IN THE SUPREME COURT OF FLORIDA

CORNELIUS WILSON,

Petitioner,

vs.

Case No. 65,446

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Cornelius Wilson, the criminal defendant and appellant below, will be referred to as "petitioner.". Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

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

All emphasis will be supplied by the State unless indicated.

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 opinions of the First District, 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, which the State accepts in full.[2] The Court will note that it has also accepted certiorari review over the First District's certification of the identical question in Ames v. State, ___So.2d___ (Fla. 1st DCA 1984), 9 F.L.W. 663, opinion on rehearing denied, 9 F.L.W. 1089, Case No. 65,445. For the convenience of the Court, conformed copies of both opinions under review are attached to this brief as an appendix, cf Fla.R.App.P. 9.120(d).

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1 Emphasis in original.

2 The State thus rejects petitioner's own statement of the case and facts as second-best to the opinions of the First District.

ISSUE

THE FIRST DISTRICT PROPERLY HELD THAT THE TRIAL JUDGE, AFTER HAVING IMPOSED CONSECUTIVE SENTENCES FOR KIDNAPPING AND SEXUAL BATTERY, COULD IMPOSE TWO CONSECUTIVE THREE-YEAR MANDATORY MINIMUM TERMS OF IMPRISONMENT BASED UPON PETITIONER'S POSSESSION OF A FIREARM DURING THESE OFFENSES, BECAUSE THESE OFFENSES AROSE "FROM SEPARATE INCIDENTS OCCURING AT SEPARATE TIMES AND PLACES", THEREBY PERMITTING SUCH SENTENCINGS UNDER PALMER V. STATE, 438 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),[3] 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

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3 The pertinent §775.087(2)(1981) read, in pertinent part, as follows:

> 775.087 Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.--
>
> (2) Any person who is convicted of:
>
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes:... and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provision of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.27 or. 944.29, prior to serving such minimum sentence.

The recent amendment to this statute is of no relevance here.

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.[4] The Court qualified this holding, however, by 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 properly held that the trial judge here correctly imposed two consecutive three-year mandatory minimum terms of imprisonment based upon petitioner's possession of a firearm first during the kidnapping and then during the sexual battery. The evidence unmistakably showed that petitioner kidnapped the victim at

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The unamended §775.021(4) read:

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

gunpoint and then drove her "a short distance" before he sexually battered her at gunpoint. That the kidnapping began in one location before the sexual battery began in another means that these two offense arose "from separate incidents occuring in separate times and places" as the thirteen simultaneous armed robberies in Palmer v. State obviously did not. See Murray v. State, ___So.2d___ (Fla. 4th DCA 1984), 9 F.L.W. 1466, in which the Fourth District correctly determined that Palmer v. State did not prohibit the imposition of two consecutive mandatory minimum sentences based upon a defendant's armed robbery and sexual battery of the victim in the course of a kidnapping. The Fourth District did not decide whether a separate consecutive mandatory minimum sentence for the kidnapping would have been proper because the trial judge imposed no such sentence, and unfortunately decided that a separate consecutive mandatory minimum sentence for a sexual battery committed by the defendant's accomplice was improper. The State believes that under Palmer v. State, the defendant in Murray v. State could have received separate consecutive mandatory minimum sentences for the kidnapping, the robbery, and both sexual batteries, insofar as all were committed sequentially at gunpoint. 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 offenses which 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 threefold.

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. Thomas 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 petitioner and by the First District in Ames v. State, see also Warren v. State, ___So.2d___ (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, Fla.Stat. Did the legislature really intend that a criminal defendant such as petitioner who uses a firearm to first kidnap a women, then to rape her, should escape with legal consequences effectively no more severe than those which would have ensured had he cast the weapon aside after the kidnapping had commenced? 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 1980); 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.

The third problem with Palmer v. State and its progeny is that they essentially continue the notorious "single transaction rule," recently and correctly repudiated by this Court in the context of when a defendant may receive separate consecutive sentences for distinct offenses committed in the course of a single criminal episode, see, e.g., Scott v. State, State v. Thomas Baker, State v. Gibson, and State v. Charles L. Baker, ___So.2d___ (Fla. 1984), 9 F.L.W. 282,[5] in the context of when a defendant may receive separate consecutive mandatory minimum sentences for

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5 These decisions effectively overrule the decisions of Simpkins v. State, 395 So.2d 625 (Fla. 1st DCA 1981), Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980), Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980), and Faison v. State, 426 So.2d 963 (Fla. 1983), relied upon by petitioner for the proposition that separate adjudications and sentences for kidnapping and another serious offense cannot lie where the kidnapping is in incidental facilitation of the other offense. Compare also Golden v. State, 120 So.2d 651 (Fla. 1st DCA 1960) with Johnson v. State, 436 So.2d 248 (Fla. 5th DCA 1983), Cowart, J., concurring.

possessing a firearm while committing such offenses. The State would submit that there is no legal or logical rationale for such an inconsistent approach either under the unamended §775.021(4) interpreted in the aforecited cases, or under the amended version of the same statute. Should the Court disagree with regards to the old statute, i.e. the one at issue here and in Ames v. State, the State would alternatively argue that the new statute, at least, makes it crystal clear that the "single transaction rule" is under all circumstances a dead letter in this state, and ask the Court to limit Palmer v. State accordingly.

CONCLUSION

WHEREFORE, the State would request that the sentencing decision of the First District be AFFIRMED.

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 Ms. Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, by hand delivery this 20th day of July, 1984.

John W. Tiedemann
Assistant Attorney General