IN THE SUPREME COURT OF FLORIDA

ELI BUTLER, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,614

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent State of Florida was the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court and will be referred to here as the state or respondent. Petitioner, Eli Butler, Jr, was the appellant in the district court and the defendant in the trial court. He will be referred to here as the petitioner or by proper name.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts with the following clarifications.

Petitioner was separately sentenced in the trial court to two life sentences and one fifteen-year sentence for separate convictions. All sentences were consecutive. Those convictions and sentences were per curiam affirmed and are not at issue. Eli Butler, Jr. v. State, 703 So.2d 479 (Fla. 1st DCA 1997). Here, Butler was found in violation of probation because of the separate convictions and sentenced to another fifteen-year sentence, also consecutive to the separate sentences. This was an upward departure sentence for which oral reasons were given at hearing but which were not subsequently memorialized by a written order.

SUMMARY OF ARGUMENT

It is not the constitutional role of this Court to perform mere error review, particularly where, as here, the claimed error is non-prejudicial and involves the application of statutory law which has been superseded by legislative enactments. Accordingly, this Court should discharge jurisdiction as improvidently granted.

If the Court does conduct discretionary review of the district court decision below, it should approve that decision without prejudice to petitioner's right to seek correction of the claimed non-prejudicial error in the trial court.

ARGUMENT

ISSUE

DID THE TRIAL COURT COMMIT PREJUDICIAL SENTENCING ERROR WHICH CAN BE REVIEWED FOR THE FIRST TIME ON APPEAL BY IMPOSING A FIFTEEN-YEAR DEPARTURE SENTENCE, CONSECUTIVE TO TWO LIFE SENTENCES AND ANOTHER FIFTEEN-YEAR SENTENCE, WHICH ARE NOT CHALLENGED, FOR DEPARTURE REASONS WHICH WERE ORALLY STATED AT SENTENCING BUT NOT SUBSEQUENTLY MEMORIALIZED IN A WRITTEN SENTENCING ORDER? (RESTATED)

Petitioner was separately sentenced in the trial court to two life sentences and one fifteen-year sentence for separate convictions. All sentences were consecutive. Those convictions and sentences were per curiam affirmed in a separate appeal which is now final and is not before this Court. Eli Butler, Jr. v. State, 703 So.2d 479 (Fla. 1st DCA 1997). Here, Butler was found in violation of probation because of the separate convictions and sentenced to another fifteen-year sentence, also consecutive to the separate sentences. This was an upward departure sentence for which oral reasons were given at hearing but which were not subsequently memorialized by a written order. Butler objected at trial to the oral reasons for departure but did not file a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) to demand that the trial court file written reasons for the departure. On appeal, the petitioner abandoned the preserved claim from the trial court concerning the oral reasons for departure and argued that the failure of the trial court to enter written reasons for departure was fundamental and could be addressed on appeal for the first time. The district court held that the issue had not been properly

preserved in the trial court, that Butler had failed to show how he had been prejudiced by the absence of written reasons, and, finally, "to the extent that error occurred, it is not 'fundamental.' Davis v. State, 661 So.2d 1193 (Fla. 1995)."

IMPROVIDENT EXERCISE OF DISCRETIONARY JURISDICTION

This Court should discharge discretionary jurisdiction as improvidently granted for the following reasons.

1. It is not the constitutional role of this Court to conduct discretionary review of claims of district court error for the purpose of correcting those errors when such review will not furnish precedential authority for future application of law in either the appellate or trial courts of the state. See, Jenkins v. State, 385 So.2d 1356, 1357-1358 (Fla. 1980) quoting approvingly Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958):

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. Diamond Berk Insurance Agency, Inc. v. Goldstein, Fla., 100 So.2d 420; Sinnamon v. Fowlkes, Fla., 101 So.2d 375. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy. **Id.**

The claim here that the trial court erred in not filing statutory written reasons for departure pursuant to statute has no future relevance because the statute no longer requires that upward departures from sentencing guidelines be memorialized by written reasons. See, §921.002(1)(g) and (h), Fla. Stat. (Supp. 1998), which authorize sentences up to the statutory maximum without regard to the guidelines and permit appeals only if the sentence is below the lowest permissible sentence.

2. The claim here is not prejudicial because the sentence challenged, fifteen years, is consecutive to two life sentences and another fifteen-year sentence. There is no good reason for this Court, or any appellate court, to address a claim of non-prejudicial sentencing error which has not been challenged in the proper forum but which can be easily challenged and corrected, if desirable, in the trial court by authorized remedies. Fla. R. of Cr. P. 3.850.

3. Whatever may be the current or future state of the fluctuating law on illegal sentences and fundamental error, the district court was correct in relying on Davis v. State, 661 So.2d 1193,1196 (Fla. 1995) for the proposition that this Court had unequivocally rejected the claim that "failure to file written findings for a departure sentence constitutes an illegal sentence" if the sentence is within the statutory maximum. For this Court to now exercise discretionary review will entail overlooking the failure of petitioner to raise his claim in the trial court and revisiting Davis to show how the district court erred in relying on it.

For the above reasons, the state urges the Court to discharge jurisdiction as improvidently granted.

DID THE TRIAL COURT COMMIT PREJUDICIAL SENTENCING ERROR WHICH CAN BE REVIEWED FOR THE FIRST TIME ON APPEAL BY IMPOSING A FIFTEEN-YEAR DEPARTURE SENTENCE, CONSECUTIVE TO TWO LIFE SENTENCES AND ANOTHER FIFTEEN-YEAR SENTENCE, WHICH ARE NOT CHALLENGED, FOR DEPARTURE REASONS WHICH WERE ORALLY STATED AT SENTENCING BUT NOT SUBSEQUENTLY MEMORIALIZED IN A WRITTEN SENTENCING ORDER?(RESTATED)

If the Court does exercise discretionary jurisdiction, it should approve the decision below.

The district court below did not err in declining to address a claim of sentencing error which had not been preserved in the trial court. Section 924.051(3), Florida Statutes (Supp. 1996) prohibits appeals where no prejudicial error has been properly preserved in the trial court unless such error is fundamental. Both the legislature and the district court below could properly rely on this Court's decision in Davis that failure to file written reasons for a guidelines departure was not fundamental error. That reliance is further supported by this Court's holding in Amendments to Florida Rules of Appellate Procedure, 696 So.2d 1103, 1105 (Fla. 1996) that the "legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error." Petitioner has done neither. Note, also that in Amendments, this Court went on in the next

sentence to point out that it had "promulgated an emergency amendment ... [rule 3.800(b)] to authorize the filing of a motion to correct a defendant's sentence." That emergency rule was promulgated for just such situations as here. Petitioner did not avail himself of that remedy either. Note, further, that this Court then rewrote Florida Rule of Appellate Procedure 9.140 to codify in the rules that no sentencing error could be raised for the first time on appeal. This rule became effective after the sentencing here but it is persuasive as an additional indicator that the legislature could properly require preservation or error or fundamental error as a condition precedent to an appeal.

The sentencing guidelines statutes have been extensively revised in the nine years since Pope v. State, 561 So.2d 545 (Fla. 1990) and Ree v. State, 565 So.2d 1329 (Fla. 1990) issued. The statute as it now exists permits sentencing up to the statutory maximum without written reasons for departure. To the degree that Pope and Ree have any continuing relevance, they apply only to downward departures.

Finally, if this Court now finds that failure to file written departure reasons is fundamental error it should simply direct the trial court to correct the sentencing order to reflect a guidelines sentence without requiring the presence of the defendant. The length of this fourth consecutive sentence is immaterial to the length of time which petitioner will serve - life, twice over, plus fifteen years, plus whatever sentence he ends up with here.

CONCLUSION

This Court should discharge discretionary jurisdiction as improvidently granted. Alternatively, it should approve the district court decision below and hold that subsequent case law, statutory enactments, and procedural rule changes have overtaken and mooted the 1990 decisions in Pope v. State, 561 So.2d 545 (Fla. 1990), and Ree v. State, 565 So.2d 1329 (Fla. 1990) insofar as they apply to upward departure sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# L99-1-1012]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of RESPONDENT'S ANSWER BRIEF has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of June 1999.

_____
James W. Rogers
Attorney for the State of Florida

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