IN THE SUPREME COURT OF FLORIDA

WILLIAM VALRIO,
a/k/a RICHARD BICKERS

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 88,845
DCA CASE NO. 95-2816

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANDREA J. SURETTE
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COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

The state charged Petitioner, William Valrio, with felony driving under the influence, an offense which occurred in 1992. Petitioner pleaded nolo contendere to the charge, and a sentencing hearing was held more than three years after the offense was committed. After hearing evidence in mitigation at the sentencing hearing, the trial court found that Petitioner no longer posed a threat to the general population of Florida. Based upon this finding, the trial court decided to depart downward from the sentencing guidelines. The court orally announced the reasons for the departure and placed Petitioner on community control for one year, followed by four years of probation.

The state appealed the departure sentence, arguing that the trial court failed to file contemporaneous written reasons. On August 9, 1996, the Fifth District Court of Appeal reversed Petitioner's sentence and remanded to the trial court for resentencing within the guidelines. On August 15, 1996, Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

This Court should exercise its discretionary jurisdiction to review Petitioner's case. In its opinion the Fifth District Court of Appeal cites a case which **is** pending for review by this Court on a certified question. This Court has jurisdiction in accordance with Jollie v. State, 405 So. 2d **418** (Fla. 1981) and pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

ARGUMENT

THE DISTRICT COURT'S DECISION IN THIS CAUSE CITES STATE v. PEASE, 669 So. 2d **314** (Fla. 1st **DCA** 1996), WHEREIN THE FIRST DISTRICT COURT OF **APPEAL** CERTIFIED TO THIS HONORABLE COURT **A** QTJESTION OF GREAT PUBLIC IMPORTANCE.

The state appealed Petitioner's downward departure sentence on the grounds that the trial court failed to file contemporaneous written reasons for the departure. The Fifth District Court of Appeal reversed and remanded for resentencing within the guidelines. The First District Court of Appeal reached the same decision **in** State v. Pease, **669 So.** 2d **314** (Fla. **1st DCA** 1996), where the trial court also failed to enter contemporaneous written reasons supporting a downward departure sentence. However, the First District Court of **Appeal** in Pease certified to this Honorable Court the following question as a matter of great public importance:

> May a downward departure sentence be affirmed where the trial court orally pronounced valid reasons for departure at the time of sentencing, but inadvertently failed to enter Contemporaneous written reasons'?

In Petitioner's case the Fifth District Court of Appeal cites Pease in its opinion, but declines to certify the same question.

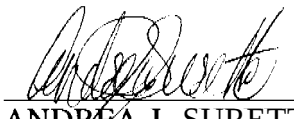
Pease v. State is pending for review by this Court in Case Number 87,571. Consistent with Jollie v. State, **405** So. 2d **418** (Fla. 1981), this Court should accept jurisdiction over Petitioner's case as well. In Jollie this Honorable Court held that a ***per*** *curiam* affirmance that relies upon a decision pending for review in this Court constitutes prima facie express conflict. Under such circumstances, this Court may exercise jurisdiction to review the ***per*** *curiam*

decision to ensure that the petitioner is not denied relief in the event the Court decides the pending decision favorably. Similarly, if this Court answers the certified question in Pease affirmatively, Petitioner will be denied the benefit of that decision should this Court **deny** jurisdiction over his case. Because the Fifth District Court of Appeal reached the same conclusion in Petitioner's case as the First District did in Pease, and because the Fifth District cited Pease in its opinion, but did not certify the same question pending for review, this Honorable Court has jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. Cf. Jollie.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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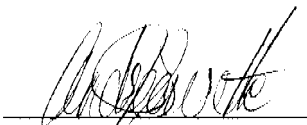
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, **444** Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, in his basket, at the Fifth District Court of Appeal, and mailed to: William T. Valrio, 2509 NE 3rd Avenue, Ocala, FL 32670-3518.



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A P P E N D I X

After Detective Baxley read the defendant his *Miranda*[1] rights, the defendant agreed to be interviewed. When asked whether he had penetrated his daughter's vagina, the defendant replied, "Yes . . . a finger could have went there." While acknowledging penetration. the defendant claimed that it was not "on purpose", and that he did not think his finger "went in very far."

Detective Baxley then asked the defendant to make a tape recorded statement, suggesting that a recorded statement would alleviate the risk of anyone misunderstanding his statements:

If we make a tape, you don't have to worry about me or any other cop later on coming in and putting anything in your words.

The defendant agreed. However, while making the recording, the defendant altered his position and denied penetration.

The defendant thereafter filed a pretrial motion to suppress his unrecorded admissions of penetration, arguing that the admissions had been obtained as a result of an improper *quid pro quo* agreement. After conducting a hearing, the trial court granted the motion and suppressed the defendant's unrecorded admissions. In so ruling. the court explained that, although all of the defendant's statements were made voluntarily, the state was bound by the ***quid pro quo*** agreement between Dctcctive Baxley and the defendant that the state would not use the defendant's unrccorded statements as evidence if the dcfcndant agreed to make a recorded statement, This ruling was incorrect.

In addressing a claim that a defendant's statement is inadmissible because it is the product of an improper ***quid pro quo*** agreement, the issue for determination is whether the defendant's statement was made voluntarily. *Traylor v. Stare,* 596 So. 2d 957 (Fla. 1992); ***Foreman v. State***, 400 So. 2d 1047 **(Fla.** 1st DCA 1981). In this rcgard, when a defendant claims that he made a statement based upon a ***quid pro quo*** agrccment with a government official, the defendant's statement is subject to suppression only when the defendant establishes that the official's actions in procuring the agreement wcrc calculated to dcludc or cxcrt undue influence over the dcfendant. Stated another way, if a government official induces a dcfendant to make a statement using language which amounts to a direct or implied promise of benefit, the statement must be excluded because it is given involuntarily. ***State v. Beck,*** **390** So. 2d 748 **(Fla.** 3d **DCA 1980),** ***rev. denied,*** **399 So. 2d** 1140 (Fla. 1981).

Here, the trial court found that the defendant's unrecorded statements were made voluntarily. This finding is supported by the record. There was no coercion exercised upon, nor promises madc to, the defendant during the initial unrccorded interview. The defendant cannot reasonably maintain that Detective Baxley's conduct induced him into making his unrecorded admissions of penetration since the admissions were made before Detective Baxley suggested that the defendant record his statements. Furthermore, there was no ***quid pro qua*** agreement, implied or otherwise, between Detective Baxley and the defendant concerning the consequences arising from the recording of the defendant's interview. *Cf.* ***Black v. State, 630*** So. ***2d*** 609 (Fla. 1st DCA 1993), ***rev. denied,*** 639 ***So.*** 2d **976** (Fla. 1994).

Because the defendant's statements were voluntarily made, they are admissible. The order suppressing the statements is therefore reversed.

REVERSED and REMANDED. (PETERSON, C.J., and HARRIS, J., concur.)

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

* * *

Criminal law—Sentencing—Guidelines—Departure—Failure of lower court to issue contemporaneous written reasons for downward departure sentence requires reversal and remand for resentencing within guidelines

STATE OF FLORIDA, Appellant, v. WILLIAM VALRIO, a/k/a RICHARD BICKERS, Appellee. 5th District. Case No. 95-2816. Opinion filed August 9, 1996. Appeal from the Circuit Court for Volusia County. Edwin P.B. Sanders, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee. and Belle B. Turner, Assistant Attorney General, Daytona Reach, for Appellant. James B. Gibson, Public Defender, and Andrea J. Surette, Assistant Public Defender, Daytona Beach, for Appellee.

(GRIFFIN, J.) The state appeals a downward departure sentence for an offense committed in 1992. The defendant, William Valrio, acknowledges that under the holdings of ***Jones v. State,*** **639** So. 2d 28 (Fla. 1994) and ***Pope v. State,*** 561 So. 2d 554 (Fla. 1990),[1] the failure of the lower court to issue contemporaneous written reasons for a below guidelines departure sentence would require a rcvcrsal and remand for resentencing within the guidelines. Valrio urges, however, that this court should certify to the Florida Supreme Court the same question certified by the First District Court of Appeal in the case of *State v. Pease,* 669 So. 2d 314 (Fla. 1st DCA 1996). Based upon the cited cases, we can see no basis to do so. In line with controlling authority, the sentence is vacated and remanded for resentencing within the applicable sentencing guidelines.

SENTENCE VACATED and REMANDED. (THOMPSON, J, and PERRY, B., Associate Judgc, concur.)

[1]See *also Stare v. Colbert*, 660 So. 2d 701 (Fla. *1995).*

* * *

Criminal law—Second degree murder—Conviction **for second degree murder** reversed **where trial** court **failed to** give mandatory **jury** instruction on justifiable and excusable homicide—, Defendant's request **that** court forego instructing jury **as** *to* lesser included offenses could **not be** construed **as** specific waiver **of, or** affirmative request **to** limit, the justifiable **and** excusable homicidc instruction

LARRY HALL, Appellant, v. STATE OF FLORIDA. 'Appellee. 5th District. Case No. 95-0554. Opinion filed August 9, 1996. Appeal from the Circuit Court for Flagler County. Kim C. Hammond, Judge. Counsel: James B. Gibson, Public Defender, and Dee R. Ball, Assistant Public Defender. Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Hall, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) The defendant challenges his convictions of attempted second-degree murder', armed burglary of a dwelling[2]. two counts of aggravated assault on a law enforcement officer[3], possession of a firearm by a convicted felon[4], and possession of drug paraphernalia[5]. Only his challenge concerning his attempted second-degree murder conviction has merit. In this regard, wc reverse the judgment and sentencc for attempted second-degree murder because the trial court failcd to give the mandatory justifiable and excusable homicidc jury instruction. In all other respects, wc affirm the defendant's judgments and scntcnces.

At the conclusion of trial, the trial court instructed the jury on attempted second-degree murder but failed to give the standard jury instruction on justifiable and excusable homicidc. Fla. Std. Jury Instr. (Crim.) 61. ***See also*** §§ 782.02, 782.03, Fla. Stat. **(1993).** In all murder and manslaughter trials, the jury must be instructed as to the definitions of justifiable and excusable homicide. *State* ***v. Smith,*** 573 So. 2d 306 **(Fla. 1990).** Failure to give this instruction constitutes fundamental error in cases where the defendant has been convicted of manslaughter or a greater offensc not more than one step removed. ***State v.*** *Lucas*, 645 So. 2d 425 (Fla. 1994).

Relying on *Armstrong v.* ***State,*** **579 So.** 2d **734** (Fla. 1991), the state argues that reversal is not warranted because the defendant rcqucsted that the jury not bc instmctcd as to any lesser included offenses. However, *Armstrong* is distinguishable and therefore the state's reliance upon it is misplaced. In *Armstrong*, the supreme court held that a defendant who specifically requests an abbreviated form of the justifiable and excusablc homicidc instruction cannot later complain that the instruction was improper. *Id.* at 735. Here, the defendant's attorney did not mention the justifiable and excusable homicide instruction in his comment to the court. He merely stated: