IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

PAMELA Y COLBERT,

Respondent.

_____/

CASE NO. 85,047

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

INITIAL REPLY BRIEF OF RESPONDENT ON THE MERITS

O. J. HARP, III
Counsel for Respondent
301 South Main Street
Post Office Box 1857
Brooksville, FL 34605-1857
(904) 796-7434

Florida Bar #: 181003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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. All cases involved guilt and penalty phase proceedings.

Petitioner's contention that Colbert was convicted as charged is erroneous and unfounded. Colbert was convicted as charged on Counts I and III (R 548-552). Colbert was convicted of the lesser included offense of kidnapping in Count II rather than kidnapping with a firearm (R 549). At the sentencing hearing, Judge Springstead announced "The basis for the upward departure is the fact you have been convicted along with Count II and Count I of a first degree murder, a capital offense." (R 871). On December 2, 1992, Judge Springstead rendered a factual basis for the upward departure, nunc pro tunc November 23, 1992, which for the first time addressed the issue that Count I was a non-scorable capital offense (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, Colbert v. State, 646 So. 2d 234 (Fla. 5th DCA 1994) but reversed the departure sentence on Count II

on the authority of Ree v. State, 565 So. 2d 1329 (Fla. 1990).

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, it is 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 decline to reconsider its holding that it is improper to enter written reasons for departure after the imposition of a departure sentence. It is so simplistic for a trial court to separate the sentencing hearing from the imposition of sentence that error should not arise. Since a departure sentence is extraordinary punishment that requires serious and thoughtful attention by the trial court, no excuse exists to not follow the law.

ARGUMENT

THIS COURT SHOULD DECLINE TO RECONSIDER ITS HOLDING IN REE V. STATE, 565 So. 2d 1329 (Fla. 1990), AS THAT CASE PROVIDED A THREE STEP PRIMER MANUAL TO TRIAL JUDGES EXPLAINING HOW TO AVOID PROBLEMS IN DEPARTURE SENTENCES.

In Ree v. State, 565 So. 2d 1329 (Fla. 1990), this court held that a trial court must produce written reasons for departure from sentencing guidelines at the sentencing hearing. The court acknowledged that although the procedure might involve some inconvenience for judges "a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." This court subsequently ruled in State v. Lyles, 576 So. 2d 706 (Fla. 1991) and modified Ree, Supra to the extent a trial judge had the leeway to reduce to writing, immediately after the hearing, the reasons orally stated to a defendant in open court. This court in Lyles, Supra, again stressed "It is important that these written reasons are entered by the trial judge on the same date as the sentencing." Id. at 709.

Respondent contends that Petitioner's reliance upon Harris v. State, 645 So. 2d 386 (Fla. 1994) and United States v. DiFrancesco, 449 US 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980) is misplaced for a number of reasons. Harris, Supra, involved a habitual offender and uncertainty in the then state of the law which was actually clarified while the defendant's case was still pending, Id. at 388. This court noted in Harris, Supra, that the result was effected "without a scintilla of the vindictiveness focused upon in

North Carolina v. Pierce." Harris 624 So. 2d at 280 (citing North Carolina v. Pearce, 395 US 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Respondent respectfully submits that Petitioner's contention that Respondent was convicted of first degree murder, armed kidnapping and armed robbery is incorrect and therefore flawed. Respondent further contends that a flawed premise could well result in flawed rationale and an unjust, improper result. Respondent would further submit that close scrutiny of the entire transcript in the instant cause would more than likely convince the reader that Respondent was convicted under Florida's felony murder doctrine. Unfortunately for Respondent a trial court is not required to submit a special verdict form to a jury to specify whether the verdict is predicated on premeditation or felony murder. Haliburton v. State, 561 So. 2d 248 (Fla. 1990).

Respondent submits that the theory of felony murder against Respondent was predicated upon the felony of kidnapping (R 32). Respondent further submits that the jury rendered a lesser included verdict in Respondent's case of simple kidnapping rather than armed kidnapping (R 549). Petitioner has correctly pointed out that the two codefendants were convicted as charged. It was also pointed out to the trial court at sentencing that the Respondent, to her detriment, had turned down a plea of second degree murder (R 868). Respondent's contention is that there exists a scintilla of vindictiveness focused upon in North Carolina v. Pearce, Supra.

Petitioner's reliance on Rodwell v. State, 588 So. 2d 19

(Fla. 5th DCA 1991) is misplaced as the alleged crush on the trial court is not readily apparent. The three codefendant's cases were based on the same facts and circumstances and the trial court had the benefit of having tried one codefendant prior to Respondent.

As to Petitioner's contention that Respondent was not prejudiced the Respondent respectfully begs to differ and suggests the record reflects otherwise. At the sentencing hearing the assistant state attorney related to the court "And as to Count II, she be sentenced to life in prison for the offense of kidnapping with a firearm (R 867). The assistant state attorney went on to request of the court that the sentences be consecutive "based on this defendant's attitude and total lack of concern or regard for her active involvement in the offense." (R 867). Lack of remorse is not a valid reason for an upward departure from a guideline recommended sentence. Gordon v. State, 599 So. 2d 1048 (Fla. 5th DCA 1992). Couple those factors with the unusual aspect that the presentence investigation did not contain recommended sentences on Counts II and III (R 868) and the Respondent respectfully suggests prejudice did in fact result.

CONCLUSION

Based on the foregoing arguments, facts and authorities, Respondent respectfully requests this court deny the PETITION FOR DISCRETIONARY REVIEW.

Respectfully Submitted,

O. J. HARP, III
Specially Appointed Public Defender
Florida Bar #: 181003
301 South Main Street
Post Office Box 1857
Brooksville, FL 34605-1857
(904) 796-7434

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Reply Brief of Respondent on the Merits has been furnished by U. S. Mail delivery to KELLIE A. NIELAN, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, this 6th day of March, 1995.

O. J. HARP, III