IN THE SUPREME COURT OF FLORIDA

RANDY ASHLEY TILLMAN,

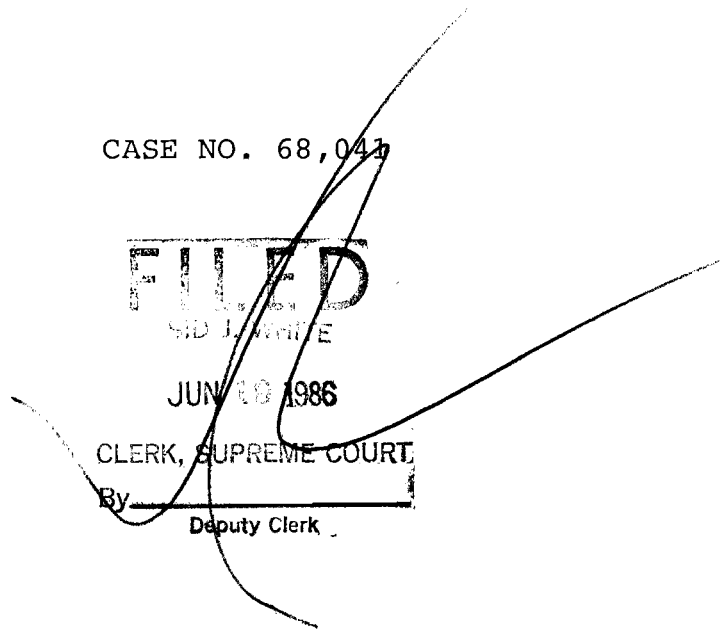
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 68,041



REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in petitioner's initial brief.

II ARGUMENT

ISSUE I

THE TRIAL COURT'S CLASSIFICATION OF A DEFENDANT AS A HABITUAL OFFENDER, AS DEFINED IN FLA. STAT. §775.084(1)(a), CANNOT BE USED AS A JUSTIFICATION FOR A DEPARTURE FROM THE SENTENCING GUIDELINES, SINCE THE DEFENDANT'S PRIOR CRIMINAL RECORD HAS ALREADY BEEN FACTORED INTO THE COMPUTATION OF THE PRESUMPTIVE SENTENCE UNDER THE GUIDELINES.

Petitioner will rely on his initial brief with regard to this issue. Petitioner would point out that if this Court were to accept the state's position that the habitual offender statute supersedes the sentencing guidelines (AB 6-7), and that a sentence imposed pursuant to that statute is "outside the ambit of the guidelines" (AB 7), then the opinion should reflect that petitioner is eligible for parole. See Dorman v. State, 457 So.2d 503,505 (Fla. 1st DCA 1984) (on motion for rehearing).

ISSUE II

IN SENTENCING PETITIONER AS A HABITUAL OFFENDER, IN DEPARTING FROM THE SENTENCING GUIDELINES, AND IN IMPOSING A SENTENCE OF THIRTY YEARS IMPRISONMENT WITHOUT PAROLE, THE TRIAL COURT IMPROPERLY CONSIDERED SPECULATION AS TO WHAT MIGHT HAVE OCCURRED AND IMPROPERLY DISREGARDED THE JURY'S VERDICT.

The state, to its credit, makes no attempt to argue that the trial court, in imposing sentence upon petitioner, could properly take into consideration his own disagreement with the jury's verdict regarding petitioner's intent or his own speculation as to what further crimes petitioner might have committed had he not been thwarted. Rather, the state seems to be taking the position that the sentencing decision in this case was not influenced by these factors. Throughout its brief, the state ignores the facts which it finds inconvenient (including, inter alia, the prosecutor's argument in the sentencing proceeding and the trial court's findings of fact in his order declaring petitioner a habitual offender) and consistently mischaracterizes petitioner's arguments.[1] The state dismisses as "speculation" petitioner's contention that the trial court's sentencing decision was influenced by his disagreement with the jury's verdict and by his belief that petitioner might have committed further, more serious, crimes but for the intervention of Drew Cockrell (See AB 12). The state, possibly with a straight face, says, "Whatever the trial judge may have thought as to petitioner's true intention at the time the instant offense was committed

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[1] The state, for example, seems to think (or to want the Court to think) that the gravamen of petitioner's complaint is that the trial court used the PSI (See AB 16-17).

is something we do not know" (AB 15). In his order classifying petitioner as a habitual offender, in support of his finding that extended imprisonment is necessary to protect the public from further criminal activity by petitioner, Judge McClure, using the English language, said:

> The Defendant contends that his only intention was to steal Ms. [redacted]s vehicle. However, given the facts of this incident and the facts of the Defendant's prior rape conviction, it appears unlikely to this Court that that was the Defendant's true intention. It is this Court's belief that but for the intervention of Drew Cockrell we would be faced with a much more serious charge.

(R 74).

Short of employing the Great Kreskin, it is hard to imagine a better method of determining what a trial judge thought than by looking to what he said he thought. Obviously the trial court would not have expressly stated these views in his sentencing order if he considered them irrelevant. It is also interesting that the state, on appeal, can so complacently assure this Court that the trial court's sentencing decision was not influenced by these improper factors, when the state, at trial, emphasized these very factors in urging the court to (as he did) sentence petitioner to thirty years imprisonment without parole, as a habitual offender and outside the guidelines. In the sentencing hearing, the prosecutor stated to the court, "[It's] my contention he was attempting to do something very similar to what happened in October '73"(R 326), and continued:

> I don't think there is any question in my mind or any question in the minds of the people involved on behalf of the State of Florida in this case that the Defendant certainly intended to take [redacted] off and sexually batter her. That is my belief. And I don't think the Court has to ignore the facts of this prior incident as part of your consideration. We did not present that to the jury. The jury was given a chance to consider this Defendant completely impartially without information. I am convinced and I am sure the Court is probably convinced, too, that had they been presented with information from the prior incident to explain why this Defendant was attempting to take [redacted] off, they would have convicted him as charged and would have convicted him of kidnapping.
>
> I think, for those reasons, Judge, for the reasons set out by Sergeant Taylor and by the father of the girl involved in this, [2] I think that he needs to be put away so we don't have to worry about him committing this type of act on somebody else.

(R 326-27).

The trial court sentenced petitioner as recommended by the state, to a term of imprisonment six times more severe than that called for by the guidelines. It is patently obvious that the improper factors which the state urged the trial court to consider were in fact considered, and considered heavily. For the reasons and based on the

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[2] The PSI contained a recommendation by Sergeant Taylor, an FSU police officer, that petitioner's sentence be enhanced under the habitual offender statute based in part on his "personal and professional opinion" that petitioner intended to commit another sexual battery (R 473). The letter from [redacted]'s father also urged that petitioner be sentenced as a habitual offender, so he could not be released at age 46 or 47 when he would "still have the power to attack, or rape and kill someone else" (R 468), and wondered what would have happened to his daughter "had[petitioner] not been prevented from his supposed car theft only, by the God sent intervention of Andrew Cockrell" (R 468).

authorities discussed in his initial brief, appellant's sentence must be vacated and the case remanded for imposition of a guidelines sentence or for resentencing by another judge to be assigned by the Chief Judge of the Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General, Wallace E. Allbritton, The Capitol, Tallahassee, Florida, 32302, and, a copy mailed to petitioner, Randy Ashley Tillman, this 19 day of June, 1986.

Steven L Bolotin

STEVEN L. BOLOTIN