

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-1230

JUAN LEAL ESQUIVEL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Esquivel v. State*, 32 Fla. L. Weekly D1386 (Fla. 3d DCA May 30, 2007), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as “A,” followed by the page number(s). All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

At Mr. Esquivel's sentencing hearing on February 21, 2006, the trial court imposed a sentence which constituted an upward departure from the sentencing guidelines (A. 2-3). At that hearing the trial court orally announced reasons for that departure (A. 2-3). The trial court failed to enter a written order setting forth the court's reasons for departing from the sentencing guidelines (A. 3).

After an appeal was filed to the Third District Court of Appeal, on June 8, 2006, a transcript of the February 21st sentencing proceeding was filed in the trial court (A. 3-4). The transcript was not signed by the trial judge (A. 4).

On appeal, Esquivel contended that the trial court's failure to enter signed, written reasons in support of its upward departure required that the departure sentence be reversed and the case remanded for sentencing within the guidelines (A. 4). The district court of appeal held that because Esquivel did not challenge the oral reasons for the departure sentence and did not state that he was in any way prejudiced by the judge's failure to enter signed, written reasons in support of the departure sentence, the judge's failure to enter such signed, written reasons did not require that the departure sentence be reversed and the case remanded for sentencing within the guidelines (A. 6). Accordingly, the district court of appeal reversed and remanded to the trial court "with instructions that it either sign the

transcription of the orally stated reasons for departure or resentence the defendant within the guidelines.” (A. 6).

Notice invoking this Court's discretionary jurisdiction was filed June 26, 2007.

SUMMARY OF ARGUMENT

In *Pressley v. State*, 921 So.2d 736 (Fla. 1st DCA 2006), the First District Court of Appeal held that the trial court's complete failure to either enter written reasons for its departure from the sentencing guidelines or sign the transcript of the sentencing hearing required reversal and remand for sentencing under the sentencing guidelines. In the present case, the Third District Court of Appeal held that the trial court's complete failure to either enter written reasons for its departure from the sentencing guidelines or sign the transcript of the sentencing hearing did not require reversal and remand for sentencing under the guidelines. Petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal based on this express and direct conflict of decisions.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *Pressley v. State*, 921 So.2d 736 (Fla. 1st DCA 2006).

Section 921.0016(1)(c), Florida Statutes (1995) and Florida Rule of Criminal Procedure 3.703(d)(30)(A) require that any sentence departing from the sentencing guidelines must be accompanied by a written statement, signed by the sentencing judge, delineating the reasons for departure. A written transcription of orally stated reasons for departure is sufficient if signed and filed by the judge.¹

¹Section 921.0016(1)(c) states:

“A state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent is a departure sentence and must be accompanied by a written statement delineating the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within 7 days after the date of sentencing.

Florida Rule of Criminal Procedure (d)(30)(A) provides:

“If a sentencing judge imposes a sentence that departs from the recommended guidelines sentence, the reasons for departure shall be orally articulated at the time sentence is imposed. Any departure sentence must be accompanied by a written statement, signed by the sentencing judge, delineating the reasons for departure. The written statement shall be filed in the court file within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure articulated at the time sentence was imposed is sufficient if it is signed by the sentencing judge and filed in the court file within 7 days after the date of sentencing. The sentencing judge may also list the written reasons for departure in the space provided on the guidelines scoresheet and shall sign the scoresheet.”

In *Pressley v. State*, 921 So.2d 736 (Fla. 1st DCA 2006), the trial court departed upwardly from the sentencing guidelines but the trial court did not prepare written findings for departure as required by section 921.0016(1)(c) and Rule 3.703(d)(30)(A), nor was a transcript of sentencing signed and filed by the trial court at any time before the appeal was taken. The defendant filed a motion under Florida Rule of Criminal Procedure 3.800(b)(2) based on the trial court's failure to enter written reasons or file a signed transcript. The motion was denied without the trial court entering written reasons or signing and filing a transcript of the sentencing proceeding. The First District Court of Appeal held that the trial court's complete failure to enter written reasons for the departure or sign the transcript of the sentencing hearing required reversal and remand for sentencing under the guidelines:

Although the trial court departed upwardly from the sentencing guidelines, the trial court prepared no written findings for departure as is required by section 921.0016(1)(c), nor was a transcript of sentencing signed and entered into the file at any time before appeal was taken. *See Maddox v. State*, 760 So.2d 89, 106-08 (Fla.2000). Although the appellant complained of the lack of written reasons (or signed, filed transcript) in a motion filed under Florida Rule of Criminal Procedure 3.800(b)(2), the trial court denied the motion without stating reasons for departure (or signing and filing the transcript). This failure distinguishes the case from *Mandri v. State*, 813 So.2d 65, 66 (Fla.2002), and brings it under *Butler v. State*, 765 So.2d 274, 275 (Fla. 1st DCA 2000). Accordingly, here, as in *Butler*, we reverse and remand for sentencing under the guidelines.

921 So.2d at 736.

In the case at bar, the trial court departed upwardly from the sentencing guidelines but the trial court did not prepare written findings for departure as required by section 921.0016(1)(c) and Rule 3.703(d)(30)(A), nor was a transcript of sentencing signed and filed by the trial court at any time before the appeal was taken. The defendant filed a motion under Florida Rule of Criminal Procedure 3.800(b)(2) based on the trial court's failure to enter written reasons or file a signed transcript. The motion was denied without the trial court entering written reasons or signing and filing a transcript of the sentencing proceeding. The Third District Court of Appeal held that the trial court's failure to enter written reasons for the departure or sign the transcript of the sentencing hearing did not require reversal and remand for sentencing under the guidelines. This holding expressly and directly conflicts with the holding of the First District in *Pressley* that reversal and remand for sentencing under the guidelines is required under these circumstances.

In its decision in this case, the Third District recognized the distinction drawn in the case law between a complete failure to file written reasons for departure and the late filing of such reasons where the defendant is not prejudiced by the delay:

Current case law, however, has drawn a clear distinction between a complete failure to file written reasons for departure and technical procedural errors, generally late filings, which do not prejudice defendants. See and compare Matchett v. State, 791 So.2d 1087 (Fla.2001); Pressley v. State, 921 So.2d 736 (Fla. 1st DCA 2006); Butler v. State, 765 So.2d 274 (Fla. 1st DCA 2000); with Mandri v.

State, 813 So.2d 2002; Maddox v. State, 760 So.2d 89 (Fla.2000); Beck v. State, 817 So.2d 858 (Fla. 5th DCA 2002); Weiss v. State, 720 So.2d 1113 (Fla. 3d DCA 1998), approved 761 So.2d 318 (Fla.2000.) The latter cases suggest that nonfundamental sentencing errors are subject to the harmless error rule.

(A. 4). However, the Third District placed this case into the wrong category of these types of cases. The trial court in this case completely failed to file written reasons for departure, both at the initial sentencing and when the defendant filed a Rule 3.800(b) motion to correct sentence. Accordingly, this case is governed by *Pressley* where reasons were never filed, not *Mandri v. State*, 813 So.2d 65 (Fla.2002) and *Weiss v. State*, 720 So.2d 1113 (Fla. 3d DCA 1998), *aff'd*, 761 So.2d 318 (Fla.2000) where written reasons were filed late.

The decision of the Third District in this case renders the mandatory requirement of written reasons for departure set forth in both the Florida Statutes and the Florida Rules of Procedure meaningless. While untimely compliance with these mandatory requirements is excused under *Mandri* and *Weiss* where no prejudice can be demonstrated as a result of that untimeliness, a total failure to comply with the mandatory requirement of written reasons, both at the initial sentencing and when the judge is given a second chance upon the filing of a 3.800 motion, must require resentencing under the guidelines if the mandatory requirement of written reasons for departure is to have any force and effect. *See Matchett v. State*, 791 So.2d 1087 (Fla.2001)(trial court's complete failure to file

written reasons for departure at all, rather than failure to timely file reasons for the departure sentence, constitutes fundamental error); *Maddox v. State*, 760 So.2d 89, 108 (Fla.2000)(“In our opinion, while there is a qualitative effect on the integrity of the sentencing process when the trial court fails to file any written reasons for imposing a departure sentence, this same concern is not present when the written reasons are filed late but within sufficient time for the defendant to file a motion to correct the sentence on this basis.”).

It is therefore respectfully submitted that this Court should exercise its discretionary jurisdiction to review the decision of the Third District in this case based on the express and direct conflict between that decision and the decision of the First District in *Pressley*.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 9th day of July, 2007, and that the type used in this brief is 14 point proportionately spaced Times New Roman.

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