IN THE SUPREME COURT OF FLORIDA

ROBERT DAVID DOMBERG,

Petitioner,

vs. CASE NO. 83,954

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLA. BAR #325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
904/488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner's convictions and sentences for kidnapping, conspiracy to commit murder, and violating the Florida RICO act were affirmed by the district court in Domberg v. State, 518 So. 2d 1360 (Fla. 1st DCA 1988). Although there are no significant factual issues in this case, the state asks the Court to take judicial notice of the record on appeal in Domberg pursuant to section 90.202(6), Florida Statutes. Appended to this brief are copies of the relevant portions of that record. References to that record will be made using "R" and page number.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case set out in part I of his statement but rejects his argumentative and inaccurate presentation in part II, particularly footnote 4. The state supplements with the following.

First, concerning the prior notification to petitioner/defendant of the factors which the state intended to rely on in seeking departure sentences, the sentencing transcript on which the district court relied shows that after petitioner elected on the day of sentencing to be sentenced under the guidelines, the prosecutor represented in open court without contradiction as follows.

> MR. REGISTER: I already provided Mr. Africano a copy with the aggravating factors sheet that was attached to Mr. McCabe and Mr. Sallas' PSI. I informed him about ten days ago that would be the same factors would be relying on and provided him a copy of those this morning, so the record is clear, there being no presentence investigation for Mr. Domberg in this particular case, the State now feels at this time the list of aggravating circumstancws (sic) as to him as well. We also ask that in the case of Edward Michael McCabe and Robert David Domberg, the Court impose a maximum penalty allowable.
>
> This was a very sophisticated organization on Mr. Domberg's part. The Court heard testimony of his involvement in offenses other than those that were charged in the grand Jury's Indictment, the statement goes to Mr. McCabe. I think there were five such Williams Rules incidents that were brought out and three that I can recall as to Mr. Domberg. This was a very sophisticated organization, Judge.

> And even though there was--the situation was where employees were kind of robbing the boss, so to speak, Mr. Domberg being the head of the organization, he nonetheless must be held accountable as must Edward Michael McCabe at this time for the activity that is they have been involved in and those that they've been convicted of by this jury in Leon County.

R10912-10913.

Second, as the district court below found, the "aggravating" factors on which the state relied were discussed and challenged by the various counsel during the sentencing hearing. R10913-10918. After hearing the parties on whether to depart, the trial court immediately announced its decision to depart from the guidelines and imposed departure sentences. R10918-10919. The judgment and sentencing order entered on 26 October 1984 shows a date time stamp in the Leon County clerk's office of 26 October 1984. R12921-12930. The trial judge's signature also carries a notation that it was done and ordered in Leon County. In this connection, although the charged crimes occurred in Columbia County, a change of venue was granted and the trial and sentencing took place in Leon County. R12301-12303. It appears that venue reverted to Columbia County upon completion of the trial and sentencing hearing. R12869.

Third, the trial court's departure order was entered on 20 November 1984. Although the signature line, unlike the Leon County order, does not carry a statement of where the order was entered, the copy in the record on appeal carries a date time stamp in the Columbia County clerk's office of 3 December 1984.

R12935. The notice of appeal carries a service of 20 November 1984 and a date time stamp of 21 November 1984 in the Columbia County clerk's office.

Finally, the facts necessary to give context to this petition are set out in the district court's decision in the direct appeal.

> Appellant and other defendants, including Edward McCabe and Joseph Sallas, were variously charged by a grand jury indictment alleging the murder of agricultural inspector Austin Gay, the kidnapping of and conspiracy to murder agricultural inspector Leonard Pease, and violations of the Florida RICO Act based upon the murder of Gay, the kidnapping of and conspiracy to murder Pease, and numerous drug offenses. Extensive evidence was presented at a lengthy trial during which it was indicated that appellant was an organizational leader in a wide-ranging conspiracy involving the importation and sale of drugs. Appellant had proclaimed to various individuals that he controlled the sale of marijuana on Chicago's south side, and the evidence established that on numerous occasions these drugs were transported through Florida and ultimately received for distribution in Chicago with appellant's aid and assistance. During one such transaction inspector Pease was kidnapped when he discovered a large quantity of marijuana being transported in north Florida. Pease was left bound in north Florida and the individuals whom he had confronted fled the state. Appellant thereafter indicated that it would be necessary to have Pease killed and suggested that this could be arranged through Edward McCabe, who was involved with appellant in various drug transactions. McCabe arranged a meeting with Joseph Sallas who was then hired to kill inspector Pease. Sallas suggested that alibis should be arranged and he traveled to Florida. While Sallas was

> in Florida inspector Austin Gay was killed, whereupon Sallas abandoned the plan to kill inspector Pease.
>
> Appellant was found guilty of kidnapping and conspiring to murder inspector Pease and violating the Florida RICO Act. McCabe was found guilty of conspiring to murder Pease and violating the RICO Act, and Sallas was found guilty of conspiring to murder Pease.

Domberg, 518 So. 2d at 1361.

SUMMARY OF ARGUMENT

Petitioner has not meet his burden of showing that his appellate counsel rendered ineffective assistance under controlling case law at the time of appeal. Under controlling case law, the departure order was timely and the notice of appeal on which petitioner relies was premature. Thus, there was no basis on which appellate counsel could have challenged the jurisdiction of the trial court to enter the departure order. Further, even if jurisdiction had been successfully challenged, petitioner has not shown that the departure sentence itself would have been overturned and that he would have received a non-departure guidelines sentence.

ARGUMENT

ISSUE

HAS PETITIONER SHOWN THAT HIS APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO KNIGHT V. STATE, 394 SO. 2D 997 (FLA. 1981) AND STRICKLAND V. WASHINGTON, 466 U.S. 668, 80 L. ED. 2D 674, 104 S. CT. 2052 (1984) BY NOT RAISING THE ISSUE OF WHETHER THE GUIDELINES DEPARTURE ORDER WAS UNTIMELY ENTERED SUBSEQUENT TO THE NOTICE OF APPEAL?

The factual basis for petitioner's claim is that the trial court's departure order of 20 November 1984 was not filed with the clerk of the Columbia County court until 3 December 1984, subsequent to the filing of the notice of appeal on 21 November 1984. Petitioner reasons from this that the trial court did not have jurisdiction to enter the departure order because, he asserts, it was divested of jurisdiction by the filing of the notice of appeal on 21 November 1984. Factually, as the record shows, the departure order was actually signed by the trial judge prior to the filing of the notice of appeal. The record does not show why there was a thirteen day delay between the order being entered by the trial judge and the actual filing with the clerk of the court but the two changes in venue from Columbia to Leon and back to Columbia counties probably caused this delay. Petitioner has not meet his burden of showing that the factual predicate for his claim exist or that, in choosing which course to pursue under the circumstances as they existed in 1984-88, his appellate counsel would have been justified in arguing that entry of the departure order by the sentencing judge on 20 November was of lesser significance than the date time stamping of an order by

a clerk of the court on 3 December. Petitioner appears to envision a race to the clerk's office in which the trial court is expected to successfully compete.

Turning to the legal issue of ineffective assistance of counsel, and assuming without conceding that the departure order was filed after the notice of appeal, petitioner still has not shown that he received ineffective assistance of appellate counsel under the circumstances and the controlling case law of the time. In considering this question, the district court found that the unsettled state of the law at the time of sentencing in 1984 did not require that departure orders be simultaneously entered with the oral pronouncement of sentence. Taken literally, and ignoring what the district court then said, this might suggest that the district court was not applying the law in effect at the time of appeal. This notion is immediately disproven, however, because the district court also found that this state of the law continued until 1990 when this Court issued its decision requiring simultaneous entry of the written order with the oral pronouncement. Ree v. State, 565 So. 2d 1329 (Fla. 1990), modified, State v. Lyles, 576 So. 2d 706 (Fla. 1991). Thus, at the time of both sentencing and appeal, there was no requirement that the written order be simultaneously entered. In further support of its decision, and relying particularly on the holding in Lyles that filing the departure reasons with the clerk of the court was a purely ministerial function, the district court reasoned as follows.

> 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 was 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.

Domberg, 636 So. 2d at 527, 529-530 (Fla. 1st DCA 1994)

An examination of the controlling law at the time of appeal, 1988, shows that the district court was correct for more reasons that it stated. First, the controlling law at the time of sentencing and at the time of appeal held that the entry of the departure order itself, not the oral pronouncement and entry of the sentencing order, signalled the commencement of the right to appeal. Thus, the trial court here did not surrender jurisdiction until it entered and filed the departure order on either 20 November or 3 December. Further, under this controlling case law, petitioner's notice of appeal filed prior to the entry of the departure order was premature and did not become operative until the departure order was entered.

In State v. Williams, 463 So. 2d 525 (Fla. 3rd DCA 1985), the court reasoned that the right to appeal a departure sentence was grounded on the validity of the guidelines departure order and, thus, the right to appeal did not arise until the departure order was entered. Under those circumstances and the state of the law, it is entirely understandable that petitioner's

appellate counsel did not argue that filing of the notice of appeal divested the trial court of jurisdiction to enter a departure order. It was not until this Court issued Fox v. District Court of Appeal, Fourth District, 553 So. 2d 161 (Fla. 1989), a year after Domberg's direct appeal became final, disapproving Williams in relevant part, that it become the law that the notice of appeal was filed based on entry of the oral pronouncement and sentencing order. Thereafter, the filing of the notice would divest a trial court of jurisdiction to enter substantive departure orders.

> The state argues that until the trial judge files written reasons for departure, it is impossible to determine if a meritorious appeal from the sentence exists. Under this theory the reasons for departure, not the sentence, form the basis for the appeal.[3] Therefore, according to the state, the time for appeal does not begin to run until the court files its written reasons for departure. The state relies upon State v. Williams, 463 So. 2d 525, 525-26 (Fla. 3d DCA 1985), in which the court held:
>
> > The essence of an appeal under Rule 9.140(c)(1)(J) is not that the trial court departed from the guidelines, but rather that the reasons given by the trial court for departing from the guidelines do not justify the departure. Thus, an appeal which precedes the filing of the written statement delineating the reasons for departure is premature.
>
> Therefore, the issue presented to this Court is whether the time for appeal from a departure sentence under rule 9.140 runs from the pronouncement and signing of the sentence in court or from filing of the written reasons for departure. We disagree with the state's contentions and disapprove Williams to

> the extent that it conflicts with this decision. We are convinced that the relevant rules and requirements of justice mandate that the time for appeal from a sentence under rule 9.140, either by the defendant or by the state, begins running when the trial judge orally pronounces sentence in court and signs the sentencing form. Oral pronouncement and signing of a sentence by the court commences the term of the sentence itself. The defendant is immediately placed into custody and immediately begins to serve the sentence. It would be unjust and illogical to suppose that pronouncement commences the sentence for the purpose of the defendant's imprisonment, but not for the purpose of starting the time for appeal. Thus, the time for appeal from the sentence should begin to run immediately from oral pronouncement[4] and signing of the sentence.

Fox v. District Court of Appeal, Fourth District, 553 So. 2d at 162-163 (footnotes omitted).

The rule in Williams barring a challenge to the departure order as timely under the circumstances of 1984-88 is sufficient in itself to show that petitioner's counsel was not ineffective. There is more, however.

At the time of sentencing, 1984, the district courts were divided on whether oral pronouncement into the record by the sentencing judge could serve as the written order of departure. The second, fourth, and fifth district courts all held that oral recitation into the record satisfied the written order requirement. The first district court held to the contrary and the third district had not ruled on the question. See, footnote 2 to State v. Williams and the cases cited therein. It was not

until this Court issued its decisions in State v. Jackson, 478 So. 2d 1054 (Fla. 1985) and State v. Boynton, 478 So. 2d 351 (Fla. 1985) that the conflict was resolved in requiring a separate written order from the oral recitation and transcriptions.[1]

Both Jackson and Boynton issued while petitioner's direct appeal was pending in the first district and both constituted the law in effect at the time of appeal. However, neither would have offered any relief to petitioner. First, because of Williams, the trial court's separately written departure order was timely and neither Jackson nor Boynton were applicable. Second, even if they had been applicable, they would not have offered a viable remedy for petitioner because the remedy for the absence of a written departure order was a simple remand for the entry of such order. See, Oden v. State, 463 So. 2d 313 (Fla. 1st DCA 1984) where the district court reversed a departure sentence for failure to enter a contemporaneous written order but remanded with instructions that the trial court could again depart if it contemporaneously entered a departure order, and this Court's decision in State v. Oden, 478 So. 2d 51 (Fla. 1985), approving the district court's decision remanding for resentencing with the option of entering a departure order. See, also, Roux v. State, 455 So. 2d 495 (Fla. 1st DCA 1984), and Jackson v. State, 454 So. 2d 691 (Fla. 1st DCA 1984), approved, State v. Jackson, 478 So.

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[1]The Florida Legislature disagreed with both State v. Jackson and Ree by amending section 921.0016, Florida Statues to permit either a written order or transcription filed within 15 days of the oral pronouncement. Ch. 93-406, §13, Laws of Florida.

2d 1054 (Fla. 1985) to the same end. Note, particularly, this Court's footnote 2 to Jackson recognizing that the remedy, as in death cases, was to remand for entry of a written order of departure.

Petitioner may still argue that his counsel was ineffective for not challenging the Williams rule and for not seeking a remand for entry of a written order. That claim is specious under the circumstances of this case. The departure order was entered on 20 November 1984. The record on appeal was not completed and certified by the clerk of the trial court until 21 March 1986, some sixteen months after the trial court entered the departure order. The record included the trial court's departure order. Petitioner's initial brief on the merits was not filed in the district court until on or about 20 April 1987 and briefing was not completed until the reply brief was filed on or about 24 August 1987. Assuming that the Williams bar could be breached, petitioner's appellate counsel would have been faced with the formidable task of persuading the district court that it should perform the useless act of remanding for entry of a written departure order when a comprehensive written order was already in the record on appeal. The cases requiring remand for preparation of a written order involve instances where the record did not contain a written order. Neither courts nor counsel are required to perform, or urge, useless acts. See, State v. Strasser, 445 So. 2d 322 (Fla. 1983) and Boston v. State, 411 So. 2d 1345 (Fla. 1st DCA), rev. denied, 418 So. 2d 1278 (Fla. 1982), where both courts involved here refused to remand when doing so would be a useless act producing the same result.

In the actual event, appellate counsel argued to the district court at length that the departure sentence was not supported by a contemporaneous written order and that the reasons given for departure were invalid or not supported by the record. See, petitioner's initial brief at pages 87-97 and his reply brief at pages 19-25[2]. The district court rejected these arguments but they were substantive, not merely procedural, and the manner in which the substantive arguments were rejected show clearly that the procedural arguments would not have been countenanced.

> Appellant elected to be sentenced pursuant to the Fla.R.Crim.P. 3.701 sentencing guidelines. The court imposed sentences which exceed the recommended guidelines range, providing written reasons for this departure. Although the listed reasons include several factors which will not support a guidelines departure, the court also specified many valid reasons to support the departure. It is clear that even without the improper considerations the court would have imposed the same sentences. In accordance with Albritton v. State, 476 So. 2d 158 (Fla. 1985), we therefore decline to remand for resentencing.

Domberg v. State, 518 So. 2d at 1362. (e.s.)

It might be suggested that appellate counsel should have anticipated this Court's subsequent ruling in Ree v. State that the appropriate remedy for failure to enter a departure order was to remand with instructions to enter a sentence within the

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[2]The direct appeal record is over 13,000 pages. Although there do not appear to be any significant factual disputes, the record may be noticed pursuant to section 90.202(6).

guidelines. Appellate counsel cannot be faulted, in view of the time-honored practice of trial courts to enter written orders subsequent to oral pronouncements, for not anticipating that this Court in Ree would reject that long-standing practice and read the statutory words "accompanied by" to mean simultaneously entered as the sentence is orally pronounced. That time-honored practice continues under most circumstances and in fact has been reinstated to departure sentencing by the legislature. See footnote 1 above.

Petitioner's claim now that appellate counsel should have pursued the fruitless tactic of attempting to get Williams overturned in order to persuade the district court to do a useless act is a classic example of hindsight as the basis for a claim of ineffective assistance of counsel. Reduced to its essence, petitioner's claim of ineffective counsel amounts to nothing more than a bald assertion that what was done was unsuccessful so therefore something else should have been done. Neither the U.S. Supreme Court's decision in Strickland v. Washington nor this Court's decision in Knight v. State permit such tactics. These two decisions make it clear that judicial scrutiny of counsel performance must be deferential and must eliminate the distorting effect of hindsight; that there must be a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; and that the claimant has the heavy burden of showing not merely that a different tactic may have had some conceivable effect but rather, except for the tactic or error,

that there is a reasonable probability that the outcome would have been different. Petitioner has simply failed to show that the performance of his appellate counsel was below that expected of competent counsel or that there is a reasonable probability that he would not have been sentenced as an habitual offender had there been a remand for entry of another written departure order. In short, petitioner has not shown either inadequacy of performance or prejudice. Strickland, Knight.

For the above reasons, the district court did not err in denying petitioner's petition for writ of habeas corpus based on a claim of ineffective assistance of appellate counsel.

CONCLUSION

The district court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
Senior Assistant Attorney General
Fla. Bar #325791

Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR APPELLEE
TCR 94-111148

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Bradley R. Stark, Esquire, 2910 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132, this 8th day of February, 1995.

JAMES W. ROGERS