IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 85,047

PAMELA Y. COLBERT,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Colbert, along with codefendants Alfred Fennie and Michael Frazier, was indicted on September 27, 1991 for the offenses of first degree murder, armed kidnapping, and armed robbery (R 32-33). Colbert was tried before the Honorable Jack Springstead from October 28 through November 4, 1992 (T 1-1652). Frazier was tried before Judge Springstead from October 19-28, 1992. Fennie was tried before Judge Springstead from November 5-13, 1992.[1] All cases involved guilt and penalty phase proceedings. Colbert was convicted as charged (R 548-552), and was sentenced on November 23, 1992 (R 840-51). At the sentencing hearing, Judge Springstead announced that he was departing from the sentencing guidelines as to count two on the basis of the unscored capital conviction (R 871). On December 2, 1992, Judge Springstead rendered a factual basis for the upward departure, *nunc pro tunc* November 23, 1992, which contained the reason identical to the one orally pronounced at sentencing (R 852).

Colbert appealed her convictions and sentences to the Fifth District Court of Appeal. On October 21, 1994, the district court affirmed the convictions without discussion, but reversed the departure sentence on count two because the trial judge did not contemporaneously file the written departure reason. *Colbert v. State,* 646 So. 2d 234 (Fla. 5th DCA 1994). In a concurring opinion, Chief Judge Harris stated that it appeared rather harsh to the state to immunize the defendant from an otherwise appropriate sentence because of the judicial delay, and perhaps this court would be willing to reconsider *Ree v. State,* 565 So. 2d 1329 (Fla. 1990).

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[1]Petitioner requests this court take judicial notice of the dates of the trials and sentencings of Frazier and Fennie. *See, State v. Frazier,* Hernando County Case No. 91-757-CF; *Frazier v. State,* Fla. 5th DCA Case No. 93-00007, 633 So. 2d 1206 (Fla. 5th DCA 1994); *State v. Fennie,* Hernando County Case No. 91-756-CF; *Fennie v. State,* Florida Supreme Court Case No. 80-923, 19 Fla. L. Weekly S370 (Fla. July 7, 1994).

Colbert at 235. On December 16, 1994, pursuant to the state's motion for rehearing/request for certification, the district court certified the following question as being one of great public importance:

> In light of this court's recognition in *Harris v. State,* 645 So. 2d 386 (Fla. 1994), that sentencing is not a game in which one wrong move by the judge means immunity for the prisoner, is it still *per se* reversible error where a trial court orally pronounces departure reasons at sentencing but does not reduce them to writing until five business days later?

Id. at 235-36. The state filed a notice to invoke this court's discretionary jurisdiction, and on January 24, 1995, this court entered an order postponing jurisdiction and setting a briefing schedule.

SUMMARY OF ARGUMENT

This court should reconsider its holding that it is improper to enter written departure reasons a few days after the imposition of the departure sentence. Such holding places form over substance, and in cases likes this, creates not only an appellate issue, but an appellate issue requiring *per se* reversal. The result is a bonus to the defendant, whose rights were never prejudiced, at the expense of the people of the State of Florida.

ARGUMENT

THIS COURT SHOULD RECONSIDER ITS HOLDING IN *REE V. STATE,* 565 So. 2d 1329 (Fla. 1990), IN LIGHT OF ITS RECOGNITION THAT SENTENCING IS NOT A GAME WHERE ONE WRONG MOVE BY THE TRIAL JUDGE MEANS IMMUNITY FOR THE PRISONER AND IN LIGHT OF THE RECENT AMENDMENTS TO THE SENTENCING GUIDELINES..

In *Ree v. State,* 565 So. 2d 1329 (Fla. 1991), this court held that written reasons for a departure sentence must be issued at the time of sentencing. The next year, this court held that the trial judge may properly enter the written statement of reasons for departure after the judge has orally pronounced sentence and orally stated the departure reasons, as long as the reasons are entered the same day. *State v. Lyles,* 576 So. 2d 706 (Fla. 1991). However, the *Lyles* court found that it would not be proper under *Ree* to enter the written reasons after departure. *Id.* at 709. More recently, in determining that the Double Jeopardy Clause is not an absolute bar to the imposition of an increased sentence on remand from an authorized appellate review of an issue of law concerning the original sentence, this court recognized, as had the United States Supreme Court, that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Harris v. State,* 645 So. 2d 386, 388, quoting, *United States v. DiFrancesco,* 449 U.S. 117, 135, 101 S.Ct. 426, 436, 66 L.Ed.2d 328 (1980).

Petitioner contends that if the Constitution does not require that sentencing should be a game in which one wrong move by the trial judge results in immunity for the prisoner, the state sentencing guidelines should not provide the prisoner with the means to play a sentencing game. Significantly, in *Lyles, supra,* this court stated that the reason for its holding in *Ree* was that the

decision to appeal may have to be made without the benefit of written reasons if they are delayed in being prepared and filed with the clerk. Respondent would first point out that the decision to appeal an order on a motion to suppress is made without a transcript of the hearing and frequently on the basis of a summary order with no written factual or legal findings, and the decision to appeal a conviction is made without the benefit of the transcript of the trial. While in theory this court's reasoning may sound reasonable, in reality it is highly doubtful that the fact that a defendant and his counsel, who know what the departure reasons are, but simply have not read them, would be influenced in their decision to appeal, or that the defendant and his counsel would actually seek out review of the written order prior to deciding whether or not to appeal the propriety of the departure reasons.

Ironically, the effect of *Ree* in a case such as this, where the trial judge has orally pronounced departure reasons but failed to file them until five business days after sentencing, is to not only **create** an appellate issue where none previously existed, but to provide for per se reversible error where no substantive error has occurred and no rights have been prejudiced. Colbert was convicted of first degree murder, armed kidnapping, and armed robbery. The trial court gave Colbert a departure sentence on the armed kidnapping count, stating that the reason was the unscored capital felony conviction. It is beyond dispute that this is a valid departure reason, and if the trial judge had simply entered a written order that day, no lawyer could in good faith claim on appeal that it was not, so the decision would clearly be to not appeal such sentence. However, since the trial judge did not enter a written order that day, there was suddenly a reason to appeal, and oddly enough, to win. Petitioner submits that there is something clearly wrong with this scenario, and just as in *Lyles, supra,* it places form over substance.

The courts of this state have consistently acknowledged the "crush" of criminal cases being handled by our state trial courts and their limited resources. *See, e.g., Rodwell v. State,* 588 So. 2d 19 (Fla. 5th DCA 1991). This "crush" of work on the trial court in the case at bar is readily apparent, and further demonstrates that while a judge may make a wrong move at sentencing, the prisoner should not be the beneficiary at the expense of, both financially and in terms of lack of justice, the citizens of the State of Florida. Colbert's codefendant Michael Frazier was tried the week before her, and her codefendant Alfred Fennie was tried the week after her. Aside from numerous pretrial hearings, the trials involved guilt and penalty phases. Judge Springstead presided over all phases of all trials. Colbert and Frazier were sentenced November 23, 1992, and Fennie received a death sentence on December 1, 1992. Pursuant to section 921.141, Florida Statutes, Judge Springstead was required to and did render extensive factual findings in support of the death sentence in that case. The written order in Colbert's case was filed five business days after oral pronouncement of sentence.

Colbert knew a departure sentence was being imposed and knew why it was being imposed. Colbert filed a notice of appeal the same day she was sentenced, and was in no way hindered in filing it since she knew why the departure sentence was being imposed. The fact that the written order was filed five business days after the pronouncement of sentence and filing of the notice of appeal in no way prejudiced Colbert.

In 1993, the legislature enacted section 921.0016, Florida Statutes (1993), which in part states:

> (c) A state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent is a departure sentence and must be accompanied by

> a written statement delineating the reasons for departure, filed within fifteen days after the date of sentencing. A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within fifteen days after the date of sentencing.

This court subsequently adopted Florida Rule of Criminal Procedure 3.702, which in part states:

> (A) If a sentencing judge imposes a sentence that departs from the recommended guidelines sentence, the reasons for departure shall be orally articulated at the time sentence is imposed. Any departure sentence must be accompanied by a written statement, signed by the trial judge, delineating the reasons for departure. The written statement shall be filed in the court file within 15 days of the date of sentencing...

Amendments to Florida Rules of Criminal Procedure re: Sentencing Guidelines, 628 So. 2d 1084, 1092 (Fla. 1993). The statute and rule both became effective on January 1, 1994. In adopting the new rules, this court stated that existing caselaw that is in conflict with the new statutes and rules of procedure will be superseded. *Id.* at 1084. Thus, it appears that *Ree, supra,* has been superseded as to any sentence imposed after January 1, 1994. Petitioner submits that these amendments pertaining to the filing of written departure reasons within fifteen days of sentencing reflect a legislative intent contrary to *Ree,* and further reflect a recognition by this court of that intent, as well as a recognition of the extensive work load of the trial courts. In light of this, petitioner would request that this court recede from its holdings in *Ree* and *Lyles,* that it is improper to enter written reasons a few days after the imposition of sentence, and hold that in cases where sentencing occurred prior to January 1, 1994, and departure reasons were orally pronounced at the sentencing and a written order was filed within fifteen days, such reasons are subject to appellate review and automatic reversal is not warranted.

CONCLUSION

Based on the foregoing arguments and authorities, petitioner requests this court answer the certified question in the negative, and affirm the departure sentence imposed in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Petitioner on the Merits has been furnished by U.S. Mail to O. J. Harp III, 301 South Main Street, Post Office Box 1857, Brooksville, FL 34605-1867, this 21st day of February, 1995.

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