IN THE SUPREME COURT OF FLORIDA

ELI BUTLER JR.,

Petitioner,

v. SUPREME COURT NO. 94,614

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 242705

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

RULES

Florida Rules of Appellate Procedure

Florida Rules of Criminal Procedure

CONSTITUTIONS

IN THE SUPREME COURT OF FLORIDA

ELI BUTLER, JR.
:
Petitioner,
:
v. SUPREME COURT NO. 94,614
:
STATE OF FLORIDA, :
Respondent. :
:

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

This appeal began in the First District Court of Appeal as a direct appeal from a judgment and sentence imposed for violation of probation. Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal. The state prosecuted the violation of probation in the trial court and will be referred to in this brief as State or Respondent.

The record consists of a record volume which will be referred to as "R" and a hearing transcript which will be referred to as "T".

This brief is prepared in 12 point Courier New type.

II. STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of sexual battery in the circuit court of Madison County and was sentenced to a split prison/probation sentence (T 5-6, R4). His probation term began on September 5, 1995 (R2, T6). On January 8, 1996, he was charged with violating his probation by committing a sexual assault (R1). A hearing was held on the alleged violation of probation on October 29, 1996 (T3-10).

The prosecutor stated that the violation was based on commission of three new felonies; attempted murder, aggravated sexual battery, and kidnaping (T3). He further explained that petitioner had received a life sentence on the new felony case (case no. 96-18-CF, subsequently affirmed by the First District Court of Appeal in appeal number 96-03687). The state moved the verdict form from the new felony case into evidence at the violation of probation hearing (T4, R20); it showed that petitioner had been found guilty of attempted murder in the first degree while armed with a weapon, guilty of the lesser included offense of attempted sexual battery with great force, and guilty of kidnaping while armed with a weapon, on August 29, 1996 (R20, 21). Those offenses had been committed in January of 1996 (T5).

With no objection from petitioner’s trial counsel, the court

found that the new convictions were substantial and material violations of probation (T5). The probation officer who was present at the hearing stated that there was a sentencing guidelines scoresheet on the case which gave petitioner 208 points (T5). The court stated that the permitted range of sentencing with a "one cell bump" would be 2½ to 5½ years (T5). (Appellate counsel attempted to obtain the scoresheet from petitioner's trial counsel, the prosecutor's office, and the clerk's office, without success; see numerous District Court of Appeal pleadings regarding supplementation of the record).

The state requested maximum prison sentencing on the violation of probation case, consecutive to the sentence on the new felony case, which was two life sentences and one 15-year sentence (T4, T6). On this case, the court revoked petitioner's probation, adjudicated him guilty of the second-degree felony offense of sexual battery, and sentenced him to the maximum term of 15 years, with jail time credit for all time spent awaiting disposition of the violation and the actual time served in prison, consecutive to his existing sentence (T7, R7-11).

This sentence departed from the guidelines, and the court stated orally that his reason for departure was that the new felony offense was similar but more serious than the sexual

battery offense involved in this case, and had been committed within four months and two days of petitioner's release from prison (T6). Petitioner's trial counsel objected to the departure, stating that his conviction in this case had been used as a basis for departure in the new felony case, and now the court was using the 1996 case to depart from the guidelines on this case (T8). In addition, trial counsel argued that the offenses were not similar. The prosecutor responded that there were other written reasons for departure in the new felony case and mentioned that there were written findings for reasons for departure in the other court file (T9).

The court then noted petitioner's objection to the departure sentence in this case but stated that the sentence would remain at the maximum term of 15-years (T9).

No written order of departure was ever prepared by the trial court in this case. Petitioner's appeal to the First District Court of Appeal followed.

On November 30, 1998, the First District Court of Appeal affirmed petitioner's departure sentence. The court noted that the trial court had explained on the record at the sentencing hearing why it was imposing an upward departure sentence, and that petitioner's trial counsel had objected at that time to the

reasons announced by the trial court (see appendix in petitioner's jurisdictional brief). However, the First District Court of Appeal found that because petitioner's counsel had not filed a motion to correct sentence in the trial court concerning the failure to file written reasons justifying the departure sentence, the issue was not preserved for appeal (App. 2). In addition, the First District Court of Appeal found that petitioner had failed to demonstrate prejudice. To the extent that any error occurred, the Court found that it was not "fundamental." (App. 2).

This Court, on April 26, 1999, accepted jurisdiction of this case and dispensed with oral argument.

III. SUMMARY OF ARGUMENT

Petitioner objected during his sentencing hearing to the trial court's imposition of a sentence which departed from the sentencing guidelines. The trial court noted the objection but kept the departure sentence in place. The trial court did not subsequently file a written departure order. Accordingly, petitioner argues that under this Court's unbroken line of cases beginning with Pope v. State, 561 So. 2d 545 (Fla. 1990), the District Court should have reversed his departure sentence and remanded for imposition of a guidelines sentence.

The passage of the Criminal Appeal Reform Act and this Court's enactment of Fla. R. Crim. Proc. 3.800(b) should not alter petitioner's entitlement to relief. First, the departure sentence was a patently illegal sentence under this Court's latest definitions of illegal sentence. Second, petitioner did object to the departure at the time of sentencing, preserving the issue for appeal under appellate rules. Third, as a matter of policy, sentencing errors which are apparent on the face of the record should be corrected on appeal as a matter of judicial economy. Finally, since defendants acting without assistance of counsel will generally not be capable of correcting sentencing errors by filing pro se 3.850 motions, the Court should develop

an alternative to 3.800(b) which will allow correction of sentencing errors with the assistance of counsel.

For legal and policy reasons, therefore, petitioner urges this Court to reverse his departure sentence, reaffirm the Pope line of cases, clarify the conflicts in the law on this issue, and create a new rule of procedure which will assure the correction of sentencing errors.

IV. ARGUMENT

ISSUE I

WHERE PETITIONER OBJECTED TO HIS DEPARTURE SENTENCE AT THE TIME OF SENTENCING AND THE TRIAL COURT SUBSEQUENTLY DEPARTED FROM THE GUIDELINES SENTENCE WITHOUT ENTERING A WRITTEN ORDER, THE SENTENCE WAS PATENTLY ILLEGAL, WAS PROPERLY PRESERVED FOR APPEAL, AND SHOULD HAVE BEEN REVERSED DESPITE PETITIONER'S FAILURE TO FILE A MOTION TO CORRECT SENTENCE.

FACTS AND PROCEDURAL POSTURE OF CASE

Although the record in this case is sketchy, the basic facts are: (1) the proper sentencing guidelines range in petitioner's case was 2½ to 5½ years; (2) the trial court exceeded this range, imposing a maximum 15-year sentence for the second-degree felony offense; (3) petitioner objected to the departure sentence at the time of sentencing; (4) the trial court did not file a written departure order within the statutorily required period; (5) petitioner did not file a motion to correct sentence after the time for filing a departure order passed. On these facts, the District Court affirmed petitioner's sentence, finding that he had not preserved the sentencing error. Furthermore, the Court found that if there was an error, it was not fundamental within the meaning of the Criminal Appeal Reform Act, section 924.051(3), Florida Statutes (1997).

Petitioner argues in this court that his departure sentence was illegal under this court's latest opinions defining illegal sentences, and that the sentencing error in his case was sufficiently preserved for correction on appeal. Third, as a policy matter, he contends that this error should have been corrected by the District Court as a matter of judicial economy and because he would not have assistance of counsel in trying to correct it by filing a 3.850 motion in the trial court.

CASELAW CONCERNING DEPARTURE SENTENCES WITHOUT WRITTEN ORDERS

In Pope v. State, 561 So. 2d 545 (Fla. 1990), this court encountered facts identical to those presented here: a defendant had been sentenced to a departure sentence for a violation of community control and the trial court had not provided a written order of departure, although oral reasons for the departure had been given. Relying on Florida Rule of Criminal Procedure 3.701(d)(11), this court vacated the departure sentence due to the trial court's failure to provide written reasons. The court, resolving previous inconsistencies in the law, held unequivocally that when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines.

Subsequently, in Ree v. State, 565 So. 2d 1329 (Fla. 1990), this court explained why strict adherence to the requirement of a written order was required: because "a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." 565 So. 2d at 1332. The strict rule of Ree was reiterated in State v. Colbert, 660 So. 2d 701 (Fla. 1995), where is was held that it is "still per se a reversible error" when a trial court orally pronounces departure reasons at sentencing but fails to reduce them to writing.

Between 1990 and 1998, the Ree/Pope holding was applied in virtually hundreds of cases. Very recently it was applied by this court in Donaldson v. State, 722 So. 2d 177 (Fla. 1998). However, in September of 1998, the Third District Court, without citing Pope v. State, supra, found in Jordan v. State, 23 FLW D2130 (Fla. 3d DCA, September 16, 1998), that with the recent adoption of rule 3.800(b) Florida Rules of Criminal Procedure and the passage of the Criminal Appeal Reform Act of 1996, "the legal landscape has changed." Id. at page 6. In Jordan, the court considered several sentencing errors including a departure sentence which the trial court had orally announced at sentencing but had not reduced to a sentencing order within the statutory seven day period of Section 921.0016(1)(c), Florida Statutes

(1997). The defendant raised the departure order issue for the first time on appeal. The court, relying on the Criminal Appeal Reform Act and this court's adoption of Florida Rule of Appellate Procedure 9.140, effective January 1, 1997, found that the departure issue was barred on appeal because "the point was not preserved, nor is it a matter of fundamental error." Id. at D2131. As authority, the court cited the First District's early Criminal Appeals Act case, Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997), and the Fifth District's Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), decision. Subsequently, the Third District decided Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), holding again that a departure sentence could not be raised on appeal in the absence of a motion to correct below, and then the First District decided this case, relying on Jordan supra, and Weiss, supra. Butler v. State, 723 So. 2d 865 (Fla. 1st DCA 1998).

At the end of the year, however, the Fourth District decided Carridine v. State, 24 FLW D1 (Fla. 4th DCA, December 16, 1998), and held to the contrary. Citing Article V, Section 2 (a) of the Florida Constitution, which gives this court the power to adopt rules for practice and procedure, and Article V, Section 2 (a) concerning the Legislature's ability to repeal a rule of

procedure by two-thirds vote of the membership of each house, the court found that Section 924.051 had not impliedly modified the strict rule of procedure applied in Colbert, supra, and Ree. In Carridine, the trial judge had orally pronounced the reasons for departure and had even filed a written order of departure in a timely manner. However, the court had failed to sign the order. While sympathizing with the trial court, the Fourth District Court of Appeal reversed the departure sentence simply because "our reading of cases from our Supreme Court compel us to reach this result." 24 FLW at D2.

Very recently, the Third District Court of Appeal reconsidered Jordan v. State, supra, on rehearing, and failed to change its decision. The court acknowledged that its decision was in conflict with Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), but declined to certify direct conflict with Maddox. The appellant in Jordan, supra, has now sought discretionary jurisdiction in this court.

SENTENCING ERRORS AND ILLEGAL SENTENCES

It is indisputable that the District Courts have struggled mightily with what types of sentencing errors are correctable on direct appeal since the passage of the Criminal Appeal Reform Act. See, e.g., Nelson v. State, 719 So. 2d 1230 (Fla. 1st DCA

1998); Bain v. State, 24 Fla. L. Weekly D314 (Fla. 2d DCA Jan. 29, 1999); Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998). As explained in Nelson v. State, supra, errors which were apparent from the face of the record were correctable on direct appeal despite the absence of preservation in the trial court prior to July 1, 1996. Id. at 1231. However, in trying to apply the legislative intent that only fundamental errors be cognizable on direct appeal in the absence of objection below, courts have looked back to previous judicial definitions of "illegal sentence". Such cases include King v. State, 681 So. 2d 1136 (Fla. 1996); Davis v. State, 661 So. 2d 1193 (Fla. 1995); and State v. Calloway, 658 So. 2d 983 (Fla. 1995). In those cases, the basic definition of an illegal sentence was one that exceeded the maximum period set forth by law. However, in Hopping v. State, 708 So. 2d 263 (Fla. 1998), expanded the definition, finding a sentence illegal because it could be determined from the record without an evidentiary hearing that a double jeopardy violation had occurred. Then, in State v. Mancino, 714 So. 2d 429 (Fla. 1998), this court, dealing with a sentence which had not properly credited the defendant's time served in jail, held;

> A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal". Id. at 433.

Under that test of illegality, petitioner's sentence here is clearly illegal. Both the statute - Section 921.0016(1)(c), Fla. Stat. (1995), and the rule of procedure Rule 3.701(d)(11) - clearly required the trial court to prepare a written departure order to justify a sentence which exceeded the guideline range by 10 years. In addition, it was not necessary to have a evidentiary hearing to see or understand the trial court's error. Moreover, this is not a case where the trial court prepared an order but forgot to sign it or file it in a timely manner; it simply was never done. Petitioner argues, therefore, that his departure sentence is an illegal sentence and should have been correctable on direct appeal despite his failure to file a 3.800 motion to correct sentence.

Additionally, petitioner's sentencing error should have been considered by the District Court of Appeal under the plain language of 9.140(d), Florida Rule of Appellate Procedure. That rule provides:

> (d) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

This provision, which was added to the appellate rules in this

court's Amendments to Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996), took effect on January 1, 1997. The salutary intent of this rule was to create procedures assuring that sentencing errors would be pointed out to trial courts and corrected at the lower level, instead of unnecessarily gearing up the full processes of appeal. And this petitioner did present his sentencing arguments to the trial court at the time of his sentencing. The trial court, however, noted the arguments but ruled that the departure sentence would remain in effect. Petitioner could not be accused of "sandbagging" under these facts. (Indeed, it is difficult to understand how any defendant would deliberately fail to point out a sentencing error at the trial level if aware of the error).

Here, the only thing that could have been accomplished by filing a motion to correct sentence after the statutory time passed for a departure order was to hold a hearing in which the trial court could withdraw the departure sentence and impose a guidelines sentence. Since the trial court had already specifically declined to do that, such a hearing clearly would have futile. The only way petitioner could obtain relief from his illegal sentence was a direct appeal.

In addition, the rule of law announced by the First District

Court of Appeal in Nelson, supra, on November 5, 1998, should have applied to petitioner, whose case was decided on November 30, 1998. However, that court apparently now has determined that cases involving the failure to file a departure order are not cognizable on appeal in the absence of a specific objection and a motion to correct sentence, Collins v. State, ___ So. 2d ___, 24 FLW D981 (April 13, 1999)(rehearing pending).

POLICY CONSIDERATIONS

As a policy matter it is clear that petitioner and others like him will be deprived of an effective remedy for his illegal sentence if it is held that his claim could not be raised on direct appeal. His only remaining remedy, a motion under Rule 3.850, Florida Rules of Criminal Procedure, would have to be pursued without assistance of counsel under Section 924.066(3) Florida Statutes (1997). Only if he were able to file a motion pro se and correctly argue the error as an ineffective assistance of trial counsel issue would he have any chance of relief from the departure sentence. Petitioner suggests to this court that that remedy is not effectual. Leaving the correction of sentencing errors to the vagaries of pro se post-conviction litigation is simply not a viable solution.

Therefore, it would seem that this court would fashion a

remedy which would allow appellate counsel to assist defendants who have cases with sentencing errors which have not been discovered at the trial level. A system in which appellate lawyers could seek remand to the trial court for correction of such errors, staying the appeal until such time as the trial court has an opportunity to correct the error, would be the most efficient, and certainly the most equitable solution to the difficulties the state is currently experiencing in this area.

CONCLUSION

Petitioner is grateful that the court accepted jurisdiction of this case, which presents a subspecies of the many sentencing error cases which have occurred since the passage of the Criminal Appeal Reform Act. He recognizes that the court attempted to avoid such cases by the passage of Rule 3.800(b) after the Act was passed. However, it has become apparent that that rule, requiring overwhelmed lawyers and judges to know and apply Florida's increasingly complex sentencing laws to a massive volume of cases in the daily crush of the criminal courts, is not working effectively.

On a specific level, Petitioner requests this court to find that the sentencing error in his case was preserved adequately by his objection at the time of sentencing. Alternatively, he asks

the court to find that the error was fundamental and therefore could and should have been corrected on direct appeal.

On the policy level, petitioner urges this court to adopt a new procedure for correcting sentencing errors, one that will assure the correction of sentences with assistance of counsel.

IV. CONCLUSION

Based on the arguments and authorities made above, petitioner respectfully requests this court to reverse the First District's decision in this case.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
Florida Bar #242705
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Criminal Appeals Division, Tallahassee, Florida, this ____ day of May, 1999.

NANCY A. DANIELS