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IN THE SUPREME COURT OF FLORIDA

REGINALD BRYANT, :

Petitioner, :

vs. : Case No. SC12-1507

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL
OF FLORIDA SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Mr. Bryant, the Appellant below, will be referred to as the Petitioner. References to the trial court documents, are preceded by the letter "R" and references to the trial transcript are preceded by the letters "TR".

STATEMENT OF THE CASE AND FACTS

The Petitioner, Reginald Bryant, was charged in the Thirteenth Judicial Circuit with robbery and felony petit theft. Following a jury trial he was found guilty of the lesser of petit theft and felony petit theft (R14-15,TR227). Although, the criminal punishment code scoresheet reflected only 17.1 total sentencing points, the trial judge sentenced the Petitioner to five years incarceration on the felony petit theft. The trial judge provided no oral or written reasons/findings for the sentence imposed. No objection to the sentence was raised at the time of the sentencing (T234-235).

Petitioner filed a timely 3.800(b)(2) motion to correct the sentence, in the trial court pointing out the court's failure to file the written reasons required (R81-95). The trial court orally denied the motion but filed no written order and filed no written findings supporting the imposition of the five-year prison sentence (R97).

On June 27, 2012, the Second District Court of Appeal issued its opinion in the case reversing the sentence for the lack of the written reasons required by section 775.082(10). The Second District remanded the case to the trial court for resentencing permitting the trial court to again impose a departure sentence if the required statutory findings are provided. Bryant v. State, 93 So. 3d 381 (Fla. 2d DCA 2012). The Court recognized that permitting the trial court to provide written reasons on remand was contrary to the conclusion reached in Goldberg v. State, 76

So. 3d 1072 (Fla. 5th DCA 2011), and certified conflict on this point (Appendix A). The Goldberg court held that when the trial court failed to enter written reasons for the upward departure under section 775.082(10), during the original sentencing and then again during a 3.800(b)(2) hearing, upon reversal of the sentence, the court would be limited to imposing a nonstate sentence on remand (Appendix B).

A notice to invoke discretionary jurisdiction was timely filed in this Court on July 20, 2012, and on November 6, 2012, this Court issued its order accepting jurisdiction.

SUMMARY OF THE ARGUMENT

Under section 775.082(10), Florida Statutes (2009), when a criminal punishment code scoresheet for a defendant charged with a nonviolent third degree felony reflects 22 or fewer total sentencing points a trial judge is limited to imposing a nonstate prison sentence unless written findings are entered establishing that the defendant would be a danger to society. These written findings are mandatory and must be entered to support a prison term. Id. When a trial judge fails to provide written reasons justifying a departure from the nonstate sanction at the time of the original sentencing, and again through a 3.800, hearing, the judge should not be permitted to enter written reasons for the departure on remand.

ARGUMENT

ISSUE I

WHEN A DEFENDANT'S PRISON SENTENCE IS REVERSED BECAUSE OF THE FAILURE OF THE TRIAL JUDGE TO FILE WRITTEN REASONS FOR UPWARD DEPARTURE AT THE TIME OF THE ORIGINAL SENTENCING AS REQUIRED UNDER SECTION 775.082(10), FLORIDA STATUTES (2009), AND THE TRIAL JUDGE AGAIN FAILS TO FILE WRITTEN REASONS FOR THE DEPARTURE THROUGH A 3.800(B)2, HEARING, THE TRIAL JUDGE SHOULD NOT BE PERMITTED TO PROVIDE WRITTEN REASONS FOR DEPARTURE ON REMAND AND SHOULD BE LIMITED TO IMPOSING A NONSTATE PRISON SANCTION.

Standard of Review

As the question presented addresses a legal issue it is subject to de novo review. Jackson v. State, 64 So. 3d 93 (Fla. 2010).

Argument

Section 775.082(10), Florida Statutes (2009), provides that: "If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, 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". Florida Rule of Criminal Procedure

3.704(d)(29), also provides that absent written reasons showing that a defendant possesses a danger to society, a nonstate prison sentence must be imposed when the scoresheet reflects 22 or fewer total sentencing points. The purpose of these provisions is to limit the number of people that are subject to prison sanctions. Like the pre-Criminal Punishment Code sentencing guidelines they create a maximum sentence, in this instance, no more than a nonstate disposition, that the trial court may exceed in limited circumstances and only if the court explains its reasons in writing. Jones v. State, 71 So. 3d 173 (Fla. 1st DCA 2011).

The issue presented here is how many opportunities should a trial court have to provide the reasons supporting an upward departure. In the Petitioner's case the Second District Court held that even though the trial court failed to enter written reasons for departure at the time of sentencing and again at the 3.800(b) hearing, it would still be permitted to depart and impose a prison sentence on remand if written reasons were provided. In reaching its decision, the Court referred to this Court's opinion in State v. Collins, 985 So. 2d 985 (Fla. 2008), in support of the conclusion that the development of reasons for departure on remand did not implicate the holding of Shull v. Dugger, 515 So. 2d 748 (Fla. 1987). The court felt that because the case did not involve reversal of the original reasons for departure, but rather involved an instance where no reasons for departure had ever been entered, there was no concern about the trial court coming up with after-the-fact reasons to support its

departure.

What the Bryant court overlooked in reaching this conclusion is the fact that the Collins opinion addressed the reversal of a habitual offender designation and sentence for the failure of the state to establish the required predicate, not the reversal of an upward departure sentence from the sentencing guidelines. As this Court itself noted in Collins, the reasoning in Shull, does not apply to habitual offender sentencing as such sentencing does not fall under the guidelines. Additionally, the designation of a defendant as a habitual offender is based upon documentary and evidentiary findings, and does not involve the development of reasons for departure that can be the subject of manipulation. Id. at 991-992. The Bryant Court's reasoning and decision was flawed as Collins, does not support the position that the trial court can provide written reasons for the upward departure on remand.

In Goldberg v. State, 76 So. 3d 1072 (Fla. 5th DCA 2011), the Fifth District Court held that when a trial court fails to issue written reasons for a departure under section 775.082(10), at the time of sentencing and then fails to avail itself of the opportunity to provide written reasons for the departure at a subsequent 3.800(b) hearing, the court is limited to imposing a nonstate prison sanction upon remand. This decision is consistent with prior Florida court decisions regarding the ability of a trial court to provide written reasons for a departure for the first time on remand, particularly when the court has had the

ability to provide those reasons through a 3.800(b)(2) motion.

Prior to enactment of the 1994 sentencing guidelines, trial courts were required to file written reasons for departure contemporaneously with the imposition of the sentence. Pope v. State, 561 So. 2d 554 (Fla. 1990). Subsequent to the enactment of the 1994 guidelines the courts were given 15 days after sentencing to file the required departure reasons and a written transcript of the reasons for departure presented at the sentencing hearing could be used as the written order. Section 921.0016, Florida Statutes (Supp.2004). Currently, the criminal punishment code (CPC) and corresponding rules of procedure give a trial judge seven days in which to file reasons for a downward sentencing departure and those reasons need only be written on the sentencing scoresheet. Section 921.00265(2), Florida Statutes (1998), Fla. R. Crim. P. 3.704 (d)(27)(A).

In cases decided prior to the CPC, Florida Courts have consistently held that a when a trial court imposes an upward departure sentence without providing written or oral reasons in support of the departure sentence or where the reasons provided have been reversed on appeal, the court is limited to imposing a guidelines sentence upon remand. Shull v. Dugger, 515 So. 2d 748 (Fla. 1987), Pope v. State, 561 So. 2d 554 (Fla. 1990). Over the years, Florida Courts have created a distinction between technical delays in the filing of written reasons for departure and the failure to provide any reasons for departure at all. Courts have been forgiving of non-prejudicial technical delays finding the

error to be harmless and allowing the departure sentences to stand. Mandri v. State, 813 So. 2d 65 (Fla. 2002)(failure to file written reasons for upward departure at sentencing hearing was harmless error where trial court entered written findings during 3.800(b) hearing); Beck v. State, 817 So. 2d 858 (Fla. 5th DCA 2002)(four month delay between sentencing and signing of scoresheet listing departure reasons at 3.800(b)(2) hearing was not error requiring imposition of guidelines sentence). Conversely, Florida Courts have consistently maintained that when a trial court fails to provide written reasons for departure at the original sentencing or during a subsequent 3.800 motion to correct sentence, the court is precluded from imposing a departure sentence on remand. See, Pressley v. State, 921 So. 2d 736 (Fla. 1st DCA 2006)(trial court's failure to file written reasons for upward departure sentence at either the original sentencing or at the subsequent 3.800(b)(2), hearing, distinguished case from Mandri v. State, 813 So. 2d 65 (Fla. 2002), and required that defendant be resentenced within sentencing guidelines); Leeks v. State, 973 So. 2d 1200 (Fla. 2d DCA 2008)(where trial court failed to file written reasons for upward departure sentence at time of sentencing and again failed to file reasons for departure even though defendant raised issue in 3.800(b)(2) motion, reversal of departure sentence and resentencing within applicable guidelines range was required).

The Second District Court in Bryant correctly ruled that the failure of the trial court to enter written reasons in support of

the departure sentence required reversal of the sentence and that portion of the decision should be affirmed, but precedent shows that the court erred in finding that the trial court could provide reasons for the departure on remand even though the court failed to avail itself of the opportunity to enter written findings in the 3.800(b)(2) hearing and the portion of the opinion so holding should be reversed. Accordingly, this court should approve the decision in Goldberg, and hold that in instances when a trial court fails to enter written reasons for imposing an upward departure sentence, pursuant to section 775.082(10) and then fails to correct the error through a 3.800 motion, upon remand, the trial court is limited to imposing a nonstate sanction.

CONCLUSION

In light of the foregoing argument, issues and authorities, Appellant respectfully requests that this Honorable Court affirm the reversal of the Petitioner's sentence but reverse the portion of the Second District Court opinion permitting the trial court to provide written reasons/findings for the imposition of the five-year prison term on remand.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General, at e-mail address CrimappTPA@myfloridalegal.com on this 30th day of November, 2012.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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APPENDIX

A. Opinion filed in Bryant v. State on June 27, 2012, Case No. 2d10-5135

B. Opinion filed in Goldberg v. State, 76 So.3d 1072 (Fla. 5th DCA 2011)

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

REGINALD L. BRYANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D10-5135

Opinion filed June 27, 2012.

Appeal from the Circuit Court for Hillsborough County; Manuel A. Lopez, Judge.

James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

Received By
JUN 27 2012
Appellate Division
Public Defenders Office

DAVIS, Judge.

Reginald Bryant challenges his conviction and sentence for felony petit theft. Because the trial court did not make certain statutorily required written findings when sentencing Bryant, we reverse his sentence and remand for resentencing.

The State originally charged Bryant with robbery and felony petit theft, but the jury returned a verdict of guilty of the lesser included charge of petit theft in count one and guilty of petit theft as charged in count two. The trial court sentenced Bryant to time served in count one and to five years' incarceration on count two.[1]

On appeal, Bryant argues that because his guidelines scoresheet score was 17.1 sentencing points, his five-year sentence was an upward departure for which the trial court should have provided valid written departure reasons but did not. Bryant preserved this argument in a Florida Rule of Criminal Procedure 3.800(b)(2) motion, which was orally denied below.

Section 775.082(10), Florida Statutes (2009), provides as follows:

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a non[-]state prison sanction. However, if the court makes written findings that a non[-]state prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

(Emphasis added.) See also Fla. R. Crim. P. 3.704(d)(29) ("If the total sentence points equal 22 or less, the court must sentence the offender to a non[-]state prison sanction unless it makes written findings that a non[-]state prison sanction could present a danger to the public." (emphasis added)).

Here, the parties agree and the record indicates that the trial court sentenced Bryant to a five-year prison sentence—despite the fact that he only scored

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[1]On appeal, Bryant does not raise any issues related to double jeopardy, and we have not considered any.

17.1 sentencing points—without making any written findings to support the upward departure. The State, however, argues that the record supports a finding that sentencing Bryant to a non-state prison sentence would have presented a pecuniary danger to the public based on his prior record, which includes several theft convictions.

We agree with the State that the "danger to the public" contemplated by section 775.082(10) may be a pecuniary one. See McCloud v. State, 55 So. 3d 643, 644 (Fla. 5th DCA 2011) ("While McCloud may not be a physically violent offender, he is apparently willing to steal anything and everything. We believe that 'danger may, at least in some cases, encompass pecuniary or economic harm.' " (quoting United States v. Reynolds, 956 F.2d 192, 192-93 (9th Cir. 1992))). We also agree that the instant record indicates that such was the basis for the trial court's imposition of a prison sanction here. However, the plain language of the statute requires the trial court to make "written findings that a non[-]state prison sanction could present a danger to the public" before it "may sentence the offender to a state correctional facility." § 775.082(10) (emphasis added). And the trial court failed to do so here.

As such, we reverse Bryant's sentence and remand for resentencing, at which the trial court may again impose a prison sanction if it makes the proper written findings. See generally State v. Collins, 985 So. 2d 985, 989 (Fla. 2008) (reversing habitual felony offender designation, remanding for resentencing, and explaining "that a resentencing must proceed as an entirely new proceeding and that a resentencing should proceed de novo on all issues bearing on the proper sentence" (citation omitted) (internal quotation marks omitted)). We note that 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. See Shull v. Dugger, 515 So. 2d 748, 750 (Fla. 1987) ("[A] trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court."). Rather, the trial court failed to specify in writing its reasons for departing. As such, "the underlying reason for [the] decision in Shull—preventing after-the-fact justifications for a previously imposed departure sentence—is not implicated here." Collins, 985 So. 2d at 992.

Finally, we recognize that in Goldberg v. State, 76 So. 3d 1072, 1074 (Fla. 5th DCA 2011), the Fifth District stated as follows:

> The trial court may well have been able to correct its initial failure to make the necessary written findings required by section 775.082(10) by doing so in response to Goldberg's rule 3.800(b)(2) motion. However, it failed to do so. On remand, the trial court must sentence Goldberg to a non[-]state prison sanction.

(Citation omitted.) To the extent that our opinion here conflicts with Goldberg, we certify conflict.

Reversed and remanded.

KELLY and KHOUZAM, JJ., Concur.

76 So.3d 1072, 37 Fla. L. Weekly D22
(Cite as: 76 So.3d 1072)

District Court of Appeal of Florida,

Fifth District.

Jeffrey Manny GOLDBERG, Appellant,

v.

STATE of Florida, Appellee.

No. 5D10–3450.

Dec. 23, 2011.

Background: Defendant was convicted by jury in the Circuit Court, Marion County, Hale R. Stancil, J., of grand theft from a person sixty-five years of age or older of property valued between $300 and $10,000, and he appealed.

Holding: The District Court of Appeal, Evander, J., held that trial court was required, on remand, to sentence defendant to a nonstate prison sanction, given that trial court made no pronouncement as to whether a nonstate prison sanction could present a danger to the public.

Reversed and remanded.

West Headnotes

Criminal Law 110 ⚿1192

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1192 k. Mandate and proceedings in lower court. Most Cited Cases

Sentencing and Punishment 350H ⚿1910

350H Sentencing and Punishment

350HIX Probation and Related Dispositions

350HIX(E) Proceedings for Imposition

350Hk1908 Findings

350Hk1910 k. Necessity and purpose. Most Cited Cases

Trial court was required, on remand, to sentence defendant, who was convicted of grand theft, to a nonstate prison sanction; defendant scored less than twenty-three points on his sentencing scoresheet, trial court failed to make written findings that a nonstate prison sanction could present a danger to the public, and statute provided that, if the total sentence points

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were 22 points or fewer, the court had to sentence the offender to a nonstate prison sanction, but if the court made written findings that a nonstate prison sanction could present a danger to the public, the court could sentence the offender to a state correctional facility. West's F.S.A. § 775.082(10).

***1073** James S. Purdy, Public Defender, and Colby Nicole Ferris, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Megan Saillant, Assistant Attorney General, Daytona Beach, for Appellee.

EVANDER, J.

Jeffrey Goldberg was convicted, after a jury trial, of grand theft from a person sixty-five years of age or older of property valued between $300 and $10,000.[FN1] He appeals the trial court's imposition of a three-year prison sentence where he scored less than twenty-three points on his sentencing scoresheet and the trial court failed to make written findings that a nonstate prison sanction could present a danger to the public. We reverse.

FN1. § 812.0145(2)(c), Fla. Stat. (2009).

Section 775.082(10), Florida Statutes (2009) provides:

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, 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.*
>
> (Emphasis added).

The State does not dispute that under section 775.082(10), Goldberg was entitled to a nonstate prison sanction unless the court made written findings, supported by competent evidence, that imposition of a nonstate prison sentence could present a danger to the public.

The facts presented at trial show that Goldberg, while working as an operating room nurse, stole jewelry from an elderly patient. At the sentencing hear-

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ing, the trial court understandably focused on *1074 Goldberg's reprehensible conduct of stealing from an incapacitated patient:

> Well, I mean, the Court thinks that this is pretty serious, you know, when you take the ring off somebody who is incapacitated or take—you are in their environment. You are right there next to them. It is like burglarizing somebody's home....
>
> And you make the nursing profession look bad because a person in a nursing environment generally is under the complete control of those around them and you took advantage of a situation. And therefore, I think, you know, I have got to punish you to this extent.

However, the trial judge made no pronouncement as to whether a nonstate prison sanction could present a danger to the public and the written sentencing order similarly failed to address this issue.

While this appeal was pending, Goldberg filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), arguing that because the court failed to make contemporaneous written findings that a nonstate prison sanction could present a danger to the community, the sentence should be corrected to a nonstate prison sanction. In response, the trial court entered an "Order Granting Departure Sentence from Sentencing Guidelines." The order reiterated the rationale for a prison sentence given by the trial court at the sentencing hearing, but again failed to include findings that the imposition of a nonstate prison sanction could present a danger to the public.

The trial court may well have been able to correct its initial failure to make the necessary written findings required by section 775.082(10) by doing so in response to Goldberg's rule 3.800(b)(2) motion. *See, e.g., Mandri v. State,* 813 So.2d 65 (Fla.2002) (trial court's failure to file written reasons in support of guidelines departure sentence was harmless error corrected by court's filing of written reasons in response to motion for correction of sentence). However, it failed to do so. On remand, the trial court must sentence Goldberg to a nonstate prison sanction.

REVERSED and REMANDED for resentencing.

ORFINGER, C.J. and SAWAYA, J., concur.

Fla.App. 5 Dist.,2011.

Goldberg v. State

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(Cite as: 76 So.3d 1072)

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