

No Reg. Case

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 PAUL JOSEPH COTE,)
)
 Respondent.)
 _____)

CASE NO. 67,166

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent was the defendant in the criminal division of the circuit court of the Seventeenth Judicial Circuit, and was the Appellant in the Fourth District Court of Appeal. Petitioner was the prosecution and Appellee below. The parties will be referred to as they appear before this Court.

The following symbol will be used:

"R" Record on appeal.

STATEMENT OF CASE AND FACTS

Petitioner herein augments his prior Statement of the Case and Facts as follows:

1. The victim (mother) was home alone at night, with her infant child asleep on the couch, when suddenly and violently the Respondent smashed into the glass jalousie door with a crow bar, in an attempt to gain entrance, to kill her husband (R 20-22).

2. Respondent was under the mistaken belief that the victim's husband vandalized Respondent's apartment (R 20-21).

3. The victim "was startled out of my wits", "I jumped and screamed" as the Respondent continued yelling "Where is your husband?, I'm going to kill him" (R 22).

4. The victim grabbed her infant child from the couch, and saw Respondent step through the jalousie door. The victims locked themselves in the bedroom, as Respondent continued to break the door down in the bedroom (R 22).

5. The victim remained in panic, screaming and yelling (R 22).

6. The baby kept waking up screaming for about two months after the incident, continuously every night at ten o'clock (R 24).

POINTS ON APPEAL

POINT I

WHETHER PETITIONER RESPECTFULLY ACKNOWLEDGES THIS COURT'S RECENT DECISION IN JACKSON AS DISPOSITIVE OF THIS POINT?

POINT II

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES DUE TO THE PSYCHOLOGICAL TRAUMA CREATED?

SUMMARY ARGUMENT

POINT I: Petitioner respectfully acknowledges that this Court's very recent decision in Jackson, infra, is dispositive of this point.

POINT II: Petitioner maintains that the Fourth District Court of Appeal correctly determined that the trial court had not abused its discretion in departing from the guidelines due to psychological trauma caused to the victim. The offense of aggravated assault sub judice constituted an excessively violent and threatening act, and departure for such reason was proper. See Davis v. State, infra.

ARGUMENT

POINT I

PETITIONER RESPECTFULLY ACKNOWLEDGES
THIS COURT'S RECENT DECISION IN JACKSON
AS DISPOSITIVE OF THIS POINT.

Petitioner respectfully acknowledges this Court's recent decision in State v. Jackson, 10 FLW 564 (Fla. October 17, 1985), as dispositive of this point.

POINT II

THE TRIAL COURT DID NOT ERR IN DEPART-
ING FROM THE GUIDELINES DUE TO THE
PSYCHOLOGICAL TRAUMA CREATED.

Petitioner maintains herein that the Fourth District Court of Appeal correctly determined that the trial court had not abused its discretion in departing from the guidelines due to psychological trauma caused to the victim. Cote v. State, 468 So.2d 1019 (Fla. 4th DCA 1985). As held in Cote, supra at 1020-1021:

At the sentencing hearing the trial judge stated his reasons for departing from the guidelines:

Now, with respect to sentencing here, the only thing I would give the defendant benefit for is the fact he admitted his guilt here as opposed to putting the State through the task of going through a trial and the expense that would be encountered. On the other hand, the defendant did not come forward for a period of time to confess his guilt, and he does appear to have some remorse about what happened. The defendant does exhibit some remorse. That does not undo what he has done. That is always in the sentencing judge's mind as to whether the defendant realizes what he did was wrong, whether he feels sorry for it as opposed to saying, "I don't give a damn about it." I will give him credit for that.

On the other hand, what took place here obviously, you know, I could just place myself in the victim's situation, where it is 10:00 o'clock at night. She is sitting home with the baby.

Apparently, the defense attorney thought it would be in his client's best interest, knowing if the jury listened to the facts, they would return a verdict of guilty. But I can place myself in a situation of a wife

sitting at home with her infant, and all of a sudden, at 10:00 o'clock at night, someone is breaking through a glass door with a pole in his hand, and glass is breaking all over the place. The baby is crying. They run into a bedroom. She screams and he is saying he is going to kill her husband. This is like a scene out of a movie. We never expect something like that to be factual and happen to us, but unfortunately, it happened to this lady. I can empathize with her and her baby and the traumatic psychological and emotional experience this would have to them. If the husband had been home at the time, if he were home, probably he could have prevented this or curbed it before it got carried away. He is equally upset, you know, he exhibits love and concern for his wife and child. He is quite upset about what happened. So those are the facts you have to bear in mind.

....

The State is coming in and asking for the sentence to be aggravated in view of the long term and emotional and psychological circumstances to this victim of this crime.

Okay. I am going to sentence the defendant to a period of incarceration in the Florida State Prison for four years.

Appellant argues that the facts of this case do not provide a sufficient basis for departure from the guidelines. In Mischler v. State, 458 So.2d 37, 40 (Fla. 4th DCA 1984), we outlined some of the reasons which justify departure from the guidelines:

Clear and convincing reasons for departure have been held in Florida to include violation of probation repeated criminal convictions, crime "sprees" or "binges," "careers" of crime, extraordinary mental or physical distress inflicted on the victim, and extreme risk to citizens and law enforcement officers. We ask ourselves: What do all these reasons have

in common? The answer appears to be an excess in crime which either results in repetitive convictions, successive probation violations which decry the likelihood of rehabilitation or unusual physical or psychological trauma to the victim. To that, we now add crimes committed in a repugnant and odious manner. (Footnotes omitted).

We recognize that assault, by definition, requires a well-founded fear that violence is imminent, and that some degree of psychological trauma is already embodied in the guidelines' recommended sentencing range for assault. However, as we stated in Davis v. State, 458 So. 2d 42 (Fla. 4th DCA 1984), where "[t]he facts show something more than a simple robbery [assault]," a trial judge may properly exercise his discretion in departing from the guidelines. Based on the facts of the case sub judice, we do not find an abuse of discretion. (emphasis added).

The reason for departing from the guideline sentence, as stated by the trial judge, focused on the psychological trauma experienced by the victims of the convicted crimes, the mother and child who were alone at the time of the offense. Recently the court in Green v. State, 455 So.2d 586 (Fla. 2nd DCA 1984), addressed this issue and held that the psychological trauma of the victim is a permissible reason for departure. See Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984); and see Mischler v. State, 458 So. 2d 37 (Fla. 4th DCA 1984). In the case sub judice the victim (mother) testified regarding her fear of the Respondent, that she was alone in her apartment with their 4 month old baby, the husband was not at home, that while sitting in a rocking chair by the jalousie window, with the baby asleep on the couch, the Respondent suddenly and violently broke through the glass jalousie doors with a crow bar screaming and yelling that Respondent

was going to kill her husband (R 21-22). The victim testified that she was "startled out of my wits", she jumped and screamed, grabbed her baby, saw the Respondent step through the jalousie door, and she locked herself in the bedroom (R 22). Respondent continued to break the door down in the bedroom, while the victim was in a panic, screaming and yelling (R 22). The residual traumatic effects on the baby were that for two months thereafter the child would wake up screaming every night at ten o'clock (R 24).

As held in Green, supra, this Court's role is limited to assuring that the sentencing judge did not commit an abuse of discretion in exercising his discretion to sentence outside the guideline range. Albeit psychological trauma is inappropriate for guidelines scoring (where only physical trauma is permitted), it would be appropriate as a basis of departure from the guidelines. Green, supra. In that regard, Petitioner maintains that the trial court properly considered the psychological trauma of the victim as an appropriate reason for departure.

The sentencing judge is in the best position to observe the vicious and malevolent intentions of the accused together with their marked and lasting effect on the victim. By considering psychological trauma as a reason for departure from the guidelines, the sentencing judge can ensure in appropriate cases that the penalty imposed is "commensurate with the severity of the convicted offense and the circumstances surrounding the offense." See Fla.R.Crim.P. 3.701 b.3.

Green, supra.

See also Ochoa v. State, 10 FLW 2337 (Fla. 2nd DCA, October 9, 1985); Head v. State, 10 FLW 1783 (Fla. 3rd DCA, July 23, 1985).

Respondent contends that psychological trauma is inherent in the nature of the convicted offense of "aggravated assault", and, as such, the

trial court could not depart for that reason. See Smith v. State, 10 FLW 2370 (Fla. 1st DCA October 18, 1985). Petitioner maintains, however, that pursuant to Davis, supra, which was approved by this Court very recently in State v. Davis, 10 FLW 569 (Fla. October 17, 1985), the departure was proper. As held in Davis v. State, supra at 44:

The defense argues that armed robbery by its very definition cannot help but induce trauma. This argument troubles us, but we again reiterate that the trial judge retains the right to exercise discretion under the Guidelines and we see no abuse here. The facts show something more than a simple robbery. The young male defendant chose a relatively helpless female to terrorize, kidnap and promise to kill while holding a gun at her head rendering her "madly hysterical." Little of this was required to snatch her purse and his behavior was repugnant and odious. See Mischler.


Petitioner posits that this decision, which was relied upon by the Fourth District Court below in Cote, supra, was implicitly approved by this Court in State v. Davis, supra. See generally Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982). The offense sub judice was clearly more than a simple assault, it constituted an excessively violent and threatening act, and, as such, Petitioner maintains that departure for reasons of the psychological trauma caused, on the conviction for aggravated assault, was proper.

CONCLUSION

Pursuant to the aforementioned argument, and in light of this Court's very recent decision in Jackson, supra, Petitioner respectfully requests that the Fourth District Court of Appeal's determination - that departure was proper based upon psychological trauma - be affirmed, and that this cause be remanded for resentencing in accordance with Jackson, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished, by courier delivery, to ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, Public Defender's Office, 224 Datura Street, West Palm Beach, Florida 33401, this 20th day of November, 1985.



Of Counsel