IN THE SUPREME COURT OF FLORIDA

BRADLEY JAMES JACKSON,

Petitioner**,**

v. **CASE NO. SC09-2383**

STATE OF FLORIDA,

Respondent**.**
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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I. PRELIMINARY STATEMENT

Bradley James Jackson was the defendant in the trial court, and petitioner before the District Court of Appeal, First District of Florida. In this appeal, Mr. Jackson will be referred to as "petitioner," "defendant," or by his proper name.

Reference to the original record on appeal, containing copies of the pleadings and motion filed in this cause, as well as a transcript of the change of plea hearing and sentencing, will be by use of the symbol "R" followed by the appropriate page number in parentheses.

Reference to supplemental volume I of the record on appeal will be by use of the symbol "SRI" followed by the appropriate page number in parentheses.

Reference to supplemental volume II of the record on appeal will be by use of the symbol "SRII" followed by the appropriate page number in parentheses.

Reference to the *Initial Brief Of Appellant* dated September 18, 2008, filed by the state in this cause, will be by use of the symbol "IB" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Count I of an information containing two charges alleged that petitioner, on April 11, 2008, sold or delivered a controlled substance, cocaine, contrary to Section 893.13(1)(a)1, Florida Statutes (2007). Count II alleged that petitioner, on April 11, 2008, was in actual or constructive possession of less than 20 grams of cannabis, contrary to Section 893.13(6)(b), Florida Statutes (2007)(R-7).

On June 25, 2008, petitioner tendered and the court accepted a plea of guilty to both counts in the information. Counsel for Mr. Jackson represented petitioner had been screened by Matrix, a program run by the Duval County Jail. When the trial court inquired about how long the Matrix program would last, counsel responded it was from four to six months (R-26-27).

After conducting a colloquy with petitioner, the trial court accepted the change of plea. The prosecutor requested an eight year sentence in state prison, noting the guidelines recommended a sentence of 14 months to 15 years.[1] The trial court orally sentenced petitioner to nine months in county jail[2], remarking:

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[1] The *Criminal Code Scoresheet* recommended a sentencing range of 13.95 months to 15 years (R-16-17).

[2] It appears the defendant has already served his nine-month sentence and has been released. This is so because, at sentencing on June 25, 2008, he was sentenced to nine months. Nine full months from June 25, 2008, is March 25, 2009. But petitioner was also given 72 days credit for time served. Subtracting the 72 days credit from March 25, 2009, suggests that he finished his sentence on or about January 13, 2009. Moreover, any application of gain time he may have received would have pushed his release to an earlier date.

> THE COURT: On your plea of guilty, I adjudge you to be guilty. You're sentenced to nine months in the county jail, with credit for 72 days time served.
>
> I find the defendant is amenable to rehabilitation and has requested assistance, and on that basis I am deviating downward from the guidelines. You are to enroll in and complete the Matrix program at the Duval County Jail….
>
> * * * * * * *
>
> Do you understand that?
>
> DEFENDANT JACKSON: Yes, sir.
>
> THE COURT: That's concurrent on both counts. Step over and be fingerprinted.
>
> PROSECUTOR: Your Honor, the State does object to the Court's decision to go below guidelines and the reasons given.
>
> THE COURT: All righty.

(R-31).

Judgment And Sentence was entered in accordance with the trial court's oral pronouncement (R-10-15). The state filed a timely *Notice Of Appeal* (R-18).

The state filed the *Initial Brief Of Appellant*. After noting the departure order was invalid because not supported by a written document setting forth the trial court's reasons for the underdeparture, the state argued the reason given for the departure is invalid under Section 921.0026(3), Florida Statutes (2007),

which prohibits substance abuse, addiction, or intoxication as a reason for an underdeparture (IB-5-15).

On October 24, 2008, petitioner filed a *Motion To Correct Sentencing Order* in the trial court pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). This motion requested the trial court to enter a written order containing its reason(s) for departing from the lowest permissible sentence as calculated by the sentencing guidelines scoresheet (SRI-1-4). On or about December 29, 2008, the trial court clerk certified that no order had been entered in response to the Rule 3.800(b)(2) motion (SRI-1).

On or about January 20, 2009, petitioner filed a *Second Motion To Correct Sentencing Error,* again requesting the trial court to enter a written departure order (SRII-1-4). In this motion, it was noted that a Rule 3.800(b)(2) is a proper vehicle by which to correct a failure to file written reasons supporting a departure from the guidelines, citing to ***Pressley v. State***, 921 So.2d 736 (Fla. 1st DCA 2006) and ***Leeks v. State***, 973 So.2d 120 (Fla. 2nd DCA 2008)(SRII-3)

By *Order Denying Defendant's Motion To Correct Sentencing Error,* the trial court ruled it was without jurisdiction. The trial court cited ***Domberg v. State***, 661 So.2d 285 (Fla. 1995) and ***Davis v. State***, 606 So.2d 470 (Fla. 1st DCA 1992)("***Davis I***") for its view that a sentencing judge is without jurisdiction

to file written reasons for departure once a notice of appeal has been filed from a properly rendered judgment (SRII-15-16).

Petitioner filed his *Answer Brief Of Appellee*, raising two issues:

> ISSUE ONE:
> APPELLEE IS ENTITLED TO A "***DAVIS II***[3]" REMAND BECAUSE THE TRIAL COURT ERRED IN RULING IT WAS WITHOUT JURISDICTION TO RULE UPON JACKSON'S *SECOND MOTION TO CORRECT SENTENCING ERROR*.
>
> ISSUE TWO:
> THE ISSUE RAISED BY THE STATE IN THIS APPEAL WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW AND, EVEN IF IT WAS, THE REASONS ARTICULATED ORALLY BY THE TRIAL COURT AT SENTENCING ARE LEGALLY VALID.

The state filed a *Motion To Strike Answer Brief*, arguing the district court did not have jurisdiction to review the issue raised under ISSUE ONE because Jackson had failed to file a *Notice Of Cross-Appeal*, after either of the two motions to correct sentencing error were denied. Petitioner responded with a *Motion To Allow Untimely Cross-Appeal*. The district court denied the *Motion To Strike Answer Brief* and granted the defendant's *Motion To Allow Untimely Cross-Appeal.*

The state filed its *Reply Brief Of Appellant/Answer Brief Of Cross-Appellee*. Petitioner filed his *Reply Brief Of Cross-Appellant*. Oral argument was conducted before the district court on October 20, 2009.

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[3] ***State v. Davis***, 997 So.2d 1278 (Fla. 3rd DCA 2009)(hereafter referred to as "***Davis II***").

By opinion issued in ***State v. Jackson***, 22 So.3d 817 (Fla. 1st DCA 2009), the district court reversed. The district court first noted that, because the trial court did not file a written departure order, the court could affirm only if the trial court provided oral reasons for departure. Ruling that the oral reason, that the defendant was amenable to drug rehabilitation, was not a valid reason for departure under ***State v. Owens***, 848 So.2d 1199 (Fla. 1st DCA 2003), and Section 921.0026(3), Florida Statutes (2008), Florida Statutes (2008), the district court reversed.

The district court ruled further that, on remand, the trial court had no discretion but to impose a sentence within the guidelines with no possibility of departure, relying upon ***Pope v. State***, 561 So.2d 554 (Fla. 1990) and ***Shull v. Dugger***, 515 So.2d 748 (Fla. 1987).

Although ruling that the issue raised by cross-appeal was moot, the district court did recognize and certify conflict with three cases from the third district: ***Davis II***; ***State v. Williams***, 20 So.3d 419 (Fla. 3rd DCA 2009); and, ***State v. Berry***, 976 So.2d 645 (Fla. 3rd DCA 2008). Each of those cases held that, upon remand, the trial court could again depart below the guidelines, if based upon a legally valid reason. ***State v. Jackson***.

Notice To Invoke Discretionary Jurisdiction was timely filed December 23, 2009.

By *Order* issued April 9, 2010, the Court accepted jurisdiction and ordered that the *Initial Brief Of Petitioner On the Merits* be filed on or before May 4, 2010. This *Initial Brief Of Petitioner On the Merits* follows.

III. SUMMARY OF THE ARGUMENT

Although the criminal punishment code established a sentencing range of 13.85 months to 15 years, the trial court sentenced petitioner to 8 months in jail. The state appealed the underdeparture. During the direct appeal process, petitioner filed two motions to correct sentencing error in the trial court pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), requesting that the trial court provide a written sentencing order. The trial court ruled it was without jurisdiction.

On appeal, the district court reversed, holding in ***State v. Jackson*** that the reason orally given at the sentencing hearing, that petitioner was amenable to rehabilitation, was legally insufficient. The district court, citing to ***Pope*** and ***Shull v. Dugger***, ruled that, on remand, the trial court must impose a sentence within the guidelines.

The district court recognized its holding conflicted with three cases from the third district court of appeal, ***Davis II, Williams*** and ***Berry***. In each of those cases, the third district reversed an underdeparture sentence and remanded. On remand, however, the sentencing court could again impose an underdeparture sentence if based upon a legally valid reason.

Before this Court, petitioner requests the Court to quash ***State v. Jackson***, and approve ***Davis II, Williams***, and ***Berry***.

Many of the factors at play when ***Shull v. Dugger*** and ***Pope*** were decided are no longer applicable. The sentencing guidelines "cells" no longer exist. There is no such thing as an overdeparture sentence because, under the criminal punishment code, the maximum possible sentence is the statutory maximum.

Another factor is the enactment of Florida Rule of Criminal Procedure 3.800(b)(2). An appellate court no longer has to cull the appellate record to discern the grounds for an underdeparture sentence.

IV. ARGUMENT

ISSUE PRESENTED:

THE DISTRICT COURT ERRED IN RULING THAT, ONCE A REASON GIVEN IN SUPPORT OF A DOWNWARD DEPARTURE SENTENCE IS REVERSED ON APPEAL, THE TRIAL COURT MUST IMPOSE A SENTENCE WITHIN THE GUIDELINES.

The record reflects that, at sentencing, the trial court imposed a sentence of nine months in county jail for sale of cocaine, where the *Criminal Code Scoresheet* recommended a sentencing range of 13.95 months to 15 years (R-10-17). The trial court did not file a written departure order but orally found the defendant was amenable to rehabilitation (R-31). The state timely appealed the underdeparture sentence (R-18).

Prior to the time the first district decided petitioner's case, he filed a *Motion to Correct Sentencing Error* motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), requesting the trial court to enter written reasons for departure (SRI-1-4). The trial court clerk certified that no order had been entered within 60 days.

Petitioner filed a *Second Motion To Correct Sentencing Error* (SRII-1-4). The trial court ruled it was without jurisdiction (SRII-15-16).

The issue of whether the trial court had jurisdiction to provide written departure reasons in response to a request made via Rule 3.800(b)(2) was the subject of a cross-appeal.

By opinion issued in ***State v. Jackson***, the district court reversed. The district court first noted that, because the trial court did not file a written departure order, the court could affirm only if the trial court provided oral reasons for departure. Ruling that the oral reason, that the defendant was amenable to drug rehabilitation, was not a valid reason for departure under ***State v. Owens***, and Section 921.0026(3), Florida Statutes (2008), Florida Statutes (2008), the district court reversed.

The district court ruled further that, on remand, the trial court had no discretion but to impose a sentence within the guidelines with no possibility of departure, relying upon ***Pope*** and ***Shull v. Dugger***.

Although ruling that the issue raised by cross-appeal was moot[4], the district court did recognize and certify conflict with three cases from the third district:

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[4] The issues of whether a trial court can provide a written departure order in response to a Rule 3.800(b)(2) motion, or whether a trial court in remand has no discretion under ***Pope*** and ***Shull v. Dugger*** but to impose a sentence within the guidelines are inextricably intertwined in this case since petitioner did, in fact, file such a Rule 3.800(b)(2) motion. It is well-settled that, once the Court accepts jurisdiction to resolve legal conflict it may, in its discretion, consider other issues properly raised and argued, although the other issues are not the issue on which jurisdiction is based. ***Price v. State***, 995 So.2d 401 (Fla. 2008) and ***Savoie v. State***, 422 So.2d 308 (Fla. 1982).

Davis II*; *Williams; and, ***Berry***. Each of those cases held that, upon remand, the trial court could again depart below the guidelines, if based upon a legally valid reason. ***State v. Jackson***.

Petitioner argues the district court erred in ***State v. Jackson*** in ruling that, once the appellate court invalidated the reason for the under departure orally made by the trial court, that the trial court was required to impose sentence within the guidelines, and could not again impose an underdeparture sentence based upon a legally valid reason.

In essence, petitioner contends the district court erred in relying upon ***Pope*** and ***Shull v. Dugger***, as those decisions are distinguishable, and no longer good law. Petitioner requests the Court to quash the decision in ***State v. Jackson*** and approve the decisions of the third district in ***Williams, Davis II***, and ***Berry***.

Since this issue is a pure question of law arising from undisputed facts, the standard of review is *de novo*. ***Aills v. Boemi***, 29 So.3d 1105 (Fla. 2010).

Both ***Shull v. Dugger*** and ***Pope*** were cases involving review of sentences imposed *over* the range of sentence recommended by the then-applicable sentencing guidelines.

In ***Pope***, the trial court gave oral reasons for the overdeparture but did not provide a written order. In reversing with directions to resentence the defendant within the guidelines range, the Court noted that the failure of trial courts to

provide written reasons inappropriately required appellate courts to cull through the sometimes extensive sentencing colloquy in search of reasons supporting departure, thereby making possible results that are imprecise and unintended by the trial court. 561 So.2d at 565-566. Thus, in ***Pope*** the Court ruled that where a written departure order is not entered, on remand the trial court is required to impose sentence within the guidelines.

In ***Shull***, the Court held that, upon remand, a sentencing judge would not be permitted to provide new reasons for the overdeparture sentence. In so ruling, the Court recited the need to avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure.

Events occurring after ***Shull v. Dugger*** and ***Pope*** were decided render them inapplicable.

The first of these was the enactment of the criminal punishment code, applicable to all offenses committed after October 1, 1998. *See* Section 921.002, Florida Statutes (2009) and ***Shores v. State***, 15 So.3d 697 (Fla. 1st DCA 2009).

Under the criminal punishment code, the old sentencing guidelines "cells" were abolished. The "lowest permissible sentence" provided by calculation from the total sentencing points is assumed to be the lowest appropriate sentence for the offender being sentenced; a departure sentence is prohibited absent statutorily approved mitigating factors. Section 921.00265 (1), Florida Statutes (2009).

As to the maximum permissible sentence, the trial court may impose a sentence up to and including the statutory maximum for any offense. Section 921.002(g), Florida Statutes (2009).

Thus, it is legally impossible for a trial court to impose an *over*departure sentence.

The second event is the enactment of Florida Rule of Criminal Procedure 3.800(b)(2), which took effect November 12, 1999. ***Amendments To Florida Rules Of Criminal Procedure 3.111(e) And 3.800 And Florida Rules Of Appellate Procedure 9.020(h), 9.140, And 9.600*** (Fla. 2000).

As Justice Cantero aptly pointed out in ***Jackson v. State***, 983 So.2d 562 (Fla. 2008), Rule 3.800(b)(2) creates a two-edged sword for, on the one hand, the rule permits preservation of sentencing error for the first time after the sentence is imposed and, on the other hand, it also ***requires*** litigants to do so if the appellate court is going to consider the issue.

In ***Maddox v. State***, 760 So.2d 89 (Fla. 2000), in discussing the various "sentencing errors" that could be preserved via Rule 3.800(b)(2), the Court expressly identified "improper departure sentences" as one of those kinds of errors. 760 So.2d at 101-110. And it should be recalled that, by the time ***Maddox*** was decided, there was no such thing as an improper *over*departure sentence. Thus, the reference was clearly to underdeparture sentences.

Petitioner argues that the abolishment of the old sentencing guidelines "cell," the enactment of the criminal punishment code, and the recognition in ***Maddox*** that improper [under]departure sentences can be cured via a Rule 3.800(b)(2), serve to distinguish petitioner's situation from that at issue in ***Shull v. Dugger*** and ***Pope***.

As noted, ***Shull v. Dugger*** and ***Pope*** was based in part over the difficulties in culling the sentencing hearing record to divine departure reasons. However, that would not be an issue if the trial court were to provide a written departure order in response to a Rule 3.800(b)(2) motion.

Moreover, the spectacle of multiple appeals is mitigated by the fact that, unlike when ***Shull v. Dugger*** and ***Pope*** were decided, there were many appeals of overdeparture sentences, whereas today only underdeparture sentences can be appealed.

Petitioner also relies upon the Court's decision in ***Mandri v. State***, 813 So.2d 65 (Fla. 2002). In that case, the trial court imposed a departure sentence but did not provide a written order. The defendant filed a Rule 3.800(b)(2) motion in the trial court. In response, the trial court did provide a written sentencing order. When the case reached this Court, it held that while the initial failure of the trial court to issue a departure order was error, the error was harmless in light of the written reasons provided in response to the Rule 3.800(b)(2) motion.

Clearly, ***Mandri*** recognizes that a sentencing court may issue a written departure order in response to a Rule 3.800(b)(2) filed after an appeal is perfected.

Petitioner lastly notes that ***Pope*** and ***Shull v. Dugger*** is a judge-made rule issued within the context when the appellate courts were deluged with overdeparture appeals. But that is no longer the case. Also, the Court enacted Florida Rule of Criminal Procedure 3.800(b)(2) pursuant to its authority to regulate matters of procedure in the courts, and recognized in ***Mandri*** that it is applicable to generate written departure orders after an appeal is initiated.

V. CONCLUSION

Based upon the foregoing, petitioner requests the Court to quash ***State v. Jackson***, and approve the third district's decisions in ***Davis II, Williams***, and ***Berry***.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Heather Flanagan Ross, Assistant Attorney General, counsel for the State of Florida, The Capitol, PL-01, Tallahassee, FL 32399-1050, and to Mr. Bradley James Jackson, at last known address, Community Corr. Division, 451 Catherine Street, Jacksonville, FL 32202, on this ____ day of May, 2010.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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