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 DTSCRETTONARY REVTEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANDREA J. SURETTE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0064807
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

IN THE SUPREME COURT OF FLORIDA

WILLIAM T. VALRIO,
a/k/a RICHARD BICKERS,
Appellant,

vs.

OF FLORIDA,

Appellee.

STATEMENT OF THE CASE AND FACTS

In 1994, the state filed an information charging William Valrio, Petitioner, with felony driving under the influence, an offense that occurred on August 22, 1992 (R. 30 and 10) Valrio offered a nolo contendere plea to the charge at a hearing before the Honorable Edwin P. B. Sanders on March 9, 1995 (R. 76). Judge Sanders accepted his plea and adjudicated him guilty (R. 40 and 77). Although the plea agreement indicates Valrio was aware the state would recommend a guidelines sentence, the agreement also indicates that the state did not forfeit anything because Valrio pled as charged (R. 38-39).

Judge Sanders held a sentencing hearing on October 20, 1995, at which time the court considered evidence in mitigation (R. 1-21). Valrio presented the testimony of his mother and his probation officer in support of his claim that he was being rehabilitated. Valrio's probation officer had been supervising Valrio for more than one year, and he testified that Appellant was one of his better cases (R. 4 and 6). He told Judge Sanders that he believed Valrio had made a "turnaround." (R. 5). The officer further testified that Valrio maintained a

stable residence and employment and that all of his substance abuse tests for the previous year had been negative (R. **6).**

Valrio's mother informed the court that Valrio had been residing with her and that she was monitoring his conduct (R. 14). Hc had not driven a vchicle at any time in the prior year, nor had he drank to excess (R. 14). He had a job wailing for him because his boss thought highly of him (R. 15). Valrio confirmed all of this testimony when hc spoke at the hearing; he expressed a strong desire to continue with his rehabilitation efforts (R. 16).

Valrio's guidelines scoresheet yielded a permitted sentencing range of four and one-ha1f to nine years incarceration (R. 62). Rased upon the evidence presented at the hearing, Judge Sanders decided to depart downward from that range, orally stating the following reasons:

> [He has] been on probation for over a year, that [he has] had no violations of probation during that period of time. That [he has] not driven a car during that period of time. And it appears to this Court that [he has] reached **a** level of rehabilitation that no long (sic) makes [him] a threat to the general population of thc state of Florida.

(R. 18).[1] Judge Sanders then placed Appellant on community control for onc year, followed by two years of drug offender probation and another two years of regular probation (R. 18 and **42-46).** Judge Sanders filed a *nunc pro tunc* order with the trial court on February 9, 1996, stating the reasons for the departure (R. 79). Thc reasons stated in the written order comport with the orally pronounced reasons

In its appeal to thc Fifth District Court of Appeal, the state argued that Valrio's sentence must be reversed because the trial court failed to file contemporaneous written

---

'The probation the trial court referred to had been imposed in an unrelated case.

reasons for the departure sentence. Valrio moved for the district court to relinquish jurisdiction temporarily to attempt to determine an explanation for the absence of timely filed written reasons. The district court denied his motion. In response to the state's appeal, Valrio urged the district court, if it reversed his sentence, to certify the same question the First District did in State v. Pease, **669 So.** 2d **314** (Fla. 1st DCA 1996), now pending before this Court in case number 87,571. In Pease, he First District Court of Appeal also reversed a downward departure sentence for the tria court's failure to file contemporancous written reasons, but it certified 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?

The Fifth District Court of Appeal reversed Valrio's sentence and remanded to the trial court for imposition of a guidelines sentence. The Fifth District declined to certify the above question because it determined that prior case law in this Court provided no basis for doing so. Valrio sought to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Florida Constitution. This Honorable Court accepted jurisdiction on October 31, 1996.

SUMMARY OF ARGUMENT

The trial court's decision to depart downward from the sentencing guidelines should have been affirmed under the circumstances of this case. The trial court's reasons for departing were orally pronounced at the sentencing hearing and were manifest from the face of the record. The trial court inadvertently neglected to enter a contemporaneous written statement articulating the reasons for departure. When the trial court was aware it had not entered a written order, the court articulated the reasons in writing and filed the statement with the trial clerk. The written statement is substantially the same as the oral reasons provided at sentencing. Hence, the trial court's intentions were obvious, the state was not prejudiced in its ability to prepare an appeal, and the appellate court could effectively review the reasons. These facts, therefore, do not implicate the potential problems that may arise when the trial court fails to enter a contemporaneous written explanation for departure. Under such circumstances, it is fundamentally unfair and a violation of due process to require the defendant to serve a harsher sentence than he would be required to serve if the trial court had timely filed the written reasons. The decision of the Fifth District Court of Appeal should be quashed.

ARGUMENT

CONSISTENT WITH PRINCIPLES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS A DOWNWARD DEPARTURE SENTENCE SHOULD BE AFFIRMED WHEN THE TRIAL COURT ORALLY ANNOUNCED VALID REASONS AT THE TIME OF SENTENCING, HUT INADVERTENTLY FAILED TO ENTER CONTEMPORANEOUS WRITTEN REASONS.

Requiring the trial court to impose a guidelines sentence on remand, when the trial court originally failed to rile written reasons for departure within the requisite time period, violates Valrio's substantive due process rights under the circumstances of this case. It is the trial court's responsibility to reduce the orally stated reasons to writing, and it is a manifest injustice to increase a defendant's sentence because of the trial court's failure to comply with that rule.[2] Where the reasons are orally announced at the time of sentencing, apparent from the face of the record, and later converted into written form, meaningful appellate review can he achieved. Ilence, the policy underlying the requirement of written reasons is satisfied. To avoid the inequitable result of penalizing the defendant with a greater sentence, an appellate court should affirm a downward departure sentence when the following facts exist: the trial court orally pronounced valid reasons supporting the departure at the sentencing hearing; the reasons are obvious from the face of the record; the trial court inadvertently neglected to file timely written reasons; and the trial court subsequently entered substantially the same reasons in writing.

The Fifth and Fourteenth Amendments to the United States Constitutions and Article I,

---

[2]In 1992, Rule 3.701(d)(11), Florida Rules of Criminal Procedure provided that "[a]ny sentence outside of the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure." See also State v. Colbert, 660 So. 2d 701 (Fla. 1995) (written reasons must be entered contemporaneously with sentencing).

Section 9 of the Florida Constitution require criminal proceedings to be conducted according to due process. Due process primarily embodies the concept of "fundamental fairness" Scull v. State, 569 So. 2d 1251 (Fla. 1990); Steinhorst v. State, 636 So. 2d 498 (Fla. 1994). This Court has recognized that substantive due process and fundamental fairness involve the availability and severity of remedies. Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991). Where a defendant is not responsible for strict compliance with a rule, nor is he at fault for noncompliance, it is fundamentiilly unfair to penalize the defendant for an officer **of** the court's failure to adhere to the rules. Cf. Allen v. State, 662 **So.** 2d 380 (Fla. 4th DCA 1995) (finding a defendant in violation of probation for failure to pay costs, where the defendant was not at fault, is fundamentally unfair and contravenes due process). Compelling a defendant to serve a harsher sentence for the trial court's inadvertent failure to adhere strictly to a procedural requirement offends notions of fair play essential to the proper administration of justice.

Under certain conditions, exceptions to the general rule requiring a guidelines sentence are necessary as a matter of fundamental fairness to the defendant. For instance, in State v. Hunter, 610 So. 2d 115 (Fla. 4th DCA 1992), the district court affirmed a downward departure sentence even though the trial court did not timely file written reasons. In Hunter, the defendant had specifically requested the court to enter a conteniporaneous written order. The district court recognized that the defendant was relying on the trial court to file the reasons and that it would be unduly harsh to penalize the defendant for the trial court's failure to do so in a timely manner. Similarly, in Smith v. State, 598 So. 2d 1063 (Fla. 1992), this Court affirmed a downward departure without *any* written reasons because the trial court had unambiguously directed the state to articulate the reasons in writing. This Court noted that the defendant should

not be penalized for the state's failure to comply with the court's instructions. Id. at 1067. These cases demonstrate that the policy reasons underlying the requirement of contemporaneously filed written reasons, while important, are sometimes subordinate to the defendant's fundamental right to fairness.

As in Hunter and Smith, an exception to the general rule is warranted in Valrio's case. Judge Sanders's intended reasons were clear from the record, the judge's neglect in immediately entering a written order was inadvertent, and he eventually reduced the reasons to writing. These facts do not implicate the policy concerns associated with requiring a contemporaneous writing because the trial court's intentions were evident, and, as such, appellate review of the reasons would be productive. See State v. Jackson, 478 So. 2d 1054 (Fla. 1985) (written reasons are necessary to avoid forcing the appellate court to glean the intended reasons from the record and to prevent unintended results). First, Judge Sanders could not have been more clear in stating his reasons for imposing a downward departure. At the moment he imposed the sentence, he announced:

> It is the court's decision to sentence you below the guidelines *and for the stated reason* that you have been on probation for over a year, that 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 (sic) makes you a risk to the general population of the [S]tate of Florida.

(R. 17) (emphasis added). Because the reasons were evident from the record, the appellate court did not have to sift through the record in search of reasons that the trial court may or may not have intended. This concern stated in Jackson is not present in Valrio's case; there could be no doubt what Judge Sanders intended. Indeed, the state was not prejudiced in any way: the

prosecutor knew the reasons and decided to appeal the court's decision.

Second, the trial court in the instant case, unlike in Jones, did convert the orally stated reasons to a written form, and the written statement coincides with the orally announced reasons (R. 79). In Jackson this Court noted that written reasons are essential because the judge, after "due consideration," may intentionally omit something (s)he had orally stated at sentencing. Hence, without written reasons, there is a danger the reviewing court will not give effect to the trial court's actual intent. Again, this concern does not exist in Valrio's case. Due to both the conspicuous, orally stated reasons and the identical written reasons, the appellate court had a clear indication of the trial court's intentions. The outcome of the appeal would be reliable.

The policy reasons for requiring a defendant to serve a more severe sentence when the trial court fails to file timely written reasons for departure do not always justify the harshness of such a result. This Court noted in Pope v. State, 561 So. 2d 554, 556 (Fla. 1990), that a guideline sentence was required on remand "[t]o avoid multiple appeals, multiple resentencing, and unwarranted efforts to justify an original departure."[3] While these are significant considerations, they do not necessarily outweigh the defendant's fundamental right to fairness, such that a ***per se*** rule is always appropriate. For instance, multiple resentencing and multiple appeals will be unnecessary in a case such as Valrio's, where the reasons for departure are evident from the face of the record, and where the "untimely" written reasons comport with the oral reasons. In such a case, there is no reasonable dispute over the reasons for departure, and the state can effectively appeal the validity of the reasons. Resentencing is only necessary if the

---

[3]In Jones v. State, 639 So. 2d 28 (Fla. 1994), this Court held that the same policy considerations apply in a downward departure case where written reasons were not timely filed, and imposition of a guidelines sentence would be required on remand.

reasons arc invalid, which would be the case regardless of whether or not the trial court cntcrs the written reasons timely. Also, when the reasons are facially apparent and reinforced in a subsequent written order, there is no "unwarranted effort to justify an original dcparturc" upon resentencing. Again, the state can effectively appeal the validity of the reasons, which would finally dispose of the case by either upholding the validity, or by declaring the reasons invalid and remanding for imposition of a guidelines sentence.[4] Valrio's case illustrates the inequity of applying the general rule when there is no real concern about the potential for multiple appeals, multiple resentencing, and unwarranted attempts to justify a departure sentence.

Moreover, there are equally compelling policy reasons to affirm a downward departure under the circumstances of this case. Deference to the lower court's conscientious decision to depart, and recognition **of** the "practical reality of life on the trial bench" are among such concern. Pease, 669 So. 2d at 315-316. Judge Sanders heard evidence and arguments of counsel, and the judge posed questions to the witnesses relating to a potential departure sentence. After "due consideration," he determined that a guidelines sentence would not be appropriate. He cogently stated the reasons and iinposed the sentence he deemed appropriate. Mechanical application of the general rule in this case fails to give effect to the trial court's thoughtful decision. Furthermore, given a trial court's heavy case load, the failure to commit the reasons to writing iminediately is not surprising.

It is also important to consider that Valrio attempted to relinquish the district court's jurisdiction temporarily, in order to reconstruct the record in the trial court to determine the

---

[4] See Shull v. Dugger, 515 So. 2d 748 (Fla. 1987) (trial court cannot provide new reasons for departure when the original reasons were invalid, and a guidelines sentence must be imposed on remand).

reason for failing to file a contemporaneous written order. It is possible the reasons were written, but misplaced, for example. Likewise, a comment could have been made off the record that would have brought this case directly in line with cases such as Hunter and Smith. The explanation, if any, might have had an impact on the outcome of the appeal. The district court denied the motion to relinquish jurisdiction, however, and, ultimately, Valrio will be penalized for something over which he had no control. Again, this illustrates the inequity of applying the general rule rigidly.

Additionally, Appellant relies on the arguments set forth by the Petitioner in Pease v. State, Case No. 87,571, pending before this Court.

CONCLUSION

Based on the foregoing argumen s and authorities, Petitioner respec fully requests this Honorable Court to quash the order of the Fifth District Court of Appeal and to remand with appropriate directions.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANDREA J. SURETTE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0064807
112 Orange Avc., Stc. A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

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 N.E. 3rd Avenue, Ocala, FL 32670-3518, on this 25th day of November, 1996.

ANDREA J. SURETTE
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLIAM T. VALRIO,
a/k/a RICHARD BICKERS,

Petitioner/Appellant,

vs.

STATE OF FLORIDA,

Respondent/Appellee.

Supreme Court Case No. 88,845

DCA Case No. 95-2816

APPENDIX

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 corning 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 suppresshis 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 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 *quid pro 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 defcndant claims that he made a statement based upon a *quid pro quo* agreement with a governmcnt official, the defendant's statement 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 officialinduces 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 made to, the defendant during the initial unrecorded 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 statcmcnts. Furthermore, there was no *quid pro quo* agreement, implied or otherwise, between Detective Baxley and the defendant concerning the consequences arising from the recarding of the defend'ant'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 Beach. for Appellant. James B. Gibson, Public Defender, and Andrea J. Surette. Assistant Public Defender. Dayiona 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 Appeal in the case of *State v. Pease*, 669 So. 2d 314 (Fla. 1st DCA 1996). Based upon the cited cases, wc *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 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: 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', anned 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, we reverse the judgment and sentence for attempted second-degree murder becausc the trial court failed to give the mandatory justifiable and excusable homicide jury instruction. In all other respects, wc affirm the defendant'sjudgments and sentences.

At the conclusion of trial, the trial court instructed the jury on attempted second-degree murder but failed to givc the standard jury instruction on justifiable and cxcusablc 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 defcndant 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 offenscs. Howcvcr, *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 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 cxcusablc homicide instruction in his comment to the court. He merely stated: