

IN THE SUPREME COURT OF FLORIDA

KELVIN L. DUNN,

Petitioner,

v.

CASE NO. SC09-1101

STATE OF FLORIDA,

Respondent.

_____/

JURISDICTIONAL BRIEF OF PETITIONER

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VS. : CASE NO. SC09-1101
STATE OF FLORIDA, :
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JURISDICTIONAL BRIEF OF PETITIONER

I STATEMENT OF THE CASE AND FACTS

The state appealed Dunn's downward departure sentence. The First District reversed because the trial court failed to make written or oral findings to support the underdeparture. However, the appellate court provided the trial court a second opportunity to justify the sentence: "If the trial court wishes to depart downward . . . it must announce on the record a valid reason for doing so." State v. Dunn, 970 So. 2d 922 (Fla. 1st DCA 2007)(Dunn I). On remand, the trial court again imposed a downward departure. The state again appealed. Disregarding its decision in Dunn I, the First District held that the previous reversal was for a decision within the Criminal Punishment Code minimum, "with no possibility of departure." State v. Dunn, 2009 WL 886230 (Fla. 1st DCA April 3, 2009)(Dunn II). The First District denied rehearing. Dunn now seeks discretionary conflict review.

II. SUMMARY OF THE ARGUMENT

The First District's decision directly and expressly conflicts with Pease v. State, 712 So. 2d 374 (Fla. 1997), on whether a downward departure sentence can survive the failure to issue a contemporaneous downward departure order. The district court's reliance on the rule in Pope v. State, 561 So. 2d 554 (Fla. 1990), requiring resentencing without departure when a trial court neglects to provide contemporaneous written reasons, undermines the exception for downward departures recognized in Pease. This Court should grant discretionary review and order briefing on the merits to resolve the conflict with Pease, to determine whether Pope survives Pease as to downward departures, and to clarify whether a remand for written downward departure reasons may be rescinded in an appeal following the remand, as occurred in this case.

III. ARGUMENT

THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH PEASE V. STATE, 712 SO. 2D 374 (FLA. 1997), ON WHETHER THE TRIAL COURT'S FAILURE TO TIMELY FILE WRITTEN REASONS FOR AN OTHERWISE PROPER DOWNWARD DEPARTURE SENTENCE NECESSARILY INVALIDATES THE SENTENCE.

In Dunn's first appeal, the First District Court of Appeal reversed a downward departure sentence for lack of written reasons and remanded with instructions to provide departure reasons if the trial court again chose to depart. Dunn I. However, on appeal after remand, the same court, with a panel including one of the same three judges who served on the first panel, again reversed the downward departure and concluded that the failure to provide written reasons in the first sentencing proceeding compelled a Criminal Punishment Code sentence on remand. Dunn II. The Dunn II court cited Dunn I, but did not note its directions to the trial court to enter written reasons if it again departed downward on remand.

In Dunn II, the First District relied primarily on Pope v. State, 561 So. 2d 554 (Fla. 1990). There this Court, reviewing an upward departure sentence, ruled that "when an appellate court reverses an upward departure sentence because there were no written reasons, the court must remand for resentencing within the guidelines." Id. at 556. The court in Dunn II did not discuss Pease v. State, 712 So. 2d 374 (Fla. 1997), in which this Court approved a downward departure sentence supported by valid

but untimely written reasons. The Court in Pease distinguished upward and downward departure orders:

There is a significant difference between this situation and those situations where the State itself complains about something the State was obligated to do in order to increase a defendant's guideline's sentence, i.e., the State's obligation to see that written reasons are timely prepared and filed, if the State is going to punish the defendant more severely than the guidelines provide. Obviously, the State's mistake cannot be used as an excuse for the State's failure to do what the State itself was obligated to do.

Id. at 377. This Court discussed the rule in Pope but “recede[d] from any prior holdings suggesting that the defendant must suffer the consequences of such a mistake despite the existence of valid reasons for the judge's downward departure sentence at the time of sentencing.” Id. at 376.

The First District's opinion in Dunn I comported with Pease's holding that a valid departure order, even if untimely, can justify a downward departure sentence. In prohibiting a downward departure on remand, Dunn II conflicts with Pease's holding that a downward departure can survive the failure to issue a contemporaneous downward departure order. The conflict is express and direct. In making this determination, this Court may consider Dunn I. Dunn II incorporates Dunn I by reference, and its holding as to downward departures is comprehensible only in light of Dunn I.

This Court should grant discretionary review and order briefing on the merits to resolve the conflict with Pease, to determine whether Pope survives Pease as to downward departures,

and to clarify whether a remand for written downward departure reasons may be rescinded in an appeal following the remand, as occurred in this case.

IV. CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order briefing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Thomas Winokur, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Kelvin Dunn, this _____ day of July, 2009.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

KELVIN L. DUNN,

Petitioner,

vi.

CASE NO. SC09-1101

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX TO
JURISDICTIONAL BRIEF OF PETITIONER

APPENDIX

DOCUMENT

- | | |
|---|---|
| A | <u>State v. Dunn</u> , 970 So.2d 922 (Fla. 1st DCA 2007) |
| B | <u>State v. Dunn</u> , 2009 WL 886230 (Fla. 1st DCA
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