

No. SC18-688

In the Supreme Court of Florida

DEREK LANG SHINE JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

* * *

On Discretionary Review from the Third District
Court of Appeal of Florida, DCA No. 3D15-2876
Cir. Nos. F14-890 & F14-891

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

In 2015, Petitioner Derek Lang Shine Jr. pled guilty to criminal charges in two felony cases. A6. Due to that plea bargain, he received a downward departure sentence of three years of drug offender probation. *Id.* When he later violated probation, the circuit judge sentenced him to 40 months in prison followed by 40 months of probation, a departure below the 73.65-month bottom of the sentencing guidelines. A6-7. In its written findings justifying the departure, the judge (1) cited the fact that Petitioner had previously received a downward departure due to a valid, uncoerced plea bargain; and (2) after assessing the current facts of Petitioner's case, concluded that a guidelines sentence would be "inappropriate, too harsh and contrary to the principles of graduated sanctions." A7.

The State appealed to the Third District. That court concluded that "the trial court's reasoning does not amount to a valid legal basis for the downward departure sentence imposed," and therefore reversed the departure. *Id.* In its original opinion, the panel provided for the following remedy: "we reverse and remand for resentencing at which the trial court may again impose a downward departure sentence, but such must be a recognized legally permissible reason for such sentence." A4. On rehearing, however, the panel amended the remedy so that resentencing must be "within the sentencing guidelines." A7. Thus, the circuit judge's discretion to depart on remand has now been eliminated.

Petitioner unsuccessfully moved for rehearing *en banc*. A8. He then timely invoked this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

This case presents two separate express and direct conflicts warranting the exercise of the Court's discretionary jurisdiction.

First, on the merits of the downward departure issue, the Third District held that the fact of a prior downward departure is an invalid reason to depart at a sentencing hearing for a probation violation. But it failed to acknowledge this Court's decision in *Franquiz*, which authorizes a sentencing judge's reliance on prior departures in appropriate cases. Had it applied *Franquiz*, the Third District would have been bound to affirm the departure sentence: the sentencing judge did not grant an automatic departure based on the earlier one, but instead properly assessed Petitioner's current circumstances when concluding that the subsequent departure was the correct sentencing result.

Second, the decision below creates express and direct conflict on the question of the proper remedy where a district court reverses a downward departure on substantive grounds. Whereas every other district court, citing this Court's opinion in *Jackson*, has remanded for *de novo* resentencing and the possibility of a new departure, the Third District has constrained the circuit judge here to resentence Petitioner within the guidelines.

ARGUMENT

I. Express and Direct Conflict on the Merits of the Departure

This Court may exercise discretionary jurisdiction over a district court decision that conflicts with a decision of the Supreme Court or of another district court on the same question of law. Art. V, § 3(b)(3), Fla. Const. The issue on appeal to the Third District was whether Petitioner’s prior departure sentence was a valid basis for the subsequent departure. By reversing the new sentence, the Third District created conflict with *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996).

A. This Court held in *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996), that a prior downward departure based on an uncoerced plea can validate future departures

A circuit judge is normally bound by the bottom of the sentencing guidelines when selecting an appropriate prison term in a criminal case. *See* § 921.0024(2), Fla. Stat. (2015); § 921.0026(1), Fla. Stat. (2015). But the Criminal Punishment Code authorizes circuit judges to issue a “downward departure” sentence, meaning a sentence below the bottom of the guidelines, under appropriate circumstances. § 921.0024(2); § 921.0026(1). To guide sentencing judges, the Code provides a list of factors that may warrant such a departure, and also permits circuit judges to consider non-enumerated factors that are consistent with the aims of the Code. *See* § 921.0026(2). A body of case law has further delineated the permissible grounds for a downward departure.

This Court has previously addressed “whether an initial downward departure sentence is always, never, or sometimes a reason for the trial court’s subsequent downward departure in sentencing for a revocation of the initial sentence.” *Franquiz*, 682 So. 2d at 537. Answering that question, it held that the existence of a “prior downward departure”—though not a “guarantee”—may constitute a “factor” justifying a subsequent downward departure. *Id.* When a sentencing judge relies on that factor, it should describe in writing its reasons for concluding that the prior departure is a “valid reason for a subsequent downward departure at the revocation sentencing.” *Id.* at 538.

Franquiz specifically approved as a ground for departure the fact that prosecutors had previously agreed to a downward departure as part of a valid, uncoerced plea bargain. *Id.* at 537 (holding that “a trial court may consider the State’s prior agreement for a downward departure as a factor during resentencing”). But it clarified that a sentencing judge may not focus solely on the defendant’s situation at the time of the original sentencing; it must instead account holistically for “all the circumstances through the date of the revocation sentencing.” *Id.* at 538.

B. The Third District has now held the opposite, concluding that no valid basis for a downward departure existed here

By contrast to *Franquiz*, the Third District reversed the downward departure in Petitioner’s case because it concluded that a prior departure “does not amount to a valid legal basis for the downward departure sentence imposed.” A7. After

Petitioner's probation was revoked due to a violation, he received a departure because he had been "granted a previous downward departure based on a valid uncoerced plea agreement" and because the sentencing judge additionally found that "it would be inappropriate, too harsh and contrary to the principles of graduated sanctions to now sentence the Defendant to 73.65 months imprisonment." *Id.*

Under *Franquiz*, the circuit court's stated justifications, arrived at within the sound exercise of its discretion, should have been sufficient to sustain the departure. The sentencing judge not only noted the existence of the prior departure but also considered Petitioner's present circumstances and concluded that a sentence below the guidelines range was more suitable. Specifically, the judge found that the minimum guidelines sentence was not proportional, or appropriately "graduated," to Petitioner's conduct and prior sanctions.

But instead of citing *Franquiz*, the Third District relied on several of its prior decisions, none of which dealt with downward departures based on prior departures. *Id.* (citing *State v. Pita*, 54 So. 3d 557 (Fla. 3d DCA 2011); *State v. Kasten*, 775 So. 2d 992 (Fla. 3d DCA 2000); *State v. Nolasco*, 542 So. 2d 1052 (Fla. 3d DCA 1989)). It also cited section 921.0026, which governs downward departures generally. As this Court has already concluded, however, that statute authorizes departures based on prior, uncoerced plea bargains so long as the judge weighs the facts of the individual offender's case in determining that a current departure is warranted.

II. Express and Direct Conflict on the Proper Remedy

Next, in holding that the circuit judge was required to resentence Petitioner within the guidelines on remand—precluding a new departure—the district court created a separate basis for conflict jurisdiction. Every other district, citing this Court’s decision in *Jackson*, has held that circuit judges should have the opportunity to impose a new departure sentence on remand if a lawful basis exists.

A. In *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), this Court held that where a downward departure is reversed on appeal, the circuit judge may again consider departing on remand

Assuming for the moment that the departure here was invalid, the proper remedy should have been controlled by *Jackson v. State*, 64 So. 3d 90 (Fla. 2011). There, this Court reversed the imposition of a downward departure sentence because the trial court did not adhere to section 921.002(1)(f)’s requirement that a departure sentence be justified by written findings. *Id.* at 92-93. It then analyzed which remedy should accompany the reversal of a downward departure sentence, observing that the Criminal Punishment Code “is silent on how a trial court must resentence a defendant when the original departure sentence is reversed on appeal.” *Id.* at 92. Based on its “reading of the legislative scheme,” the Court ultimately concluded that “nothing within the [Code] precludes the imposition of a downward departure sentence on resentencing following remand.” *Id.* at 93. It therefore instructed the

trial court that it could consider reimposing a downward departure at a *de novo* resentencing hearing.

Notably, the Court did not confine that holding to cases in which the reversal was predicated on the failure to provide written reasons, and instead employed broad language forbidding “an appellate court [from] preclud[ing] a trial court from resentencing a defendant to a downward departure if such a departure is supported by valid grounds.” *Id.* The sole limitation on that rule recognized by *Jackson* is the requirement that any new departure sentence “comport[] with the principles and criteria prescribed by the Code.” *Id.* In other words, a trial court may always consider reimposing a downward departure sentence on remand so long as valid grounds support doing so.

The contrary rule—that a new departure sentence is impermissible on remand—applies only where the appellate court vacated an *upward* departure sentence under the old sentencing guidelines. *See Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987). In that circumstance, reconsideration of an upward departure sentence is unlawful because doing so would “needlessly subject the defendant to unwarranted efforts to justify the sentence.” *Id.* Because remands following reversal of downward departures do not implicate that concern, the limitation on a second departure is inapplicable. *See State v. Collins*, 985 So. 2d 985, 992 (Fla. 2008)

(explaining that *Shull* has no bearing where “the concerns *Shull* addressed do not apply”).

B. The First, Second, Fourth, and Fifth Districts have unanimously read *Jackson* to permit new downward departures at resentencing where the departure was deemed substantively invalid on appeal

The district courts have consistently acknowledged this distinction between invalid upward and downward departures. *See, e.g., Jones v. State*, 71 So. 3d 173, 176 (Fla. 1st DCA 2011) (explaining that *Shull* applies to “upward departure[s]” whereas *Jackson* governs “downward departure[s]” (emphasis in original)). In fact, they unanimously apply *Jackson* to permit consideration of a new downward departure after reversing the existing departure on substantive grounds:

First District. In *Lee*, the First District reversed a downward departure because insufficient evidence supported the statutory mitigating factor cited by the circuit court and because each of the cited non-statutory mitigators were legally impermissible. *Lee v. State*, 223 So. 3d 342, 359-60 (Fla. 1st DCA 2017) (*en banc*). The court then considered the proper remedy. Citing *Jackson*, it wrote: “On remand, the trial court may again consider imposing a departure sentence if there are valid legal grounds to support the departure sentence, and those legal grounds are supported by competent, substantial evidence.” *Id.* at 360.

Second District. In its recent decision in *Pinckney*, Second District found a lack of competent, substantial evidence to support a downward departure, and

therefore reversed the sentence. *State v. Pinckney*, 173 So. 3d 1139, 1139-40 (Fla. 2d DCA 2015). Rather than preclude the possibility of a new departure at resentencing, the Second District wrote, citing *Jackson*: “On remand, the court is free to impose another downward departure if Pinckney can establish a valid basis.” *Id.* at 1140.¹

Fourth District. The Fourth District applies the same remedy. In *State v. Michels*, it reversed a downward departure because the stated ground was not supported by the evidence. 59 So. 3d 1163, 1165 (Fla. 4th DCA 2011). The panel initially remanded for resentencing “within the guidelines.” *Id.* at 1166. But on rehearing, the panel amended its opinion to conform to this Court’s holding in *Jackson*: “On remand, the trial court should be again permitted to depart if it finds a legally sufficient reason to do so.” *Id.*

Fifth District. Finally, the Fifth District in *Milici* rejected each of the trial court’s stated grounds for a downward departure as unsupported by competent, substantial evidence. *State v. Milici*, 219 So. 3d 117, 124 (Fla. 5th DCA 2017). As with the other districts, it then cited *Jackson* and held that “the trial court may still

¹ In a later case, the Second District remanded for resentencing within the guidelines. *See State v. Imber*, 223 So. 3d 1070, 1073 (Fla. 2d DCA 2017). But it overlooked *Jackson* and instead cited *Shull*, this Court’s upward departure case. Even if *Imber*, not *Pinckney*, now dictates the remedy in the Second District, *Pinckney*’s interpretation of *Jackson*—that *de novo* resentencing is required for all reversals of a downward departure—is a ground for conflict; the Second District has never revisited its reading of *Jackson* and merely ignored the case in *Imber*.

impose a downward departure sentence if such a sentence is supported by valid grounds.” *Id.* at 124 (internal quotation marks omitted).

C. In Petitioner’s case, by contrast, the Third District precluded the possibility of a downward departure at resentencing

Unlike those precedents, the Third District has now remanded for resentencing “within the sentencing guidelines.” A7. Prior to rehearing, the district court panel had reversed the departure sentence but issued a “remand for resentencing at which the trial court may again impose a downward departure sentence,” noting only that any new departure “must be a recognized legally permissible reason for such sentence.” A4. But post-rehearing, the Third District has constrained the sentencing judge to a within-range sentence, a clear violation of *Jackson* and a conflict with the First, Second, Fourth, and Fifth Districts.

CONCLUSION

This Court should exercise its discretionary jurisdiction to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a copy of the foregoing has been furnished by electronic mail this **tenth** day of May 2018 to the following:

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

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