437 So. 2d 142, 144 (Fla. 1983); *see also* State v. Jones, 485 So. 2d 1283 (Fla. 1986) (case law at time of appeal controls).

[6] This is one of the issues that created conflict jurisdiction. In *Domberg II* the court erroneously held that when evaluating the effectiveness of appellate counsel it must "'turn back the appellate clock'" to determine whether there was "cognizable error in 1984 when the petitioner was sentenced." *Domberg II* at 529.

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written reasons for departure sentences and are therefore on point.[7]

Because an appeal is determined by the case law that exists at the time the appeal is decided, so also the effectiveness of appellate counsel must be judged by the case law as it exists at the time the appeal becomes final. The ineffective assistance of appellate counsel claim now before the court should be guided by the law applicable when *Domberg I* became final.[8] The conviction became final when rehearing was denied in *Domberg I.* See *State v. Gallo*, 491 So. 2d 541 (Fla. 1986).

B.

As A Matter Of Law There Were No Written Reasons For Departure Because The Court Was Divested Of Jurisdiction At The Time It Filed Its Written Reasons For Departure And Therefore They Were A Nullity

The requirement for the filing of a notice of appeal is a written signed judgment filed by the clerk of the court. Fla. R. App. P. 9.020(g).[9] Upon the filing of a notice of appeal the court is divested of jurisdiction and cannot modify, correct or change a sentence. *Davis v. State,* 606 So. 2d 470 (Fla. 1st DCA 1992); *Hawryluk v. State,* 543 So. 2d 1318 (Fla. 5th DCA 1989); *Wright v. State,* 617 So. 2d 837 (Fla. 4th DCA 1993); *Rivera v. State,* 575 So. 2d 306 (Fla. 2d DCA 1991). This was precedent that existed both at the time the sentence became final on appeal and at the time of sentencing. *Wolfson v. State,* 437 So. 2d 174 (Fla. 2d DCA 1983); *Smith v. State,* 407 So. 2d 399 (Fla. 1st DCA 1981). *Green v. State,* 527 So. 2d 277 (Fla. 2d DCA 1988); *State v. Williams,*

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[7] This court followed this long established precedent regarding the application of the "pipeline doctrine" to sentencing issues in Williams v. State, 576 So. 2d 281 (Fla. 1991). *Williams* held that cases in the "pipeline" received the benefit of Ree v. State, 565 So. 2d 1329 (Fla. 1990). The case of Hernandez v. State, 501 So. 2d 163 (Fla. 3d DCA 1987) was precedent at the time *Domberg I* was decided and is illustrative. In *Hernandez* the court granted a writ of habeas corpus for ineffective assistance of appellate counsel for the failure to raise as error on appeal a sentence outside the guidelines that lacked written reasons for departure. In *Hernandez* the court applied the law as it existed at the time of appeal.

[8] If appellate courts applied the law as it existed at the time of trial, case law would be unable to evolve. There would be no process of statutory interpretation. Our jurisprudence would be more akin to the Napoleonic Code.

[9] In the case before the court the trial court specifically told Domberg he was required to file his Notice of Appeal within thirty days of sentencing. *See* Cox v. District Court of Appeal, Fourth Dist., 553 So. 2d 161, 163 (Fla. 1989); State v. Lyles, 576 So. 2d 706, 708 (Fla. 1991). The "sentence, rather than the written reasons for departure, constitutes the final order appealed." *Cox* at 163.

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515 So. 2d 1051 (Fla. 3d DCA 1987).[10] Rehearing was denied in *Domberg I* at 529 So. 2d 693 (Fla. 2d DCA 1988). At that time it was clear that the court was divested of jurisdiction upon the filing of a notice of appeal and could not modify the sentence. This rule is strictly construed. *Dailey v. State,* 575 So. 2d 237 (Fla. 2d DCA 1992). In *Dailey* the court held that the filing of a notice of appeal, hours before and on the same day that the court entered an amended order modifying a sentence, divested the court of jurisdiction and the subsequent order of modification was a nullity.[11]

Thus it is clear that at the time of sentencing, because the court was divested of jurisdiction, the written reasons for departure filed thirty eight days after sentencing and twelve days after the Notice of Appeal was filed, were a nullity. As a matter of law there were no written reasons for departure to justify a departure sentence.

II

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate counsel, who was also trial counsel, rendered ineffective assistance of counsel for failing to raise this lack of jurisdiction as an issue on appeal.[12] In *Pope v. Wainwright,* 496 So. 2d 798 (Fla. 1986), this court followed a *Strickland* type of analysis and held that a petitioner must meet a two part test to establish ineffective assistance of appellate counsel.[13] The court in *Pope* held that the appellate court must first determine "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance." *Id.* at 800. Secondly, the appellate court must also determine "whether the deficiency in performance compromised the appellate

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[10] Kelly v. State, 359 So. 2d 493 (Fla. 1st DCA 1978). *See also,* Hicks v. State, 559 So. 2d 1265 (Fla. 3d DCA 1990); Jamieson v. State, 573 So. 2d 453 (Fla. 4th DCA 1991) (also holding that trial court is divested of jurisdiction upon filing of notice of appeal).

[11] Parties cannot confer jurisdiction on the court and no action by the parties can be a waiver of defects in jurisdiction. Figone v. Downey, 547 So. 2d 697 (Fla. 2d DCA 1989); *Wolfson,* 437 So. 2d 174.

[12] No contemporaneous objection was required to raise the issue of an illegal departure sentence on appeal, therefore the issue was preserved and the "pipeline doctrine" was applicable. *E.g.,* State v. Whitfield, 487 So. 2d 645 (Fla. 1986); Bruton v. State, 489 So. 2d 1195 (Fla. 1st DCA 1986), *rev'd. on other grounds,* 510 So. 2d 1243 (Fla. 1st DCA 1987).

[13] Strickland v. Washington, 466 U.S. 668 (1984).

process to such a degree as to undermine confidence in the correctness of the result." *Id.* See *Johnson v. Wainwright,* 463 So. 2d 207 (Fla. 1985).[14] Clearly appellate counsel should have raised as an issue on appeal the lack of written reasons for departure because the court was divested of jurisdiction. This was precedent at the time the direct appeal became final. This issue would have resulted in Domberg receiving a new sentencing hearing.

III

FUNDAMENTAL ERROR

Fundamental error can be considered on appeal without objection. *Barker v. State,* 518 So. 2d 450 (Fla. 2d DCA 1988). A lack of jurisdiction at the time of sentencing is a fundamental error which is never waived and can be reviewed without objection at any time. *Ray v. State,* 403 So. 2d 956 (Fla. 1981); *Jones v. State,* 599 So. 2d 769 (Fla. 1st DCA. 1992); *Booker v. State,* 497 So. 2d 957 (Fla. 1st DCA 1986); *Barker,* 518 So. 2d 450. *C.W. v. State,* 637 So. 2d 28 (Fla. 2d DCA 1994). Because the written reasons were filed after the trial court was divested of jurisdiction, the failure to have contemporaneous written reasons for departure is fundamental error requiring reversal of the illegal sentence.

IV

SENTENCING UPON REMAND

Domberg is entitled to a new appeal because of the ineffective assistance of counsel and/or the fundamental error that occurred in the direct appeal. This court must apply the law as it exists today. Pursuant to *Pope v. State,* 561 So. 2d 554 (Fla. 1990) this court "must remand for resentencing with no possibility of

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[14] In his brief on appeal Domberg raised the following issue:

> DOMBERG'S SENTENCE MUST BE VACATED BECAUSE THE SENTENCE IS EXCESSIVE, IS BASED ON IMPERMISSIBLE CONSIDERATIONS, AND IS NOT SUPPORTED BY A CONTEMPORANEOUS WRITTEN STATEMENT OF REASONS.

This brief does not mention the fact that the written reasons for departure were filed 38 days after the sentence was imposed and filed 12 days after Domberg filed his notice of appeal and therefore the court was divested of jurisdiction. Instead appellate counsel argued other grounds for the reversal of the sentence. Therefore the specific issue raised in this petition, the lack of written reasons for departure because the court was divested of jurisdiction when it filed written reasons, has never been raised.

departure from the guidelines." *Id.* at 556. *Pope* holds that when there are no written reasons for departure there must be a remand for imposition of a guideline sentence with no possibility for a departure. This court must apply *Pope* because in the case before the court there are no written reasons, since the reasons offered by the trial court were a nullity having been filed after the court was divested of jurisdiction.[15]

The cases of *Vara v. State,* 575 So. 2d 306 (Fla. 2d DCA 1991), *Davis,* 606 So. 2d 470, *Pausch v. State,* 590 So. 2d 1216, 1220 (Fla. 2d DCA 1992), and *Hawryluk,* 543 So. 2d 1318 are all on point with the case before the court. In these cases the written reasons for the departure were filed after the notice of appeal was filed. These courts held that the trial court was without jurisdiction, that the written reasons for departure could not be considered and this "requires this court to remand this case for resentencing within the sentencing guidelines." *Vara,* 575 So. 2d at 307.[16]

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[15] The same result would have been reached at the time of direct appeal. No reasons were articulated during sentencing, on the guidelines scoresheet or at any other time except after the court was divested of jurisdiction. This case would have been remanded for sentencing within the guidelines. The error in the case is the same as the one committed in *Green,* 527 So. 2d 277, *See also* State v. Jackson, 478 So. 2d 1054 (Fla. 1985) (where only oral reasons were articulated prior to imposition of sentence and the court was divested of jurisdiction).

[16] In the event the court grants a new appeal but remands for sentencing with the possibility of a guidelines departure sentence, then Domberg would raise issues on the merits of the conviction as if on direct appeal and suggest that this court bifurcate the new appeal so that the sentencing issue can be litigated prior to the merits of the conviction. The bifurcation of the sentencing and merits issues of an appeal has been done in lengthy federal cases. United States v. McGee, 981 F.2d 1260 (9th Cir. 1992); Walker v. Lockhart, 713 F.2d 1378 (8th Cir. 1983). The record in the case before the court exceeds 13,000 pages and is therefore appropriate for bifurcation.

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CONCLUSION

This court should grant Domberg a new appeal as to the issue of sentencing because of the lack of jurisdiction and remand this cause to the trial court for entry of a sentence within the guidelines with no possibility for departure and such other relief as the court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above was mailed to Gypsy Bailey, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399, on December 5, 1994.

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APPENDIX