IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM VALRIO, a.k.a.
RICHARD VICKERS,

Petitioner,

v. Case No. 88,845

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR
MARION COUNTY, FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the Petitioner's version of the case and facts with the following additions:

On August 22, 1992, Valrio was arrested for driving under the influence of alcohol after a collision with another vehicle. (R 22) As this was his fourth DUI, he was charged with a third degree felony. (R 30)

Valrio entered into a plea agreement wherein he agreed to be adjudicated guilty, pay costs, and receive a guidelines sentence. (R 38) The recommended guidelines sanction was five and one half to seven years incarceration, with a permitted range of four and one half to nine years of incarceration. (R 62)

On October 20, 1995, Valrio appeared for sentencing. The trial court announced that it intended to impose a downward departure sentence of one year of community control followed by four years of probation. (R 42-44) Although oral reasons were given, no written reasons were filed. The State timely filed a notice of appeal on October 27, 1995. (R 65)

After the initial brief was filed, Petitioner moved to supplement the record on appeal on January 17, 1996. The district court granted the Appellant until February 7 to supplement the record. On February 9, 1996, the trial court signed an order "nunc

pro tunc, October 20, 1995" purporting to justify the departure sentence imposed in this case. In the answer brief, Valrio acknowledged the controlling authorities relied upon by the State, including Pope v. State, 561 So. 2d 554 (Fla. 1990), State v. Colbert, 660 So. 2d 701 (Fla. 1995), and Jones v. State, 639 So. 2d 28 (Fla. 1994).

After oral argument, the District Court entered its decision in this case, finding these cases to be controlling, and reversed and remanded for imposition of a sentence within the guidelines. The court found "no basis" to certify the same question presently before this Court in a case upon which Petitioner now relies for jurisdiction.

SUMMARY OF ARGUMENT

The decision in this case does not expressly or directly conflict with any other decision and so this Court should not exercise jurisdiction in this case. Although the decision does cite to Pease, infra, presently pending before this Court, the fifth district found "no basis" to conclude that Pease was applicable to this case. Where, as here, a case is cited, but distinguished, the rule of Jollie, infra, does not apply.

POINT ONE

THERE IS NO EXPRESS OR DIRECT CONFLICT BETWEEN THE DECISION IN THIS CASE AND *ANY* OTHER DECISION SUCH **THAT** THIS COURT SHOULD EXERCISE JURISDICTION

Petitioner contends that the fact that the district court's decision cited to a case presently pending before this Court, finding it to be distinguishable from the instant case, requires this Court to exercise its jurisdiction. See, Jollie v. State, 405 So. 2d 418 (Fla. 1981). The State of Florida contends that review of this decision establishes that no conflict exists, and so this Court should decline to exercise jurisdiction.

Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule **of** Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court held that the only facts relevant to the decision to accept or reject petitions for review are those facts contained within the four courners of the majority decision; neither the dissenting opinion nor the record may be used to establish jurisdiction. Moreover,

jurisdiction depends upon whether the conflict between decisions *is* express and direct and not whether the conflict is inherent or implied. Dept. Of HRS v. Nat'l Adoption Counseling Service. Inc., 498 So. 2d 888 (Fla. 1986). The district courts are ordinarily the court of final appellate jurisdiction, and this Court's review on the basis of conflict of decisions is limited.

Viewed in this light, there is no basis to exercise jurisdiction in this case. Petitioner below conceded that pursuant to Jones v. State, 639 So. 2d 28 (Fla. 1994), and Pope v. State, 561 ***So.*** 2d 554 (Fla. 1990), the failure of the lower court to issue contemporaneous written reasons for a below guidelines departure sentence required a reversal and remand for resentencing within the guidelines. However, Petitioner urged the district court to 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).** In response to this request, the district court held, "...we can find no basis to do so." State v. Valrio, 21 Fla. L. Weekly D1805 (Fla. 5th DCA August 9, 1996).

The State argued below that this case was distinguishable from Pease because in this case, none of the reasons orally pronounced are valid reasons for departure which are supported by the record. In Pease, all parties agreed that the orally pronounced reasons

would have been valid had they been contemporaneously written. The district court was correct in concluding that Petitioner can find no solace in the Pease decision, whatever its outcome. Where a district court cites to, but distinguishes, a case pending before this Court, Jollie, supra, is inapplicable. Jollie only applies where the district court finds the pending case to be controlling.

It is the essense of fairness that a rule applies equally harshly to both sides; if contemporaneous written reasons are not provided, a guidelines sentence must be imposed on remand. That is exactly what Petitioner agreed to when the plea was entered. There is no reason for this Court to accept review of this case.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing motion has been furnished by delivery to Assistant Public Defender Andrea Surette, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 4th day of September, 1996.

Belle B. Turner
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTOINE L. McBRIDE,

Petitioner,

v. Case No. 87,281

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR
MARION COUNTY, FLORIDA

APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

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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 *quidpro 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 Detective Baxley and the defendant that the state would not use the defendant's unrecorded statements as evidence if the defendant 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 *quidpro quo* agreement, the issue for determination is whether the defendant's statement was made voluntarily. *Traylor v. State,* 596 So. 2d 957 (Fla. 1992); *Foreman v. State*, 400 So. 2d 1047 (Fla. 1st DCA 1981). In this regard, when a defendant claims that he made a statement based upon a *quid pro quo* agreement with a government official, the defendant's statcment is subject to suppression only when the defendant establishes that the official's actions in procuring the agreement were calculated to delude or exert undue influence over the defendant. Stated another way, if a government official induces a defendant 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 urirecordcd statements were made voluntarily. This finding is supported by the record. There was no coercion exercised upon, nor promises made to, the defendant during the initial unrecorded interview. The defcndant 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, thcrc was no *quid pro quo* agreement, irnplicd 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 Gcneral, Daytona Bcach, for Appellant. James B. Gibson, Public Defender, and Andrea J. Surette, Assistant Public Defender, Dayiotia 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 reversal 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 Appcal 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 scntencc is vacated and remanded for resentencing within the applicable sentencing guidelines.

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

[1]*See also State 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 homicide 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: Jarncs B. Gibson, Public Defender. and Dee R. Ball, Assistant Public Defender, Daytona Beach. for Appellant. Robert A. Butterworth, Attorney Gcneral, 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', two counts of aggravated assault on a law enforcement officer[3], possession of a firearm by a convicted felon', and possession of drug paraphernalia[5]. Only his challenge concerning his attempted second-degree murder conviction has merit. In this regard, we reverse the judgment and sentence for attempted second-degree murder because the trial court failed to give the mandatory justifiable and excusable homicide jury instruction. In all other respects, we affirm the defendant's judgments and sentences.

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 justifiablc and excusable homicide. 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 offense 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 requested that the jury not be instructed as to any lesser included offcrises. However, *Armstrong* is distinguishable and thcreforc 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 excusable homicide 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: