IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

VS. CASE NO. 65,445

JEFFREY AMES,

RESPONDENT.

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority and appellee below in Ames v. State, ___So.2d___ (Fla. 1st DCA 1984), 9 F.L.W. 663, opinion on rehearing denied, 9 F.L.W. 1089, will be referred to as "the State." Respondent, Jeffrey Marshall Ames, the criminal defendant and appellant below, will be referred to as "respondent."

No references to the three-volume record on appeal will be necessary.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

This case reaches this Court upon its June 18, 1984 acceptance of certiorari to resolve the following question, certified by the First District to be of great public importance:

> Whether the crimes for which the defendant was sentenced to consecutive[1] three-year mandatory minimum terms pursuant to Section 775.087(2), Florida Statutes, were "offenses [which arose] from separate incidents occuring at separate times and places" within the meaning of the rule announced in Palmer v. State, 438 So.2d 1 (Fla. 1983)?

Those matters essential to a resolution of this narrow legal issue are contained in the opinion of the First District, Ames v. State, which the State accepts in full. The Court will note that it has also accepted certiorari review over the First District's certification of the identical question in Wilson v. State, ___So.2d___ (Fla. 1st DCA 1984), 9 F.L.W. 429, opinion on rehearing granted, 9 F.L.W. 647, opinion on rehearing denied, 9 F.L.W. 1071. For the convenience of the Court, conformed copies of both opinions under review are attached to this brief as an appendix.

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1 Emphasis in original.

ISSUE

THE FIRST DISTRICT ERRED IN HOLDING THAT THE TRIAL JUDGE, AFTER HAVING IMPOSED TWO CONCURRENT THREE-YEAR MANDATORY MINIMUM TERMS OF IMPRISONMENT BASED UPON RESPONDENT'S POSSESSION OF A FIREARM DURING THE BURGLARY AND THE ARMED ROBBERY, COULD NOT THEN IMPOSE A CONSECUTIVE THREE-YEAR MANDATORY MINIMUM TERM OF IMPRISONMENT BASED UPON RESPONDENT'S POSSESSION OF A FIREARM DURING THE SUBSEQUENT SEXUAL BATTERY, BECAUSE THESE OFFENSES AROSE "FROM SEPARATE INCIDENTS OCCURING AT SEPARATE TIMES AND PLACES," THEREBY PERMITTING SUCH SENTENCINGS UNDER PALMER V. STATE, 348 So.2d 1 (Fla. 1983); ALTERNATIVELY, PALMER V. STATE IS "BAD LAW" AND SHOULD BE OVERRULED.

ARGUMENT

In Palmer v. State, 438 So.2d 1 (Fla. 1983), the defendant burst into a funeral parlor during a wake brandishing a gun and simultaneously robbed thirteen people. Upon the defendant's convictions for thirteen counts of armed robbery, the trial judge imposed thirteen consecutive seventy-five year sentences, directing that the three-year mandatory minimum sentences he was required to impose pursuant to §775.087(2), Fla.Stat. due to the defendant's possession of a firearm during these felonies would also be served consecutively. This Court ultimately held that "the imposition of cumulative three-year mandatory minimums of each of thirteen consecutive sentences (for multiple offenses) arising from the same criminal episode" was improper under the unamended §775.021(4), Fla.Stat. Id., 2.[2] The Court qualified this holding, however, by

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[2] The unamended §775.021(4) read:

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or

adding that the decision did not "prohibit consecutive mandatory minimum sentences arising from separate incidents occuring at seperate times and places", id., 4, while citing to Vann v. State, 366 So.2d 1241 (Fla. 3rd DCA 1979)--a decision which unfortunately does not clarify the parameters of the aforedescribed exception.

Assuming the legitimacy of Palmer v. State for the time being, the State would initially assert that the First District erred in holding that the trial judge here improperly imposed two consecutive three-year mandatory minimum terms of imprisonment based upon respondent's possession of a firearm first during the burglary and armed robbery and then during the sexual battery. The evidence unmistakably showed that respondent burglarized the victim's house by gaining entrance with a gun, then robbed her of $44.00 with the gun, and then sexually battered her with the gun after moving her to another room. That the robbery was completed in one location before the sexual battery began in another means that these two offenses, at least, arose "from separate incidents

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episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

Effective June 22, 1983, §775.021(4) reads:

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

The State would contend that the Palmer v. State holding would be inapplicable to defendants who commit their crimes after June 22, even if it survivesthis proceeding.

occuring at separate times and places" as the thirteen simultaneous armed robberies in Palmer v. State obviously did not. See Wilson v. State, in which the First District correctly determined that Palmer v. State did not prohibit the imposition of two consecutive mandatory minimum sentences upon an armed defendant who kidnapped a woman and then drove her "a short distance" before he sexually battered her. Certainly if the defendant in Wilson could receive consecutive mandatory minimum prison sentences for kidnapping and sexual battery when the kidnapping was ongoing during the battery, then the respondent here could receive consecutive mandatory minimumprison sentences for robbery and sexual battery when the robbery had concluded before the sexual battery began. Indeed, the State would assert that under the logic of Palmer v. State as interpreted by the First District in Wilson v. State, the respondent here, had he received three consecutive life sentences for the burglary, the armed robbery, and the sexual battery, could also have received three consecutive three year mandatory minimum sentences as conditions thereof. In other words, the State would contend that, even if Palmer v. State is "good law", its prohibition upon stacking consecutive mandatory minimum sentences applies only to offenseswhich were committed simultaneously.

The State would alternatively contend that the sentencing dispositions of the trial judge were proper because Palmer v. State is "bad law" and should be overruled. The problems with Palmer v. State are twofold.

First, as this Court has reaffirmed many times, "[s]tatutes should be construed to make effective the legislative purpose and intent rather than defeat same", State ex. rel. Watson v. Biggers,

200 So.224, 225 (Fla.1941); see e.g. Scott v. State, ___So.2d___ (Fla.1984), 9 F.L.W. 209, State v. Baker, ___So.2d___ (Fla.1984), 9 F.L.W. 209, and State v. Gibson, ___So.2d___ (Fla.1984), 9 F.L.W. 234. Axiomatically, a court should not ascribe to the legislature an absurd intent, see e.g. Winter v. Playa del Sol, 353 So.2d 598 (Fla. 4th DCA 1977). Yet Palmer v. State, particularly as interpreted by the First District in Ames v. State, see also Warren v. State, (Fla. 3rd DCA 1983), 9 F.L.W. 1132, effectively presumes that the Florida Legislature, in passing §775.087(2), absurdly intended to permit criminal defendants on crime sprees the effectively unpenalized possession of their firearms in all offenses subsequent to the first, notwithstanding the legislature's declaration of sympathy for victims of crimes, §960.02. Did the legislature really intend that a criminal defendant such as respondent who uses a firearm to burglarize a house and rob and rape its occupant should escape with legal consequences effectively no more servere than those which would have ensued had he cast the weapon aside after the burglary? Of course it did not.

The second problem with Palmer v. State is more technical, yet equally compelling. In Segal v. Wainwright, 304 So.2d 446, 449 (Fla.1974), this Court held that a defendant who receives two consecutive sentences must complete the first one way or another before commencing to serve the second. Obviously, there is no legal or logical rationale under which a defendant could serve out a condition of a sentence before he has begun serving the sentence itself. Cf Miller v. State, 297 So.2d 36 (Fla. 1st DCA 1974); Bruner v. State, 398 So.2d 1005 (Fla. 1st DCA 1981); Brooks v. State, 421 So.2d 829 (Fla. 1st DCA 1982); Dixon v. State, 339 So.2d 688 (Fla.

2nd DCA 1976), and Lund v. State, 396 So.2d 255 (Fla. 3rd DCA 1981). Yet, this is exactly in effect what will happen if a trial judge who imposes multiple consecutive sentences must direct that the mandatory minimums he is required to impose as conditions thereof be served concurrently. Palmer v. State thus conflicts in effect with Segal v. Wainwright, and must yield to it.

CONCLUSION

WHEREFORE, the State moves that the sentencing decision of the First District be REVERSED and VACATED and this cause remanded with directions that the sentencing decision of the trial judge be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true anc correct copy of the foregoing brief has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL by hand delivery this 9th day of July, 1984.

John W. Tiedemann
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