

047

IN THE SUPREME COURT OF FLORIDA

CORNELIUS WILSON,  
Petitioner,

v.

CASE NO. 65,446

STATE OF FLORIDA,  
Respondent.

**FILED**  
SID J. WHITE  
JUL 19 1984  
CLERK, SUPREME COURT  
By [Signature]  
Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CORNELIUS WILSON, :  
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 Petitioner, :  
 :  
 v. : CASE NO. 65,446  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 :  
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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

CORNELIUS WILSON was the defendant in the trial court, the appellant in the First District Court of Appeal, and will be referred to herein as petitioner. Respondent, the State of Florida, was the prosecuting authority below and the appellee before the appellate court.

The record on appeal consists of one volume and will be referred to by use of the symbol "R" followed by the appropriate page number in parentheses. The decision of the First District Court of Appeal is attached as an appendix.

## II STATEMENT OF THE CASE AND FACTS

By information, petitioner was charged with sexual battery with a firearm and kidnapping with a firearm. (R-1-2). He entered pleas of guilty to both counts of the information. (R-18-26). The factual basis of the plea reflected that on November 19, 1982, the victim was confronted on her front porch by petitioner, who was armed with a gun. In compliance with his directives, the victim entered petitioner's car. Petitioner drove the vehicle a short distance, and with the gun still in his possession, committed a sexual battery upon the victim. (R-23).

Following acceptance of petitioner's pleas, adjudication of guilt was imposed. The trial judge sentenced petitioner to thirty years imprisonment with a minimum mandatory three year sentence for Count I. (R-32-33, 5-9). As to Count II, a sentence of thirty years imprisonment with a minimum mandatory three term was imposed, to run consecutively to Count I. (R-33-34, 5-9). Jurisdiction for parole purposes was also retained. (R-33-34).

Notice of appeal was timely filed. (R-10).

Before the First District Court of Appeal, petitioner asserted, inter alia, that the imposition of consecutive three year mandatory minimum sentences was erroneous under Palmer v. State, 438 So.2d 1 (Fla.1983). In its initial opinion of January 25, 1984, the District Court ruled the imposition of consecutive mandatory minimum sentences was erroneous. (A-2). In response to respondent's timely motion for rehearing, the District Court, sua sponte, withdrew the last paragraph of

its initial opinion and affirmed the imposition of the consecutive three-year mandatory minimum sentences. (A-3-4). Petitioner's timely motion for rehearing was denied, but the District Court certified as one of great public importance the following question:

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

Petitioner filed a timely Notice to Invoke Discretionary Review. This merit brief follows.

### III ARGUMENT

#### ISSUE PRESENTED

WHETHER THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE-YEAR MANDATORY MINIMUM TERMS PURSUANT TO SECTION 775.087(2), FLORIDA STATUTES, WERE "OFFENSES [WHICH AROSE] FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" WITHIN THE MEANING OF THE RULE ANNOUNCED IN PALMER V. STATE, 438 So.2d 1 (Fla.1983)?

Petitioner submits the certified question should be answered in the negative and that accordingly, the consecutive three-year mandatory minimum sentences imposed against petitioner for his continuing possession of a firearm during a single criminal episode against a single victim must be reversed.

In Palmer v. State, 438 So.2d 1 (Fla.1983), this Court ruled that the "stacking" of consecutive mandatory three-year minimum sentences was improper. Mr. Palmer had entered a funeral parlor during a wake and, while brandishing a pistol, robbed numerous mourners. After his conviction on thirteen robbery counts, consecutive sentences totalling 975 years were imposed. The court also imposed the mandatory minimum of three years on each robbery count for a total of thirty-nine years. While recognizing that Section 775.087(2), Florida Statutes (1981) precludes the possibility of parole for a period of three years for any person who had in his possession a firearm during the commission of certain specified felonies, this Court concluded, based upon the well-established principle of statutory construction that penal statutes must be strictly construed, that that section did not authorize the prohibition of parole

for a period of greater than three years. The Court noted:

Nowhere in the language of section 775.087 do we find express authority by which the trial court may deny, under subsection 775.-087(2), a defendant's eligibility for parole for a period greater than three calendar years.

\* \* \*

Palmer, on the other hand, was sentenced to thirty-nine years, without eligibility for parole, based on a statute expressly authorizing denial of eligibility for parole for only three years.

\* \* \*

In the present case the state contends, in essence, that subsections 775.021(4) and 775.087(2), when read in pari materia, amount to a delegation of the parole authority to the trial court, whereby, in the exercise of its discretion, it may deny parole for three years multiplied by the number of separate offenses of which a defendant is convicted. We do not believe the legislature intended such a result as the sentence under review here when it added subsection (4) to section 775.021. In any event, we are unwilling to construe these two statutes in such a way as to allow the imposition of any sentence without eligibility for parole greater than three calendar years.

Id. at 304. As a caveat, the Court did state that "we [do not] prohibit consecutive mandatory minimum sentences for offenses arising from separate incidents occurring at separate times and places." Id. at 4.

In affirming the consecutive mandatory sentences herein, the District Court concluded that the petitioner's crimes arose from "separate incidents occurring at separate times and places." In so ruling, petitioner contends the District Court has misconstrued the Palmer rule.



Petitioner's offenses were not ones "arising from separate incidents occurring at separate times and places." Admittedly, petitioner abducted the victim in front of her residence and then transported her to another place where the sexual battery was consummated. This slight distinction in time and place, however, does not convert the offenses into "separate incidents." The District Court obviously overlooked that the crime of kidnapping, by its very nature, is a continuing one. Although the offense of kidnapping perhaps commenced at the abduction on the front porch, the offense of kidnapping continued during the victim's entire confinement. Thus, since the crime of kidnapping was continuing, the sexual battery was coterminous with the kidnapping.<sup>1</sup> Although petitioner committed two offenses, his crimes arose from a single criminal incident -- he abducted and raped a victim -- part and parcel of the same criminal episode.

The caveat of Palmer should be construed as referring to separate criminal episodes, as that term has been used in the traditional sense. Even in its height, the now repudiated "single transaction rule" would not have precluded separate

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The Court also overlooked that in order to even constitute separate crimes at all, the crimes of kidnapping and sexual battery require some separation in both time and place. Otherwise, the confinement is merely incidental to the sexual battery and the crime of kidnapping has not occurred. 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); Faison v. State, 426 So.2d 963 (Fla. 1983) (adopting Harkins-Friend-Simpkins interpretation of kidnapping statute).

convictions and separate sentences for Mr. Palmer's thirteen robberies. E.g., Harris v. State, 286 So.2d 32 (Fla. 2d DCA 1973); O'Neal v. State, 323 So.2d 685 (Fla. 2d DCA 1975); State v. Peavey, 326 So.2d 461 (Fla. 2d DCA 1975). Thus, this Court's reversal of Mr. Palmer's consecutive mandatory minimum sentences for his thirteen separate robberies demonstrates application of a rule much broader than the former "single transaction rule" since under the single transaction rule, "the fact that all crimes arose out of the same incident is not sufficient to render them facets of the same transaction." Moreno v. State, 328 So.2d 38, 39 (Fla. 2d DCA 1976); Estevez v. State, 313 So.2d 692 (Fla.1975). Construing the Palmer caveat as referring to separate criminal episodes would be consistent with legislative intent. The obvious objective of Section 775.087(2) was to serve as a deterrent -- to discourage the criminal use of firearms.<sup>2</sup> When viewed in this manner, Mr. Palmer's ineligibility for parole should not be determined based upon the fortuity of the number of mourners inside the funeral parlor he entered while armed. The statute was designed to discourage his armed entry. Had Mr. Palmer committed thirteen separate robberies at thirteen different houses, consecutive mandatory minimum sentences might be consistent with this legislative intent. Prior to each entry, the statute could have deterred him from further possession of the firearm. The same cannot be said, however, where possession of a firearm is continuous in a single criminal incident or episode.

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Chapter 75-7, Senate Bill No. 55, Senate Judiciary - Criminal Committee, Staff Analysis.

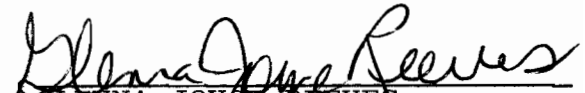
In the present case, petitioner abducted the victim at gunpoint. During the same incident, and while the gun was still in his possession, a sexual battery occurred. Imposition of consecutive mandatory minimum terms for his continuing possession of a firearm during his single criminal episode against his single victim does not further legislative intent. As in Palmer, the consecutive mandatory minimum sentences should be reversed. See also, State v. Baker, \_\_So.2d\_\_ (Fla. 1984) [9 F.L.W. 209].

IV CONCLUSION

For the reasons stated, petitioner requests a reversal of his consecutive mandatory three-year sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to JOHN TIEDEMANN, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to petitioner, CORNELIUS WILSON, #090038, Post Office Box 667, Bushnell, Florida 32513 on this 9th day of July, 1984.

  
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GLENNA JOYCE REEVES