IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,460

ERIC WEISS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

LISA WALSH
Assistant Public Defender
Florida Bar No. 964610

Counsel for Petitioner

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INTRODUCTION

This is the Petitioner's reply brief on the merits requesting that this Court grant certiorari, quash the decision below, and approve the prior decisions of this Court which are in express and direct conflict with the decision below on the same question of law. Petitioner, Eric Weiss, was the defendant in the trial court and the appellant in the Third District Court of Appeal; the Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent. In this brief, the symbol "R" indicates the record on appeal, the symbol "T" indicates the transcripts of hearings, the symbol "S.R." indicates the supplemental record on appeal, and the symbol "A." indicates the appendix to the initial brief.

ARGUMENT

THE RULE ANNOUNCED BY THIS COURT IN *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *modified by State v. Lyles*, 576 So. 2d 706 (Fla. 1991) AND *Pope v. State*, 561 So. 2d 554 (Fla. 1990), AND REITERATED IN *State v. Colbert*, 660 So. 2d 701 (Fla. 1995), HAS NOT BEEN OVERRULED BY THE APPELLATE REFORM ACT, SECTION 924.06, FLORIDA STATUTES (1996), AND THE FAILURE OF A TRIAL COURT TO TIMELY FILE WRITTEN REASONS IN SUPPORT OF AN UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES REQUIRES REVERSAL AND RE-SENTENCING WITHIN THE GUIDELINES.

1. Failure of the petitioner to raise the *Bain* and *Denson* issue in the briefs to the Third District Court of Appeal does not bar relief.

In the Initial Brief of Petitioner, the Petitioner argued that failure to preserve the *Ree*[1] issue via a motion to correct sentence under 3.800(b), Florida Rules of Criminal Procedure, is not fatal, where, as explained in *Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999) and *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), the error constitutes either fundamental error or serious, patent sentencing error which accompanies preserved error. (Petitioner's Brief on the Merits at 22-27). The State responds that this argument was not presented to the District Court. (Brief of Respondent at 7). The Petitioner has several responses.

First, this area of the law, whether an unpreserved sentencing error may be presented

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[1] *Ree v. State*, 565 So. 2d 1329 (Fla. 1990).

on direct appeal following the passage of section 924.051, Florida Statutes (1997), has been in great flux for the past two years. The district courts have ranged in opinion from *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998) (No sentencing error may be considered on direct appeal unless preserved below; the concept of fundamental error does not exist for sentencing error.) to *Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998) (argument over whether failure to preserve error which would have netted defendant reversal on review constitutes "legal churning" and unpreserved error which would have resulted in reversal if preserved may be treated as ineffectiveness of counsel on direct review) to *Austin v. State*, 699 So. 2d 314 (Fla. 1st DCA 1997) (fundamental sentencing error exists where double jeopardy claim is raised for first time), and *Nelson v. State*, 719 So. 2d 1230 (Fla. 1st DCA 1998) (improper habitualization on felony petit theft constitutes fundamental error even where sentence does not exceed non-habitual statutory maximum), to *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998) (matters such as improper fees and costs do not constitute fundamental error), and finally to *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998) and *Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999) (either fundamental error or serious patent sentencing error appended to error properly preserved or fundamental may be raised on direct appeal). The legal landscape has been rocky, in conflict, varied even within a particular district,[2] and ever changing.

[2] *Compare Weiss* to *Mizell*.

What is important to note is the state of the law on this issue at the time briefing commenced in *Weiss*. Weiss was sentenced on August 19, 1997. The Initial Brief on Appeal was filed on December 30, 1997. None of the aforementioned cases had been issued at that time. *Bain* was issued on January 29, 1999, and *Denson* was issued on May 13, 1998. It was impossible to present this issue below in the Initial Brief.

Second, the State did not attack Mr. Weiss' failure to preserve this issue in the Third District. Rather, the State argued in its Answer Brief of Appellee that "sentencing" meant rendition and not pronouncement, and nothing more. (A. 46-49).

Third, at the time of briefing, the Appellant relied upon the Third District Court of Appeal's opinion in *Pierre v. State*, 708 So. 2d 1037 (Fla. 3d DCA 1998)[3] (Reply Brief of Appellant; A. 62-63). The Third District Court of Appeal had yet to hold that the Appellate Reform Act required preservation of a *Ree* claim. Where no caselaw in the district suggested that preservation might be an impediment to relief, *Bain* and *Denson* had not been issued and the Attorney General did not raise preservation, it certainly was not incumbent upon the Appellant below to present this issue in the briefs.

2. Failure to present the *Carradine v. State*, 721 So. 2d 818 (Fla. 4th DCA 1998) issue on appeal does not bar relief.

The Petitioner argued, citing *Carradine v. State*, 721 So. 2d 818 (Fla. 4th DCA

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[3] *Pierre* was issued on April 29, 1998. The reply brief was filed on June 4, 1998. (A. 64).

1998), that the rules governing departure sentences and the rule in *Ree* are procedural in nature and therefore, the Florida Legislature cannot presume to overrule a procedural rule absent a bicameral supermajority vote to do so. *See* Art. V, Section (2)(a), Fla. Const. (Brief of Petitioner on the Merits at 28, 29, 31). The Respondent also argues that this issue was never presented below. *Carradine* was issued **two months after** the opinion in *Weiss* was issued. It would have been impossible to cite a case to the Third District which had not yet been issued.

3. The Legislature may not implicitly overrule a procedural rule absent a 2/3 bicameral supermajority intent to do so.

The Petitioner argued in the Initial Brief on the Merits that a requirement that an appellant prove harmfulness or prejudice in the instant context was a nullity where the rules governing departure sentences and the rules governing enforcement (*Ree* and its progeny) are procedural in nature and the legislature did not evince an explicit desire to overrule these rules. (Brief of Petitioner at 28, 29, 31). The Respondent does not directly address the merits of this claim, but argues instead that the legislature may condition the right of appeal. (Brief of Respondent at 22-23). The Respondent alleges that the Petitioner's argument was rejected by this Court in *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1104-05 (Fla. 1996) wherein this Court stated that the legislature may reasonably condition the right of appeal.

The Respondent is simply wrong in its assessment of what the decision in *Weiss* purports to do. *Weiss* does not speak to conditioning the right of appeal; the court specifically stated that it found the rule in *Ree* had been overruled by section 924.051, Florida Statutes (1997). *Weiss*, 720 So. 2d 1113, 1115 at note 4. This is not conditioning the right of appeal, this is divesting this Court of the right to impose a remedy or sanction where a trial court violates a procedural rule.

In fact, by this decision, there simply is no remedy any more for violating a procedural rule without a showing of the amorphous "prejudice," even a rule which this Court has deemed to be important to ensure the integrity of a departure sentence. *See Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987), *Jackson v. State*, 478 So. 2d 1054 (Fla. 1985), *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *Pope v. State*, 561 So. 2d 554 (Fla. 1990), *State v. Colbert*, 660 So. 2d 701 (Fla. 1995).

Most recently in *Pease v. State*, 712 So. 2d 374 (Fla. 1997), this Court still reaffirmed the rule in *Ree* and *Pope* for upward departures as opposed to downward departures, because the State is not excused from fulfilling its obligation to see that procedural rules on departure are obeyed.

The State's claim, that *Weiss* merely fashions a reasonable condition on the right of appeal, is an insidious way to circumvent Article V, section 2(a) of the Florida Constitution. While procedural rules appear to remain within the province of this Court,

the **remedy** for failure to follow those rules no longer remains in this Court. The rules are all rendered nullities at the whim of the legislature. Absent a showing of "prejudice," a concept which the Third District did not bother to define, the rules need not be followed.

This cannot be a just result. In creating *Ree* and its progeny, it was not "prejudice" that this Court sought to prevent, but protection of the principles that (1) departures are rare because the guidelines are presumptively correct and it should only be in the most extraordinary of circumstances that a trial judge departs, (2) written reasons are provided in a reasonable and timely fashion, (3) if the rules are not abided by, that there is not a repeated effort by a trial judge to later justify an imperfect departure and (4) a harsh prophylactic rule where there is a reasonable period for compliance with the rule will ensure in most cases that this procedural rule will be followed.

Procedural rules, including those which govern time requirements, are vital and the courts of this state have repeatedly ensured their compliance without a showing of prejudice for the failure to abide by the rule. *See, e.g.*, 3.850(b), Fla. R. Crim. P. (no motion for postconviction relief in a noncapital case may be filed more than two years after the judgment and sentence become final, regardless of whether there is any prejudice to the State); rule 3.191, Fla. R. Crim. P. (every person shall be brought to trial in a felony case within 175 days of being taken into custody regardless of prejudice to the defendant); rule 3.200, Fla. R. Crim. P. (defendant must provide notice of alibi not less than 10 days before

trial to the prosecuting attorney regardless of prejudice to the prosecutor); *Small v. State*, 630 So. 2d 1087 (Fla. 1994) (where the trial court did not inquire into the defendant's good cause for failure to abide by rule 3.200, this Court affirmed based on the defendant's inability to demonstrate harm; harm to the prosecutor because of the defendant's failure to abide by the procedural rule was never explored). The list could go on, encompassing every procedural rule and the inability of an aggrieved party to enforce the rule unless somehow that party can demonstrate prejudice.

Procedural rules, under the Respondent's analysis, are without teeth. Procedural rules which create strict time requirements are vital to ensure not only that the steps of the criminal process are orderly, but more importantly, that the criminal process actually progresses. It cannot be a reasonable construction of Article V, section 2(a) of the Florida Constitution that this Court no longer has the authority to enforce a rule which it created. This Court should quash the lower court's opinion, reverse the defendant's sentence and remand for resentencing within the guidelines.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court quash the lower court's opinion in *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998), and remand for resentencing within the guidelines.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

BY:_____
LISA WALSH
Assistant Public Defender
Florida Bar No. 964610

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered to Christine E. Zahralban, Assistant Attorney General, and Michael J. Neimand, Bureau Chief, Office of the Attorney General, Department of Legal Affairs, 712 S.E. 6th Street, 10th Floor, Fort Lauderdale, Florida 33301, this 17th day of June, 1999.

_____
LISA WALSH
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

_____
LISA WALSH
Assistant Public Defender