IN THE SUPREME COURT OF FLORIDA

REGINALD BRYANT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No.SC12-1507

MERIT ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with aggravated assault with a deadly weapon and felony petit theft. (V1/R8). The information with regard to count one was later amended to the charge of robbery. (V1/R14-16).

Subsequently, a jury trial was held, and the jury returned a guilty verdict for count two, petit theft. (V2/T227). The jury also found Petitioner guilty of petit theft, the lesser included offense of count one. (V2/T227). Appellant was adjudicated guilty. (V1/R55). To avoid a double jeopardy issue, the trial court sentenced Petitioner only to count two. (V2/T235).

During the sentencing portion of the hearing, it was agreed that Petitioner scored 17.1 total sentencing points, which resulted in a non-state prison sanction. (V2/T229-30). While the State had sought to have Petitioner sentenced as a habitual felony offender, it did not ask for the designation during the sentencing hearing. (V1/R19; V2/T229, 235). Nevertheless, Petitioner's prior convictions were a topic of focus during the sentencing hearing, as highlighted by the following related portion of the transcript:

> THE COURT: What are you asking that I give him? Well let me ask it this way. How many theft convictions does he have?
> MR. SALDMANDO: Your Honor, he has five prior felony petty [sic] thefts.

THE COURT: Five prior felonies?
MR. SALDMANDO: Yes. Five --
THE COURT: Petty [sic] thefts?
MR. SALDMANDO: -- prior felony petty [sic] thefts.
THE COURT: Okay.
MR. SALDMANDO: Four prior grand thefts.
THE COURT: Okay.
MR. SALDMANDO: Twenty-nine misdemeanors, which include -
THE COURT: Thank you. Anything else you'd like to say?
MR. BRYANT: Yes, sir. What I wanted to do, I just want to apologize to the community for the stuff I've done in the past.
THE COURT: Yeah.
MR BRYANT: This has been a real eye opener for me and I'm glad that they're going to send me somewhere for that period.
THE COURT: I'm going to send you somewhere.

(V2/T230-31).

Ultimately, the trial court sentenced Petitioner to five years in prison. (V1/R58). The sentencing order stated the following:

> THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, ASSISTANT PUBLIC DEFENDER, WILSON, MELISSA AND HAVING BEEN ADJUDGED GUILTY HEREIN, AND THE COURT HAVING GIVEN THEN DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN
> IT IS THE SENTENCE OF THE COURT THAT THE DEFENDANT:
> Is hereby committed to the custody of the Department of Corrections for a term of: 60 months.

(V1/R58).

Petitioner filed a pro se notice of appeal. (V1/R65-66). Subsequently, a motion to correct sentencing error was filed in the circuit court, and the court orally denied

Petitioner's motion. *Bryant v. State*, 93 So. 3d 381, 382 (Fla. 2d DCA 2012).

Petitioner then filed an initial brief asserting that the trial court erred in sentencing him to five years in prison where his scoresheet totaled 17.1 points and the trial judge did not make written findings. *Bryant*, 93 So. 3d at 382. Respondent's answer brief argued that the record supported a finding that sentencing Petitioner to a non-state prison sentence would have presented a pecuniary danger to the public. *Bryant*, 93 So. 3d at 383.

The Second District Court of Appeal determined that the "danger to the public" requirement of the statute could include pecuniary danger in some circumstances, and pecuniary danger was the basis for the trial court's imposition of Petitioner's prison sentence. *Bryant*, 93 So. 3d at 383. However, the court reversed Petitioner's sentence because the plain language of the statute required the trial court to make written findings. *Bryant*, 93 So. 3d at 383.

The Second District permitted the trial court to again impose a prison sentence if it made the proper written findings, and it distinguished the case from other cases where the trial court provided reasons for a departure sentence that were determined invalid reasons on appeal. *Bryant*, 93 So. 3d at 383.

SUMMARY OF THE ARGUMENT

Given the circumstances in the instant case, it was proper for the Second District to remand Petitioner's case for resentencing and to permit the trial court to impose a prison sanction so long as it made proper written findings. Resentencing proceedings are entirely new proceedings. *State v. Collins*, 985 So. 2d 985, 989 (Fla. 2008). Therefore, the trial court should not be limited to imposing a non-state prison sentence if it has legitimate and valid reasons to impose a prison sanction and it documents those reasons in writing.

Furthermore, because the Second District did not invalidate the trial court's reasons for imposing a prison sanction, there should be no concern that the trial court would take advantage of the resentencing proceeding so as to search for reasons to justify a departure sentence. *See Troutman v. State*, 630 So. 2d 528 n. 6 (Fla. 1993).

Florida courts have consistently permitted trial courts to impose a departure sentence at resentencing once the sentence had been reversed because no written findings were made. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011), reh'g denied (June 16, 2011), *State v. Lazier*, 58 So. 3d 902, 904 (Fla. 4th DCA 2011); *State v. Francis*, 954 So. 2d 755, 757 (Fla. 4th DCA 2007). Petitioner's situation should not be treated any differently, especially when the cases that mandated resentencing without a

departure were based on the old sentencing guidelines rather than the Criminal Punishment Code. Accordingly, Respondent respectfully requests this Honorable Court to affirm the Second District Court of Appeal's opinion.

ARGUMENT

ISSUE

WHETHER AN APPELLATE COURT THAT REVERSES THE IMPOSITION OF A PRISON SENTENCE FOR FAILING TO PROVIDE WRITTEN FINDINGS PURSUANT TO SECTION 775.082(10), MUST REMAND FOR RESENTENCING FOR A NON-STATE PRISON SANCTION. (RESTATED BY RESPONDENT).

The Second District Court of Appeal correctly ruled that the trial court was permitted on remand to again impose a prison sanction if supported by proper written findings. As noted by the Second District Court of Appeal in its opinion, "this is not a case in which the trial court provided reasons for a departure sentence that on appeal were determined to be invalid departure reasons. [citation omitted] Rather, the trial court failed to specify in writing its reasons for departing." *Bryant v. State*, 93 So. 3d 381 (Fla. 2d DCA 2012). Therefore, Respondent asserts that the trial court should not be precluding from imposing a prison sentence at resentencing.

Petitioner, however, argues that the trial court should not be given another opportunity to provide written reasons for a prison sentence because the court failed to enter written findings at sentencing and the 3.800(b) motion. (Petitioner's initial brief at 6). This issue presents a legal question and is subject to this Court's *de novo* review. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011), reh'g denied (June 16, 2011).

Petitioner was convicted of petit theft, a third-degree felony. Petitioner's total sentencing points amounted to 17.1 points. Pursuant to section 775.082(10), Florida Statutes (2009),

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony [...], and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

Here, Petitioner's total sentence points were fewer than 22 points; he was sentenced to a prison sanction; and the trial court did not make written findings that he was a danger to the public. Both parties are in agreement that this was error. The disagreement, however, stems from what sanction the trial court may impose upon remand. Respondent submits that the Second District correctly permitted the trial court to impose a prison sentence on remand if writing findings are made.

In *Goldberg v. State*, 76 So. 3d 1072, 1073-74 (Fla. 5th DCA 2011), the defendant, who had been an operating room nurse, was sentenced to a three-year prison sentence for grand theft after the jury found that he stole from an elderly patient. Based on the portion of the sentencing transcript recited in the opinion, it appears that the trial court imposed a prison sentence due to the defendant's reprehensible conduct in committing the crime.

Goldberg, 76 So. 3d at 1073-74. The trial court failed to make oral or written findings as to whether a non-state prison sentence could present a danger to the public. *Id.* at 1074.

Goldberg filed a motion to correct sentencing error based on the court's failure to make written findings. *Id.* In response, the trial court entered a written order granting a departure sentence; however, the order again failed to state that the imposition of a non-state prison sanction could pose a danger to the community. *Id.* The Fifth District Court of Appeal held that, on remand, the trial court must sentence the defendant to a non-state prison sanction. *Id.*

Goldberg is distinguishable from the instant case. In *Goldberg*, the trial court did not specify valid reasons for departure, nor did the court find that a non-state prison sentence could present a danger to the public. In the instant case, the parties were operating under the shared understanding that Petitioner would be sentenced to prison. (V2/T230-231). Essentially, prior to the trial court imposing the sanction, Petitioner acknowledged that he was being sent away. (V2/T230-231).

Moreover, the record revealed that the trial court considered that a non-state prison sentence could present pecuniary harm to the public, and this was a valid reason for departure. Petitioner had an extensive criminal history

involving theft. (V2/T230). The court also inquired about Petitioner's past convictions and after being advised of his significant criminal history, told the Petitioner, "I'm going to send you somewhere." (V2/T230-231). The court further indicated that Petitioner was sentenced to Florida State Prison due to his prior convictions. (V2/T232).

The "danger to the public" requirement in section 775.082 (10) Florida Statutes, encompasses pecuniary danger or economic harm. *McCloud v. State*, 55 So. 3d 643 (Fla. 5th DCA 2011), reh'g denied (Mar. 10, 2011), (*United States v. Reynolds*, 956 F.2d 192 (9th Cir. 1992)); *see United States v. Provenzano*, 605 F.2d 85, 95 (3d Cir. 1979) (explaining that danger to the community is not limited to cases involving physical harm, and holding that "a defendant's propensity to commit crime generally, even if the resulting harm would be not solely physical, may constitute a sufficient risk of danger[…]"); *United States v. Miranda*, 442 F. Supp. 786, 792 (S.D. Fla. 1977)("[I]t is beyond dispute that the criterion of 'danger to the community,' […] is not limited to the potential for doing physical harm."). Here, the record shows that the trial court was concerned about the pecuniary harm to the public due to Petitioner's vast history of theft convictions. Accordingly, the Second District properly found that the trial court had a valid reason for imposing a prison sanction, which is entirely

different from the facts in *Goldberg*.

Additionally, the court in *Goldberg* acknowledged that the trial court could have corrected "its initial failure to make the necessary written findings" in responding to the defendant's rule 3.800(b) motion, and that it had failed to do so. *Goldberg*, 76 So. 3d at 1074. Therefore, the Fifth District required that the trial court sentence the defendant to a non-state prison sanction on remand. *Id.* In the instant case, the trial court denied Petitioner's motion without an order pursuant to Florida Rule of Criminal Procedure 3.800 (b)(2)(B). This case does not present the same factual scenario where the trial court issued an additional order and again failed to make written findings as in *Goldberg*.

Nevertheless, Respondent submits that the Second District Court of Appeal is correct in that on remand, the trial court has the ability to impose a prison sentence upon making proper written findings. So much as the Second District is in conflict with the Fifth District, this Court should affirm the Second's opinion. As this Honorable Court acknowledged in *State v. Fleming*, 61 So. 3d 399, 406 (Fla. 2011), it has been long held that resentencings in criminal proceedings are *de novo*, and because of that, both parties may present new evidence bearing on the sentence. "[R]esentencing must proceed 'as an entirely new proceeding.'" *State v. Collins*, 985 So. 2d 985, 989 (Fla.

2008), quoting *Wike v. State*, 698 So. 2d 817, 821 (Fla. 1997).

Therefore, it should follow that when a sentence is reversed because a trial court fails to make written findings pursuant to Section 775.082(10), Florida Statutes, the resentencing would involve an entirely new proceeding where written findings regarding departure could be made. *Cf. Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001)(explaining that because resentencing is a completely new proceeding, "the trial court is under no obligation to make the same findings as those made in prior sentencing proceeding"); *Rich v. State*, 814 So. 2d 1207, 1208 (Fla. 4th DCA 2002) (holding that the state must present evidence at resentencing of an enhanced sentencing factor despite having done so at the prior sentencing hearing).

By the same token, a departure sentence should be permitted on remand because there is no express rule or statute precluding it. In *Ree v. State*, 565 So. 2d 1329 (Fla. 1990) *holding modified by State v. Lyles*, 576 So. 2d 706 (Fla. 1991), 131-32 (Fla. 1990), this Court explained that "the statute and the rules that create the sentencing guidelines require written reasons for departure that are 'contemporaneous.'" *Id.* at 1332 (quoting *Oden v. State*, 463 So. 2d 51 (Fla. 1985)). Here, however, Petitioner's sentencing was under the Criminal Punishment Code, and the same statute and rules do not apply.

Prior to the enactment of the Criminal Punishment Code, the

original sentencing guidelines included Rule 3.701(d)(11), which built in a requirement for a contemporaneous written order. *See* Rule 3.701(d)(11); *Ree*, 565 So. 2d at 1331. By contrast, the applicable statutory provision in the instant case does not include a contemporaneous written order requirement. § 775.082(10) Fla. Stat. (2009). Because it does not mandate a written order that is contemporaneous with a departure sentence, it does not bar a subsequent written order.

Respondent recognizes that this Honorable Court has held that "when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility for departure from the guidelines." *Pope v. State*, 561 So. 2d 554 (Fla. 1990); *see also Robinson v. State*, 571 So. 2d 429, 430 (Fla. 1990). However, this Court later explained that the ruling in *Pope* was made out of concern that "sentencing judges on remand would search for reasons to justify a departure sentence when the judge's initial reasons for departure had been reversed by the appellate court." *Troutman*, 630 So. 2d at 528. In this case, the Second District did not reverse the trial court's reasons for imposing a prison sentence; rather, the reasons were deemed proper.

Moreover, in *Shull v. Dugger*, 515 So. 2d 748, 749 (Fla. 1987), this Honorable Court held that once an appellate court

has reversed the trial court's reasons given for departure, a trial court may not enunciate new reasons for departure. Here, the Second District correctly distinguished the applicable holding in *Shull* from the facts in this case, because the trial court did not provide reasons for Petitioner's departure sentence which were deemed invalid. *Bryant*, 93 So. 3d at 383. The rulings in *Pope* and *Shull* should not be applied to the instant case because the situation necessitating those rulings does not exist here; this case should not warrant such concern, as the trial court's reasons for departure were not reversed by the Second District.

Also, *Pope* and *Shull* were not cases under the Criminal Punishment Code. Because the Pre-Criminal Punishment Code cases implicate the rule requiring contemporaneous written reasons for departure, those cases should not be applied to the instant case. This Court explained that:

> b]ased on our reading of the legislative scheme, **nothing within the CPC precludes the imposition of a downward departure sentence on resentencing following remand.** To be sure, if a trial court on remand resentences a defendant to a downward departure sentence, the **trial court must ensure it comports with the principles and criteria prescribed by the Code. However, an appellate court should not preclude a trial court from resentencing a defendant to a downward departure if such a departure is supported by valid grounds.**

Jackson, 64 So. 3d at 93 (emphasis added).

Florida courts have consistently permitted trial courts to

impose departure sentences at resentencing when the initial reasons for departing had not been reduced to writing. *Jackson*, 64 So. 3d at 93 (holding that when a trial court failed to file written reasons for a downward departure and the oral reasons were determined invalid, on remand for resentencing the court is permitted to impose a downward departure when it finds a valid basis for departure); *State v. Lazier*, 58 So. 3d 902, 904 (Fla. 4th DCA 2011) (trial court was permitted to depart if found legally sufficient reasons for doing so at resentencing when court had initially made oral indication of an intention to downward depart during sentencing hearing but failed to provide written reasons); *State v. Williams*, 20 So. 3d 419, 420 (Fla. 3d DCA 2009) (when the court imposed a sentence more lenient than required without providing oral or written reasons, the case was remanded for resentencing and the court could provide written reasons or permit withdrawal of the plea); *Francis*, 954 So. 2d, 757 (where a downward departure was imposed without the trial court providing written reasons in the disposition order, the case was remanded for resentencing and the court was directed to "clarify its oral reasons in a written order" and also permitted to depart from the guidelines).

If trial courts are permitted to impose downward departure sentences on remand when written reasons for departing had not been provided at the initial sentencing proceeding, then the

same standard should apply to prison sentences under section 775.082(10), Florida Statutes. This Court's recent opinion in *Jackson*, applying the Criminal Punishment Code, supports this conclusion, as the trial court was permitted to depart at resentencing when the initial reasons for departure had been deemed invalid. *Jackson*, 64 So. 3d at 91.

In this case, the Second District correctly permitted the trial court to resentence Petitioner to a prison sentence. The rationale for mandating a non-prison sanction at resentencing involves a rule no longer applicable under the Criminal Punishment Code. Absent a rule requiring a contemporaneous written order, there is no violation of any rule or statute by entering the order on remand. Further, the trial court should not be limited at resentencing, especially when the trial court's reasons were not invalidated. If valid reasons support a departure, trial courts should not be precluded from resentencing a defendant to a prison sentence. Based on the foregoing, the decision of the Second District Court of Appeal should be affirmed.

CONCLUSION

Respondent respectfully requests that this Honorable Court uphold the Second District Court of Appeal's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Megan Olson, Assistant Public Defender, at appealfilings@pd10.state.fl.us, meganolson@gmail.com, curl_d@pd10.state.fl.us on this 20th day of December, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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