ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ARTHUR L. BROWN,

Petitioner,

vs.

CASE NO. 88,468

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT
COURT OF APPEAL, STATE
OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Arthur L. Brown, was the defendant in the trial court, the appellee in the First District Court of Appeal, and will be referred to as Petitioner or Brown. Respondent, the State of Florida, will be referred to as the State.

Petitioner seeks review based on a certification of conflict by the First District Court of Appeal in its decision in State of Florida vs. Arthur L. Brown, DCA Case No. 95-02755. This decision is contained in the appendix to this brief.

References to the record and transcript will be by "R" and "T" respectively followed by the appropriate page number. References to the appendix to this brief are marked "A".

STATEMENT OF THE CASE AND FACTS

Brown originally plead guilty to the original charges and, pursuant to a plea agreement, was sentenced on January 18, 1994 to community control (R 3). The original sentence was an agreed upon downward departure from the guidelines scoresheet (T 41).

Brown was subsequently charged with violation of community control and the trial judge found Brown to be in violation (R 4; T 39).

During the sentencing portion of the violation of community control hearing, there was the following colloquy:

> The Court: Was this initial disposition a plea agreement?
>
> Ms. Suber [defense attorney]: The initial disposition, the two years of community control?
>
> The Court: Yes.
>
> Ms. Suber [defense attorney]: I believe that it was a plea agreement. ...
>
> Mr. Renuart [prosecutor]: Our file reflects that there was a plea agreement and the defendant received 133 days credit time and two years community control, and was adjudicated on all counts (R 41).

The state requested that for the violation of community control, that Brown be sentenced to a guideline sentence based on the original guideline scoresheet, with a permitted range of five and one-half to twelve years in prison, with a one cell increase making the permitted range seven to seventeen years (T 40; R 3).

The trial judge sentenced appellant to one year of imprisonment to be followed by one year of probation (R 7, 9, 11).

The state appealed the trial judge's sentence to the First District Court of Appeal, arguing that the sentence was a downward departure entered without written reasons. (R 14).

The First District Court of Appeal agreed with the state, and reversed appellant's sentence, stating, "We reverse the downward departure sentence imposed without written reasons. On remand, the trial court is instructed to impose a guidelines sentence." (A). In so doing, The First District Court of Appeal certified conflict with its decision in the case at bar and the decisions in State v. Hogan, 611 So.2d 78, (Fla. 4th DCA 1992), Schiffer v. State, 617 So. 2d 357 (Fla. 4th DCA 1993), and State v. Glover, 634 So. 2d 247 (Fla. 5th DCA 1994)(A).

Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

The defendant was sentenced to an agreed upon downward departure sentence on January 18, 1994 of two years community control.

Defendant argues in this brief that no reasons for downward departure need be given upon revocation of probation or community control where the initial placement on probation or community control was a downward departure disposition agreed to by the state, and that therefore the sentence imposed by the judge in this case is legal and should be upheld.

The law on this issue is presently in conflict in the District Court of Appeal's of this state and the issue is currently pending in this Court in at least two cases that undersigned counsel is aware of. State v. Delgadillo, 659 So.2d 1264 (Fla. 3d DCA 1995), rev. pending, Fla. S.Ct. Case No. 86,558; State v. Franquiz, 654 So.2d 1068 (Fla. 3d DCA 1995), rev. pending, Fla. S. Ct. Case No. 85,960.

While State v. Roman, 634 So.2d 291 (Fla. 1st DCA 1994) appears to support the state's position in this matter, the petitioner will show in this brief why the holding in Roman should be revisited and the holdings of the Fourth and Fifth District Court of Appeals adopted. See State v. Hogan, 611 So.2d 78 (Fla. 4th DCA 1992); State v. Devine, 512 So.2d 1163 (Fla. 4th DCA), rev. denied, 519 So.2d 988 (Fla. 1987);State v. Glover, 634

So.2d 247 (Fla. 5th DCA 1994); Schiffer v. State, 617 So.2d 357 (Fla. 4th DCA 1993).

The sentence in this case should be upheld. If this relief in not granted, the case should be remanded for a de novo sentencing hearing.

ARGUMENT

ISSUE

THE LOWER COURT ERRED IN HOLDING THAT WRITTEN REASONS ARE REQUIRED TO DEPART BELOW THE GUIDELINES ON A VIOLATION OF COMMUNITY CONTROL WHERE THE STATE HAD AGREED TO A DOWNWARD DEPARTURE AT THE ORIGINAL SENTENCING

The original sentence imposed in this case on January 18, 1994 was a downward departure based upon an agreed upon plea agreement between the state and the defense, and was accepted by the trial court. This is not contested and is supported by the transcript (T 41).

At a subsequent hearing on a violation of community control, the trial judge relied on this prior agreed upon departure in sentencing the petitioner to a sentence for violation of community control, which would have constituted a downward departure had the petitioner originally been sentenced within the guidelines.

The state's appeal to the First District Court of Appeal was granted and the case reversed and remanded for a guideline sentence.

Petitioner submits the lower appellate court erred. Petitioner argues in this brief that no reasons for downward departure need be given upon revocation of probation or community control where the initial placement on probation or community

control was a downward departure disposition agreed to by the state, and that therefore the sentence imposed by the judge in this case is legal and should be upheld.

The law on this issue is presently in conflict in the District Court of Appeals of this state and the issue is currently pending in this Court in at least two cases that undersigned counsel is aware of. State v. Delgadillo, 659 So.2d 1264 (Fla. 3d DCA 1995), rev. pending, Fla. S.Ct. Case No. 86,558 (written reasons required); State v. Franquiz, 654 So.2d 1068 (Fla. 3d DCA 1995), rev. pending, Fla. S. Ct. Case No. 85,960 (written reasons required -- prior departure not sufficient).

The Fourth and Fifth District Courts of Appeal have ruled that a prior agreed upon departure from a guideline sentence is grounds for subsequent departure without written reasons.

In Hogan, 611 So.2d 78 (Fla. 4th DCA 1992) the Fourth District Court of Appeal specifically found that the caselaw requiring written reasons for departure was not applicable "with respect to a downward departure following a violation of probation, where the initial sentence validly departed downward." Id. at 79. The appellate court stated "that the state's prior stipulation to a downward departure is a valid ground for a subsequent sentence below the guidelines." Id. at 79. The Court further noted that "section 948.06(1), Fla. Stat. (1991) authorizes a trial court, in sentencing following a violation of

probation, to impose 'any sentence which it might originally have imposed before placing the probation on probation'..." Id. at 79.

As additional authority defendant notes that in State v. Glover, 634 So.2d 247 (Fla. 5th DCA 1994) the appellate court accepted the reasoning of Hogan in a case involving community control.

In Schiffer v. State, 617 So.2d 357 (Fla. 4th DCA 1993) the Court found that no written reasons were required for a downward departure and that the prior plea agreement provided the reason to support a departure.

Hogan, Glover, and Schiffer reflect the better policy in the class of cases before this Court. The fact that the state and the defense had agreed upon a plea which is below the guidelines, and that the trial judge had accepted it, is a reflection of the fact that all parties found, for reasons that may not be apparent in the record, that under the facts of the case a guideline sentence was inappropriate and not in the best interest of the public. Allowing the trial judge to rely on the agreed upon downward departure, when these cases come before the judge again on a violation of probation or community control, facilitates a just and appropriate result based on all the factors in the case. It also furthers the well-established principle that probation (and by analogy community control), are in the first instance a matter of grace with the trial court and is subject to the

exercise of a liberal measure of discretion. McCarthren v. State, 635 So.2d 1005 (Fla. 5th DCA 1994); Bently v. State, 411 So. 2d 1361 (Fla. 5th DCA) (en banc), rev. denied, 419 So.2d 1195 (Fla. 1985).

In denying petitioner relief in the case at bar, the First District Court of Appeal relied on State v.Roman, 634 So.2d 291 (Fla. 1st DCA 1994). In Roman, the accused originally was sentenced to an agreed upon downward departure sentence of community control. This Court reversed a subsequent downward departure sentence imposed after the community control was revoked, stating, "However, as in State v. Nickerson, 541 So.2d 725 (Fla. 1st DCA 1989), when imposing sentence after revoking community control, the court below did not provide a contemporaneous, written reason for a downward departure from the sentencing guidelines." Roman, 634 So.2d at 292.

The defendant respectfully submits that the lower appellate court's apprehension and consequent reliance on the ruling in Nickerson was in error. In Nickerson, the trial court's departure was based in part on the fact that an agreed upon downward departure sentence had originally been imposed. The First District Court of Appeal, quoting the Fourth District Court of Appeal's decision in Devine with approval, noted that "there is no reason why a trial court may not consider during resentencing the State's prior agreement..." as grounds to

mitigate. Nickerson, at 727. The First District Court of Appeal chose to reverse in Nickerson and remand to the trial court only because the Court could not "determine from the wording of the trial court's reasons for departure whether the court was in fact considering the State's prior agreement as a reason to depart or felt constrained by it". Id. at 727.

In other words, on remand the trial judge in Nickerson was free to impose a guideline sentence or to re-impose the previous sentence which was a downward departure. The Court did not rule a downward departure would not be legal based on the prior departure.

If this Court finds that an original departure is an insufficient reason or that written reasons are required, petitioner respectfully submits it would be fundamentally unfair and would not serve any public policy to affirm without remanding to the trial court for a de novo resentencing. The trial judge was under the impression that no written reasons were required. This is supported by the record, and the First District Appeal decision in Nickerson, as well as decisions in other District Courts of Appeal. Further, if the trial judge's action violated the law, resulting in a deprivation of appellant's liberty not because a harsher sentence (i.e., imprisonment for several years) serves society or justice, but because of a technical matter, petitioner's right to due process of law is nullified.

Based on the foregoing argument and citation of authority, and to effectuate appellee's right to due process of law as guaranteed by Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution, the First District Court of Appeal's decision should be vacated, and the trial judge's sentence in this case should be upheld. If this relief in not granted, this Court should grant petitioner a re-sentencing.

CONCLUSION

Based on the foregoing argument and citation of authority, and to effectuate appellee's right to due process of law as guaranteed by Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution, the First District Court of Appeal's decision should be vacated, and the trial judge's sentence in this case should be upheld. If this relief in not granted, this Court should grant petitioner a re-sentencing.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was delivered by United States Mail to Ms. Charmaine Millsap, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 this 12th day August, 1996.

Lynn A. Williams Attorney
Fla. Bar. No. 195484

APPENDIX

(Emphasis added). Thus, only a "party" can be required to pay attorney's fees and costs to the "other party." Although "party" is not expressly defined in Chapter 61, from the usage of the term in the statute it is apparent that "party" in Chapter 61 refers to one of the two parties to the marriage which is the subject of the dissolution proceeding. For example, section 61.021 requires "one of the parties to the marriage" to reside six months in the state, section 61.075(1) relates to "distributing the marital assets and liabilities between the parties," and section 61.08 authorizes the court to "grant alimony to either party." The usage in Chapter 61 of such words as "both" and "either" as adjectives to modify the term "party" or such a prepositional phrase as "between the parties" are clear indications that the legislature intended the "parties" in Chapter 61 to be limited to two and only two persons—the two parties to the marriage which is the subject to the proceeding under Chapter 61. By the former wife seeking to recover fees from her former husband's parents, rather than her former husband, she was seeking the payment of her attorney's fees by persons who were not Chapter 61 parties and, accordingly, who had no statutory obligation to pay her attorney's fees. *See, Price v. Price*, 382 So. 2d 433 (Fla. 1st DCA 1980), *Steele v. Steele*, 617 So. 2d 736 (Fla. 2d DCA), *rev. denied*, 626 So. 2d 208 (Fla. 1993).

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion. (BOOTH AND BENTON, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Guidelines—Departure—Where downward departure sentence was originally imposed pursuant to plea agreement, and defendant was subsequently found to have violated conditions of his community control, trial court was required to provide written reasons supporting downward departure sentence imposed upon community control revocation—Conflict certified—Downward departure sentence reversed and remanded for imposition of sentence within the guidelines

STATE OF FLORIDA, Appellant, v. ARTHUR L. BROWN, Appellee. 1st District. Case No. 95-2755. Opinion filed June 11, 1996. An appeal from the Circuit Court for Leon County. Nikki Ann Clark, Judge. Counsel: Robert A. Butterworth, Attorney General; Charmaine Millsaps, Assistant Attorney General, Tallahassee, for Appellant. Lynn A. Williams, Tallahassee, for Appellee.

(WEBSTER, J.) The state seeks review of a downward departure sentence imposed, without written reasons, following revocation of community control. Because the sentence is unaccompanied by written reasons, we reverse, and remand for imposition of a guidelines sentence.

In 1994, pursuant to a plea agreement, appellee pleaded guilty to two counts of burglary of a structure, and one count of third-degree felony theft. Also pursuant to the plea agreement, appellee was placed on community control for two years. This was a significant downward departure from the sentencing guidelines recommended sentence of eight years (the permitted range was 5½ to 12 years).

In 1995, appellee was found to have violated the conditions of his community control. At the sentencing hearing, the state urged that appellee's community control be revoked, and that he be sentenced according to the guidelines, explaining that the sentence could be enhanced by one cell because of the violation of community control. With a one-cell enhancement, the permitted range was 7 to 17 years. Without explanation, and over the state's objection that such a downward departure constituted an illegal sentence, the trial court sentenced appellee on each count to one year in jail, to be followed by one year of probation, the three sentences to run concurrently. No written reasons were entered by the trial court to support its significant downward departure sentence.

Section 921.001(6), Florida Statutes (1993), states that "[a] court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence in accordance with s. 921.0016. . . . *Any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge.*" (Emphasis added.) Similarly, Florida Rule of Criminal Procedure 3.701(d)(11) (1993) states that "[d]epartures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. *Any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure.*" (Emphasis added.) There seems to be little room for interpretation regarding the intent of the foregoing emphasized language. In fact, the supreme court has said repeatedly that this language means what it appears, in relatively unambiguous terms, to say. *E.g., State v. Jackson*, 478 So. 2d 1054 (Fla. 1985); *Ree v. State*, 565 So. 2d 1329 (Fla. 1990); *State v. Colbert*, 660 So. 2d 701 (Fla. 1995). There are, of course, a number of quite valid administrative and procedural justifications for such a requirement, not the least of which is to facilitate appellate review of the propriety of departure sentences.

Appellee candidly concedes that we have previously addressed this precise issue, holding that a downward departure sentence imposed in circumstances substantively indistinguishable from those here must be reversed, and remanded with instructions to impose a guidelines sentence, because the sentence had not been accompanied by written reasons justifying it. *State v. Roman*, 634 So. 2d 291 (Fla. 1st DCA 1994). The Second and Third District Courts of Appeal appear to be in accord. *State v. Delgadillo*, 659 So. 2d 1264 (Fla. 3d DCA 1995), *review granted*, No. 86,538 (Fla. Feb. 1, 1996); *State v. Franquiz*, 654 So. 2d 1068 (Fla. 3d DCA 1995), *review granted*, No. 85,960 (Fla. Feb. 1, 1996); *State v. Clockower*, 650 So. 2d 692 (Fla. 3d DCA), *review dismissed*, 659 So. 2d 1091 (Fla. 1995); *State v. McMahon*, 605 So. 2d 544 (Fla. 2d DCA 1992).

Appellee urges that we recede from *Roman*, and adopt the position of the Fourth District Court of Appeal. In *State v. Hogan*, 611 So. 2d 78 (Fla. 4th DCA 1992), that court appears to have held that written reasons need not be filed to justify a downward departure sentence in circumstances such as those presented here. *Accord Schiffer v. State*, 617 So. 2d 357 (Fla. 4th DCA 1993). In a 2-1 opinion, the Fifth District has followed *Hogan*. *State v. Glover*, 634 So. 2d 247 (Fla. 5th DCA 1994). We find these decisions unpersuasive. *Hogan* appears to be based on the proposition that "the state's prior stipulation to a downward departure is a valid ground supporting a subsequent sentence below the guidelines." 611 So. 2d at 79. This may well be a defensible position, although it would seem that a convincing argument could be made that, the original favorable bargain having been breached by the defendant, there is little justification for continuing to enforce that bargain over the state's objection. However, it seems to us that this position misses the point. As we perceive it, the pertinent question is whether, notwithstanding the validity of such a circumstance as support for a subsequent downward departure, the trial court is still required to state its reasons in writing, when it decides to impose a downward departure sentence. *Hogan* and its progeny do not address this issue. In particular, they fail to explain why it is that the plain mandate of both section 921.001(6) and rule 3.701(d)(11), that *any* departure from the recommended guidelines sentence be supported by written reasons, does not apply in this particular situation. They also fail to explain why the administrative and procedural justifications supporting the need for such a rule generally, do not apply in this particular situation.

We adhere to our prior decision in *Roman*, and reverse the downward departure sentence imposed without written reasons. On remand, the trial court is instructed to impose a guidelines sentence. *Pope v. State*, 561 So. 2d 554 (Fla. 1990). We also certify conflict with *Hogan*, *Schiffer* and *Glover*.

A