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IN THE SUPREME COURT OF FLORIDA

WILLIAM VALRIO,)
a/k/a RICHARD BICKERS,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

S.C.T. CASE NO. 88,845
DCA CASE NO. 95-2816

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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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,
BUT INADVERTENTLY FAILED TO ENTER
CONTEMPORANEOUS WRITTEN REASONS.

The state argues in its answer brief that adherence to the doctrine of *stare decisis* mandates reversal of Valrio's sentence and remand for imposition of a guidelines sentence (AB¹ at 4-6). *Stare decisis* is not dispositive of this case, as this Court need not recede entirely from the precedent cited in the state's answer brief. Rather, this Court need only reformulate the rule of law as applied to cases where the underlying rationale for the rule does not fit the facts of the case. The rationale for requiring a guidelines sentence when the trial court inadvertently fails to enter contemporaneous written reasons is not applicable to Valrio's case. As mentioned in his initial brief, there is no concern for multiple appeals, multiple resentencing, or attempts to justify an original departure. On the facts of this case and others alike, therefore, remand for imposition of a guidelines sentence is unnecessary. Accordingly, the rule should be flexible to accommodate a defendant's right to due process.

This Court has recognized that when the rationale for an established rule of law does not apply to the case at hand, the rule must be altered. See State v. Schopp, 653 So. 2d 1016 (Fla. 1995) (holding that failure to hold a Richardson² hearing is not per se reversible error, but is

¹"AB" refers to the state's answer brief on the merits.

²Richardson v. State, 246 So. 2d 771 (Fla. 1971).

subject to harmless error analysis). In Schopp, this Court went so far as to overrule prior case law because Schopp demonstrated that there could be cases in which it would be possible for an appellate court to determine that the error was harmless. Likewise, Valrio's case demonstrates that there can be cases wherein untimely filed written reasons do not warrant mechanical application of the rule requiring remand for imposition of a guidelines sentence: there are cases in which the state is not prejudiced by the untimeliness of the written reasons, meaningful appellate review of the reasons can be achieved, and the appeal will finally dispose of the case. Under such circumstances, the rule should be adjusted to fit the circumstances of the case as a matter of fundamental fairness.

Moreover, as this Court has noted, "*Stare decisis* does not command blind allegiance to precedent. 'Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court.'" State v. Gray, 654 So. 2d 552, 554 (Fla. 1995) (citing Smith v. Department of Ins., 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring and dissenting)). This logic becomes even more compelling when it is unnecessary to overrule prior case law; instead, it is merely necessary to reconfigure the contours of the rule. It is also important to consider that *stare decisis* does not have the same import in the area of practice and procedure that it does with regard to substantive law. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403-405 (1970).

The state claims that affirming a downward departure sentence under the present circumstances will vitiate the purpose of the sentencing guidelines, which is to promote uniformity in sentencing (AB at 6). To the contrary, uniformity in sentencing is compromised when similarly situated defendants are treated differently based solely on the trial court's

inadvertent failure to enter written reasons timely. In one case, a defendant will serve his departure sentence if, to his good fortune, the trial court complied with the rule requiring contemporaneous written reasons. In another case, a defendant will be required to serve a harsher sentence if the trial court failed to comply with the rule, even though the defendant was not at fault for noncompliance and the reasons are the same as in the other case. This disparity in sentencing is especially egregious when the case does not implicate the policy concerns associated with the rule requiring imposition of a guidelines sentence.

The state additionally argues that the reasons justifying the downward departure in Valrio's case are invalid. This Court has held, however, that a finding that the defendant poses no danger to society is a valid reason for departing from the sentencing guidelines. State v. Sachs, 526 So. 2d 48 (Fla. 1988). The trial court in the instant case specifically found that Valrio had reached a level of rehabilitation that no longer made him a threat to the general population of Florida (R. 18). This is a valid reason for departure because it is not taken into account by the guidelines nor prohibited by them, and it is not an element of the crime itself. Id. at 50 (citing Mischler v. State, 488 So. 2d 523 (Fla. 1986)).

The trial court's finding that Valrio no longer posed a threat to society is supported by the record by a preponderance of the evidence. Valrio produced witnesses, such as his mother and his probation officer, who supported his contention that he was well on his way to being rehabilitated. He had complied with the terms of an unrelated probation for more than a year, he gave up drinking to excess, and he had a steady job and stable residence (R. 4-6 and 14-15). He expressed a strong desire to maintain his clean record and to continue with his rehabilitation (R. 16). Moreover, Valrio's mother showed support for her son's rehabilitation; she was

monitoring his conduct, and she allowed him to reside with her (R. 14-15). See State v. Frinks, 555 So. 2d 916 (Fla. 1st DCA 1990) (showing of support by relatives and friends for defendant's rehabilitation was a valid reason justifying a downward departure sentence). The state presented no evidence directly contradicting Valrio's assertions.


The state claims the trial court's reliance on the fact that Valrio had not violated his probation was merely an "observation that he did not violate the law." (AB at 7). The significance of Valrio's compliance with his probation was not simply that he had obeyed the conditions of his probation. Rather, his success on probation was notable because it demonstrated his desire for, and amenability to, rehabilitation. Significantly, the purpose of probation is rehabilitation. E.g., Bernhardt v. Stale, 288 So. 2d 490 (Fla. 1974). Hence, the trial court's reliance on Valrio's success on probation was an observation that probation was working, that Valrio was being rehabilitated, and consequently, that he no longer posed a threat to society.

CONCLUSION

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

Respectfully submitted,

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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 N.E. 3rd Avenue, Ocala, FL 32670-3518, on this 2nd day of January, 1997.



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