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 THE MERITS

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STATEMENT OF THE CASE AND FACT$

Respondent generally accepts Petitioner's version of the case and facts with the following additions.

On August 22, 1995, 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) In addition to the other DUI offenses, Valrio has a lengthy record of driving offenses. (R 26-29)

Valrio entered into a written 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 incarceration. (R 62)

On October 20, 1995, Valrio was sentenced to one year of community control, followed by four years of probation. (R 42-46) The court orally announced that the reason for departure was:

> the stated reason that you have been on probation for over **a** year, and you have had no violations of probation during that period of time. That you have not driven a car during that period of time. And it appears to this Court that you have reached a level of rehabilitation that no long(er) makes you a risk to the general population of the State of Florida.

(R **17-18)**

The State of Florida timely filed its notice of appeal on October 27, 1995. (R 65) The initial brief was filed on January 9, 1996. The record on appeal contained a certificate from the clerk that no written reasons for departure had been filed

On February 9, 1996, the trial court entered an order *nunc pro tunc* to October 20, 1995. (R 79) The written order gave reasons for departure which were essentially the same as the reasons orally announced. Jurisdiction was not relinquished for this purpose; the order was entered after Valrio filed a motion to supplement the record.

In the decision issued August 9, 1996, the district court followed controlling precedent and reversed for imposition of a sentence within the guidelines. The court found "no basis" to conclude that State v. Pease, 669 So. 2d 314 (Fla. 1st DCA 1996), pending case Pease v. State, Case No. 87,571, in any way changed that result. This Court accepted jurisdiction pursuant to Article V, section 3 b) (3).

SUMMARY OF ARGUMENT

It is the essence of fairness that the same rules apply to both parties evenhandedly. Contrary to Valrio's assertion, fairness requires that this Court apply well-settled case law and uphold the reversal of his downward departure sentence for imposition of sentence within the guidelines. Florida statutes, procedural rules, and well-settled case law require that departure reasons are reduced to writing and filed contemporaneously to sentencing. The trial court's failure to follow this established procedure mandates reversal.

Even if this Court accepts Petitioner's invitation to carve out an exception to this established rule of law and ignore *stare decisis*, no relief is warranted in this case in any event because the reasons given orally are not valid reasons for downward departure.

ARGUMENT

THE FAILURE TO TIMELY FILE WRITTEN REASONS FOR DEPARTURE REQUIRES REVERSAL OF THE SENTENCE

The requirement that departure reasons be in writing, filed contemporaneously with sentence has been the law for more than ten years. Florida statutes, procedural rules and well-settled case law require that the departure reasons in this case should have been reduced to writing and filed contemporaneously with sentence. The trial court's failure to do so mandates reversal and the imposition of a guidelines sentence. *Stare decisis* and an evenhanded application of relevant law require no less. This Court should affirm the district court's decision in all respects.

Section 921.001(6) Florida Statutes (1995) provides that "(a)ny sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge." Florida Rules of Criminal Procedure impose the same mandatory requirement. "(D)epartures from the presumptive sentence established in the guidelines shall **be** articulated in writing..." Fla.R.Crim.P. 3.701(b)(6); 3.701(d)(11).

This Court has repeatedly held that written reasons supporting the departure must be contemporaneously filed. State v. Colbert, 660 So. 2d **701** (Fla. 1995); State v. Brown, 655 So. 2d *82* (Fla.

1995); King v. State, 623 So. 2d 486 (Fla. 1993); Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Ferguson v. State, 566 So. 2d 255 (Fla. 1930); Pope v. State, 561 So. 2d 1329 (Fla. 1990); State v. Oden, 478 So. 2d 51 (Fla. 1985).

The key requirement of Rule 3.701 is that the written reasons must be filed on the day of sentencing. Colbert. supra; see also, Padilla v. State, 618 So. 2d 165 (Fla. 165, 170 (Fla. 1993)([T]he law does not allow the trial judge to submit those reasons in writing after the sentence has been imposed.") It is equally clear that failure to timely file written departure reasons results in reversal of the departure sentence and imposition of a guideline sentence, even when the stated reasons were valid. Id.; see also, State v. Lyles, 576 So. 2d 429 (Fla. 1990).

Applying these well-established rules in this case, there is no dispute that the reasons for departure were not put into writing and filed until nearly three months after the notice of appeal was filed, at a time when the trial court did not even have jurisdiction. 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 incarceration. (R 62) Valrio was sentenced to one year of community control, followed by four years of probation. (R 42-46) The trial court was clearly aware that he

was imposing a departure sentence, as reasons were orally announced. Therefore, the district court correctly reversed the sentence and remanded for imposition of a guidelines sanction.

Valrio requests this Court to distinguish this case from Colbert, supra, because this case involves a downward departure and not an upward departure. This Court must reject this invitation for several reasons. Neither the statutes, rules nor this Court's numerous precedents draw such a distinction. In fact, the statute and rules concern "any" departure sentence without exception. This Court's numerous precedents speak to departure sentences generally, and do not apply a double standard, Further, this Court has already applied Ree and its progeny to the detriment of criminals who received downward departures absent timely filed written reasons. E.g. Whipple v. State, 596 So. 2d 669 (Fla. 1992); Branum v. State, 554 ***So.*** 2d 512 (Fla. 1990). In Pose, supra, this Court expressly receded from Barbara v, State, 505 So. 2d 413 (Fla. 1987) on this point. Adherence to precedent is an essential part of our judicial system, and the cornerstone of due process. Perez v. State, 620 So. 2d 1256, 1259 (Fla. 1993)(Overton, J., concurring) Finally, the purpose of the guidelines--to promote uniformity in sentencing--would be compromised if this Court decided that departures in favor of criminal defendants are not subject to the

same statutes, rules and decisional law as are upward departure sentences. It is the essence of fairness that this rule of law applies equally harshly to both sides. Valrio's vague claims of due process and fundamental fairness are in reality an attempt to secure disparate treatment which is unsupported by statutes, rules or case law.

If this Court holds for the State in Pease, then the same rule of law would control this case. However, if the State does not prevail in Pease, the analysis of this case is not over. The State contends that the result here is not necessarily controlled by this Court's decision in Pease v. State, supra. In Pease, the parties agreed that the reasons given orally were valid, and the only reason that the sentence had to be reversed was due to the failure to place these valid reasons in writing. Here, the State maintains its position that the reasons given by the trial court both orally and in the written order entered some three months after the notice of appeal was filed are all improper. The fact that Valrio had not violated his probation or driven a car while his license was suspended are nothing more than an observation that he did not violate the law. The fact that a defendant has not engaged in further criminal activity is not a valid reason for departure. State v. Nathan, 632 So. 2d 127 (Fla. 1st DCA 1994). All citizens

are expected to refrain from committing crimes. Nor is the remaining reason for departure valid. The trial court's opinion that Valrio is no longer a threat to the public at large is not a valid reason for departure. State v. Warren, 629 So. 2d 1014 (Fla. 4th DCA 1994).

Contrary to Valrio's assertion, fairness requires that this Court apply well-settled case law and uphold the reversal of his downward departure sentence for imposition of sentence within the guidelines. Florida statutes, procedural rules, and well-settled case law require that departure reasons are reduced to writing and filed contemporaneously to sentencing. The trial court's failure to follow this established procedure mandates reversal. Even if this Court accepts Petitioner's invitation to carve out an exception to this established rule of law and ignore *stare decisis*, no relief is warranted in this case because the reasons given orally are not valid reasons for downward departure.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to affirm the decision of the Distict Court of Appeal in all respects.

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 12th day of December, 1996.

Belle B. Turner

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Assistant Attorney General