

IN THE SUPREME COURT OF FLORIDA

KELVIN L. DUNN,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. SC09-1101

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, KELVIN L. DUNN, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form (hereinafter referenced as ("slip op.")). The only facts in the opinion are that First District reversed and remanded the original downward departure sentence, and that on remand, the trial court again imposed a downward departure sentence.

SUMMARY OF ARGUMENT

Pease v. State, 712 So. 2d 374 (Fla. 1997), holds that a downward departure sentence may be affirmed on appeal where the trial court orally pronounced valid reasons for departure at the time of sentencing, but inadvertently failed to enter contemporaneous written reasons.

The decision below does not directly and expressly conflict with Pease in several respects. First, the trial court did not orally pronounce valid reasons for departure at the time of sentencing; instead, the court gave no reasons at all for departure. Second, the court did not inadvertently fail to enter a timely written order; again, the court simply refused to give reasons for the departure. Finally, Pease merely affirmed the sentence and did not address what the trial court can do on remand following reversal of a departure sentence, which was the matter at issue below. Accordingly, the decision below does not directly and expressly conflict with Pease.

ARGUMENT

ISSUE

DOES THE DECISION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICT WITH PEASE V. STATE, 712 SO.2D 374 (FLA. 1997)? (Restated)

Petitioner contends that this Court has jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Florida Constitution. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict).

In addition, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite Pease v. State, 712 So.2d 374 (Fla. 1997).

The First District originally reversed Petitioner's departure sentence "[b]ecause the trial court failed to make any written or oral

findings to support the downward departure sentence." State v. Dunn, 970 So.2d 922 (Fla. 1st DCA 2007). The court added, "[i]f the trial court wishes to depart downward from the lowest permissible sentence indicated on the Criminal Punishment Code scoresheet, under section 921.00265(2), Florida Statutes, it must announce on the record a valid reason for so doing."

On remand, the sentencing court again imposed a departure sentence. Slip op. at 1. The State again appealed, arguing that the resentencing court was required to sentence Petitioner "within the guidelines." Slip op. at 2. The First District agreed, citing Pope v. State, 561 So.2d 554 (Fla. 1990), for the proposition that "when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines." Slip op. at 2, citing Pope at 556. In further support, the First District cited Henderson v. State, 622 So.2d 172, 173 (Fla. 1st DCA 1993); State v. Tiedge, 670 So.2d 191, 192 (Fla. 3d DCA 1996); and Pressley v. State, 921 So.2d 736, 736 (Fla. 1st DCA 2006); all of which held that a reversal based upon the trial court's failure to provide reasons for a departure sentence must be remanded for sentencing without possibility of departure. See also State v. Scott, 608 So.2d 943 (Fla. 5th DCA 1992); Williams v. State, 697 So.2d 1309 (Fla. 4th DCA 1997); State v. Wishhart, 738 So.2d 1004 (Fla. 2d DCA 1999); McAfee v. State, 782 So.2d 1023 (Fla. 5th DCA 2001); State v. Ahua, 947 So.2d

637 (Fla. 3d DCA 2007); Leeks v. State, 973 So.2d 1200 (Fla. 2d DCA 2008); and State v. Glenn, 976 So.2d 687 (Fla. 3d DCA 2008).¹

Several of the cases noted above involved the sentencing court's failure to provide reasons for downward departure sentences, as opposed to upward departure sentences that were authorized under the pre-Criminal Punishment Code Sentencing Guidelines.² In spite of the numerous instances of appellate courts applying the Pope rule to downward-departure sentences imposed without valid reasons, Appellant contends that this Court in Pease v. State, 712 So.2d 374 (Fla. 1997), abrogated the Pope rule with respect to its applicability to downward departure sentences. As such, Appellant contends that the First District's decision directly and expressly conflicts with Pease.

In Pease, this Court addressed the following question:

MAY A DOWNWARD DEPARTURE SENTENCE BE AFFIRMED
WHERE THE TRIAL COURT ORALLY PRONOUNCED VALID
REASONS FOR DEPARTURE AT THE TIME OF SENTENCING,
BUT INADVERTENTLY FAILED TO ENTER
CONTEMPORANEOUS WRITTEN REASONS?

Pease at 374.

The trial judge in Pease imposed a downward departure sentence. Although the court provided reasons for the departure at sentencing,

¹This Court created an exception to this rule when the sentencing court is unaware that it is imposing a departure sentence. If the court imposes a departure sentence under the erroneous belief that it is imposing a sentence within the permitted range, then the court may impose a departure on resentencing. See e.g., Roberts v. State, 547 So.2d 129 (Fla. 1989); State v. Betancourt, 552 So.2d 1107 (Fla. 1989); State v. Vanhorn, 561 So.2d 584 (Fla. 1990). This exception did not apply here.

²Tiedge; Scott; Wishhart; Ahua; Glenn.

it failed to "file a contemporaneous written order setting out the reasons supporting the downward departure sentence." Id. at 375. The trial judge later filed an order setting forth the reasons for the departure sentence, *nunc pro tunc*, based upon handwritten draft notes made by him on the bench at the time of sentencing, which were not typed at that time because his judicial assistant was absent. Id. There was no dispute that the reasons were valid. Id.

This Court refused to reverse the departure sentence, holding that a defendant should not lose the benefit of a downward departure sentence on the basis of the trial judge's "inadvertent error" in failing to comply with the required "ministerial act" of providing contemporaneous written reasons for the departure,³ because the defendant was "a victim of the trial court and the State's neglect." Pease at 376.

Nothing in the four corners of the First District's opinion conflicts with Pease. The opinion does not reflect that the sentencing court orally pronounced valid reasons for departure at the time of sentencing. The opinion does not reflect that the sentencing court made an "inadvertent error" in failing to reduce valid reasons to writing within the time permitted by the statute and rule. In fact, the earlier opinion reflects that "the trial court failed to make **any written or oral findings** to support the downward

³At the time of the sentencing in Pease, the sentencing court was required to file "contemporaneous" written reasons for departure. See Ree v. State, 565 So.2d 1329 (Fla. 1990); State v. Lyles, 576 So.2d 706 (Fla. 1991). Under current law, the court has seven days to reduce oral reasons to writing. § 921.00265(2), Fla. Stat.

departure sentence." Dunn I (e.s.). As valid departure reasons given at sentencing were the basis for the ruling in Pease, the First District's opinion does not directly and expressly conflict with Pease.

This Court has described the holding in Pease as follows: "a downward departure sentence may be affirmed where the trial court orally pronounced valid reasons for departure at the time of sentencing, but inadvertently failed to enter contemporaneous written reasons." Valrio v. State, 700 So.2d 668, 669 (Fla. 1997). Because the sentencing court here did not "orally pronounce[] valid reasons for departure at the time of sentencing," Pease does not apply.

Other decisions recognize that Pease does not create a categorical rule that a sentencing court must be given another opportunity to impose a departure sentence on remand from the appellate court's reversal of an illegally-imposed downward departure sentence. For instance, the Second District in Wishhart v. State cited Pease when it ruled, "[w]hile we may affirm a downward departure sentence when the court fails to enter written reasons but has announced valid reasons at sentencing, we must reverse when it gives no reasons at all." Similarly, the Fourth District in State v. Bostick, 715 So.2d 298, 299-300 (Fla. 4th DCA 1998), ruled "Pease does not require the appellate court to affirm a departure sentence where, as here, the trial court never heard sufficient evidence to justify the departure since, in such a case, there is no 'valid reason' for departure."

In short, Pease only holds that an appellate court should affirm a downward departure when the court pronounced valid reasons for it at sentencing, but failed to reduce to writing within the time permitted by the statute and rule, through no fault of the defendant. Pease does not apply when the sentencing court imposes a downward departure but refuses to provide reasons for it, valid or otherwise, timely or not. As nothing in the First District's opinion conflicts with Pease, Petitioner has failed to show any grounds for this Court to exercise its jurisdiction here.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on July 22, 2009.

Respectfully submitted and served,

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[AGO# L09-1-17937]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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A P P E N D I X

State v. Dunn (Fla. 1st DCA April 3, 2009)A