IN THE SUPREME COURT OF FLORIDA

ELI BUTLER,

Petitioner,

v. Case No. 94,614

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

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I. PRELIMINARY STATEMENT

Respondent's Brief on the Merits will be referred as "RB." Other references will be as denoted in Petitioner's Initial Brief.

This brief was typed in Courier New 12 point.

II. 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.

Having considered the State's various procedural and substantive arguments, petitioner maintains his contention that his departure sentence in this case is an illegal sentence which should have been considered and corrected on direct appeal. Therefore he urges this Court to reverse the District Court's decision and write an opinion which resolves the raging conflict among the District Courts on this narrow but frequently-occurring category of sentencing error cases. Further, he urges this Court to go beyond the issue here to develop a rule which will allow defendants to effectively and efficiently correct sentencing errors with assistance of counsel.

The State's contradictory arguments in this very case illustrate the need for this Court's guidance on the preservation and correction of sentencing errors.

RAGING CONFLICT IN THE DISTRICT COURTS

Respondent first argues that this Court should discharge jurisdiction as improvidently granted because it is not the role of this Court to perform mere error review (RB 4). This argument

ignores the clear, current, raging conflict in Florida law on the issue of whether failure to provide written reasons for sentencing guidelines departures is a fundamental error which can be reviewed on appeal despite the absence of a motion to correct below. Just in the brief period since the filing of Petitioner's Initial Brief on the Merits, there have been four additional cases decided in the district courts of appeal with this issue. In Edwards v. State, 24 Fla. L. Weekly D1188 (Fla. 1st DCA May 14, 1999), the First District, relying on its previous opinion in this case, rejected a departure issue based on the failure to provide written reasons, finding that the error could not be raised on appeal because it was not preserved, because the sentence was not illegal, and because no argument of fundamental error was raised on appeal. Five days later, in Higgins v. State, 24 Fla. L. Weekly D1223 (Fla. 4th DCA May 19, 1999), the Fourth District similarly held that a departure error based on the failure to provide written reasons was not properly preserved for appeal. Subsequently, however, the Fifth District decided Fleshman v. State, 24 Fla. L. Weekly D1328 (Fla. 5th DCA June 4, 1999), finding that the defendant's objection to the departure sentence below did sufficiently preserve the issue. Then, in Hinkle v. State, 24 Fla. L. Weekly D1483b (Fla. 5th DCA June 25, 1999), the court found that the trial court's failure to file written reasons for departure could be reviewed on direct appeal, holding specifically:

> The failure to file written reasons for departure constitutes a serious, patent

> sentencing error because the departure results in a greater sentence.

Id. at 1483b. Thus, it is apparent that there is continuing conflict among the district courts of appeal on the issue presented in this case, and petitioner urges this Court to decide it on its merits to resolve the conflict under Article V, Section 3(b)(4), Fla. Const.

JUDICIAL EFFICIENCY AND ASSISTANCE OF COUNSEL

Secondly, the state argues that the claim here is not prejudicial because petitioner has other lengthy prison sentences, and because the departure error "can be easily be challenged and corrected, if desirable, in the trial court by authorized remedies." Fla. R. Crim. P. 3.850 (RB 5). This argument ignores notions of judicial efficiency and directly contradicts the position taken by the state previously that an erroneous upward departure sentence does not constitute fundamental error when it falls within the maximum allowed by law. The state has consistently argued that a departure sentence that is beyond the guidelines is not an illegal sentence, citing Davis v. State, 661 So. 2d 1193 (Fla. 1995), and that erroneously imposed upward departure sentences do not constitute fundamental error. See, e.g., Cowan v. State, 701 So. 2d 353 (Fla. 1st DCA 1997). Therefore, if this claim cannot be corrected on direct appeal, it is not at all clear that petitioner could raise it successfully in a 3.850 motion. Moreover, as discussed in

petitioner's initial brief, he would not be entitled to the assistance of court-appointed counsel for the filing of a collateral motion unless the trial court made a special appointment of counsel under Russo v. Akers, 23 Fla. L. Weekly S597 (Fla. November 25, 1998). It is completely inaccurate, therefore, to say that the improper departure sentence could be "easily challenged and corrected" by a collateral motion in the trial court.

PRESERVATION UNDER THE APPELLATE RULE AND THE FUNDAMENTAL ERROR DOCTRINE

Third, the state argues that this Court should discharge jurisdiction because exercising discretionary review "will entail overlooking the failure of petitioner to raise his claim in the trial court and revisiting Davis (661 So. 2d 1193 (Fla. 1995)) to show how the district court erred in relying on it." (RB 5). Petitioner does not ask this Court to overlook his failure to raise his claim in the trial court; he has pointed out repeatedly that he objected to his departure sentence in the trial court, he has admitted that he did not file a motion to correct sentence, and he has brought to the Court's attention the many conflicting cases on whether the issue is preserved under the Criminal Appeal Reform Act.

With respect to Davis, supra, petitioner asserts that the continued viability of the Davis holding is in question in light of State v. Mancino, 714 So. 2d 429 (Fla. 1998). At the time of

Davis, supra, this Court had held that an illegal sentence was one which exceeded the statutory maximum. In State v. Mancino, supra, however, the Court expanded that definition to include sentences which "patently fail to comport with statutory or constitutional limitations." In the First District Court's recent opinion in Edwards v. State, 24 Fla. L. Weekly D1188 (Fla. 1st DCA May 14, 1999), the court addressed this question but did "not view the Supreme Court's refinement of the definition of illegal sentence in Mancino as reversing the holding of Davis that a departure sentence for which written reasons are not provided is not an illegal sentence." Id. at D1189. Similarly, in Higgins v. State, 24 Fla. L. Weekly D1223 (Fla. 4th DCA May 19, 1999), the Fourth District found State v. Mancino, supra, and Hopping v. State, 708 So. 2d 763 (Fla. 1998), "inapplicable to the [sentencing guidelines departure] issues here, which involve deviation from guidelines procedure and sufficiency of record support for guidelines deviations." Id. at D1223. In contrast, the Second District in Hinkle v. State, 24 Fla. L. Weekly D1483b (Fla. 2d DCA June 25, 1999), apparently found the new Mancino definition of illegal sentence controlling as illustrated by its statement that the failure to file written reasons for departure "constitutes a serious, patent sentence error." Fn.1, id. at D1483b. It is evident that the Davis holding is questionable in light of Mancino, and this Court, accordingly, needs to clarify the law of fundamental sentencing error.

On preservation, the State relies on §924.051(3), the Criminal Reform Act, and this Court's holding in Amendments to Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996)(RB 6) However, the State nowhere acknowledges that petitioner did object to the departure sentence at his sentencing hearing, bringing him within the language of Rule 9.140(d), Fla. R. App. P. As noted previously, that rule requires sentencing errors to be brought to the attention of the trial court either at the time of sentencing or by 3.800(b) motion. The petitioner satisfied the first prong of that rule. Moreover, although the legislature has passed the Criminal Appeal Reform Act, it has not repealed §921.00016(1)(c), Florida Statutes (1997), which requires a written departure order within seven days of sentencing. And if this is simply a procedural matter that is in the province of the Court rather than the legislature, the rule of procedure, Rule 3.701(d)(11), unequivocally required the trial court to prepare a written departure order.

The State's further argument that the sentencing guidelines statutes have been extensively revised since Pope v. State, 561 So. 2d 545 (Fla. 1990), and Ree v. State, 565 So. 2d 1329 (Fla. 1990), is certainly correct; therefore, if the legislature intended to eliminate the requirement of a written departure order at the time involved here, it could have repealed that provision. The State's argument does not explain satisfactorily how or why the district courts have rejected departure issues on the basis of improper

preservation under the Criminal Appeals Reform Act without even acknowledging that they were overruling Pope and Ree, supra. Clearly, this Court's guidance is needed to clarify the confusion resulting from the cases that still follow Pope and a line of cases that ignore it.

SUMMARY

Petitioner maintains his argument that his departure sentence was illegal within this Court's latest definitions of illegal sentence. It is clearly a sentence which did not comply with the very specific sentencing guidelines statute or sentencing guidelines rule. It is a sentence which exceeded the statutory guidelines sentence range by almost ten years. It is a departure sentence which was supported by no evidence below. And although this petitioner has other sentences to serve, the illegal sentence at issue here should be one which can somehow be corrected. Therefore, this Court, as the highest court in the state, should issue a decision which not only clarifies the confusing law of preservation and fundamental error, but also provides an effective remedy for the correction of sentencing errors such as the one presented here.

III. CONCLUSION

For the reasons stated, petitioner respectfully requests this Court to reverse the First District's decision in this case and remand his case for the entry of a guidelines sentence.

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, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this date, July ~~12~~ 14, 1999.

Respectfully submitted,

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