SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 1986
CLERK, SUPREME COURT
By
Deputy Clerk

MARJORIE O. DAVIS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO.: 69,019

PETITION FOR REVIEW FROM
FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF

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Other Authority:

21 Am.Jur.2d, Criminal Law, Section 26 8

Florida Statute 790.07(2) 2

SUMMARY OF THE ARGUMENT

The District Court "extracted" four reasons for departure from the trial court's written discourse. It approved three of the four as valid basis for departure.

The first reason, the "cold-blooded" nature of the crime, the court construed to mean "the cruelty with which this crime was committed". In support of its affirmance, the District Court relied upon factual circumstances of the crime that are clearly inherent components of that crime. As part of its finding of cruelty, the court also pointed out that the Defendant's young son was present in the home, though not actually a witness to the crime. Each of these bases have been specifically disapproved in, respectively, State vs. Mischler, 488 So.2d 523 (Fla. 1986), and Scurry vs. State, 11 FLW 254, Supreme Court of Florida, Case No. 67,589, June 5, 1986.

The second reason, "abuse of the trust of the family relationship" is nothing more or less than spousal homicide. Again, the unlawful taking of a human life, including that of a spouse, is an inherent component of the charged crime. Its use as a basis for departure is in conflict with State vs. Mischler, supra, and other authority cited in the body of the Brief.

The third reason, "presence of victim's son in the house", though not a witness to the crime, was approved because of the "possible long lasting traumatic effect" on the child. The only evidence before the sentencing court was that the child was doing well while living with his paternal grandparents. Though acknowledging this evidence and that there was no proof, certainly not proof beyond a reasonable doubt, that there was any long-term traumatic effect, the District Court nonetheless approved this basis for departure. This Court has previously rejected such circumstances as a basis for departure (Scurry vs. State, supra), and, the Second District Court in Chandler vs. State, 11 FLW 1443 (Fla. 2nd D.C.A., June 25, 1986), has held that even where the child of the victim was actually a witness to the crime, this alone will not support an inference of long-lasting traumatic effect. There must be evidence sufficient to establish that fact beyond a reasonable doubt.

The trial court's fourth reason, "the Defendant's sanity and absence of 'abused spouse syndrome'", was found invalid by the District Court. The legal mental capacity to commit a crime is an essential requisite to criminal responsibility for any crime, including this one. Thus, the trial court had attempted to use an inherent component of the crime. Though the District Court recognized the invalidity of

ARGUMENT

A. Factual Summary

Petitioner, the Defendant below, was arrested on September 24, 1984, and subsequently indicted for Murder in the First Degree for the shooting death of her husband, John Davis, at their home in Middleburg, Florida. Petitioner was thirty years of age at the time of her arrest, had no prior criminal history of any kind, and, as evidenced by literally hundreds of letters received by the trial court, considered to be of good character. Also, there was record evidence that she had been mistreated by her husband prior to this incident.

The circumstances of the offense as described in the original Opinion from the First District Court of Appeal were that "Mrs. Davis fired five shots at her sleeping husband from point-blank range, then left the house while he staggered to the phone in another room to call for help". Her five year old son was sleeping in another bedroom of the home at the time of the shooting. When the police arrived at the home a short time after the shooting, they carried the child out of the house to a neighbor's home where the Defendant was being questioned.

Mrs. Davis ultimately entered a guilty plea to a charge of Second Degree Murder With A Firearm. And, as to a second Information that was filed, she entered a plea of

guilty to the Use Of A Firearm During The Commission Of A Felony in violation of Florida Statute 790.07(2) with a negotiated sentence to be imposed on this count of fifteen (15) years probation consecutive to any period of incarceration imposed as to the charge of Second Degree Murder.

The "guideline" sentencing range was twelve (12) to seventeen (17) years. The court imposed a sentence of forty (40) years imprisonment, a departure of twenty-three (23) years beyond the maximum recommended range.

The reasons for departure were not, as such, enumerated. However, from the written discourse offered by the trial court, the First District Court of Appeal found that "it is possible to extract the following four reasons:

1. The cold-blooded nature of the offense.
2. Abuse of the trust of a family relationship.
3. Presence of the victim's son in the house.
4. Defendant's sanity and absence of 'abused spouse syndrome'."

The District Court approved the first three of these reasons, disapproved the fourth, and affirmed upon a finding "beyond a reasonable doubt that the absence of the invalid reason would not have affected the departure sentence".

The judgment of the District Court finding the first three asserted reasons to be valid, and, the failure to remand upon its finding that the fourth reason was

"invalid" presents multiple express and direct conflicts with the decisions of this Court and/or the other District Courts of Appeal.

* * *

B. "The cold-blooded nature of the offense".

The Opinion of the First District Court of Appeal recognized that to the extent "cold-blooded" might denote premeditation, it would be an invalid reason because it would be the equivalent of "considering crimes for which no conviction were obtained (i.e., First Degree Murder) . . .". However, from the "manner" that the trial court used the term, the District Court concluded that it was not a reference to premeditation, but, contemplated "the cruelty with which this crime was committed". In support of this asserted reason, the court offered the following:

> "Mrs. Davis fired five shots at her sleeping husband from point-blank range, then left the house while he staggered to the phone in another room to call for help. We recently affirmed a thirty year sentence imposed for Second Degree Murder where the offense was 'carried out with particular cruelty . . . . in the presence of family members' in Scurry vs. State, 472 So.2d 779 (Fla. 1st D.C.A. 1985)."

With the Defendant having been convicted of Second Degree Murder With A Firearm, it is clear that the shooting death, regardless of how many times or at what range, is an inherent component of the crime in question. As such

it may not be used as a basis for departure. State vs. Mischler, 488 So.2d 523 (Fla. 1986); Steiner vs. State, 469 So.2d 179 (Fla. 3rd D.C.A. 1985); Baker vs. State, 466 So.2d 1144 (Fla. 3rd D.C.A. 1985).

The reference to being carried out with particular cruelty ". . . in the presence of family members" citing Scurry vs. State, 472 So.2d 779 (Fla. 1st D.C.A. 1985), is similarly in conflict with this Court's subsequent reversal of Scurry. Scurry vs. State, 11 FLW 254, Supreme Court of Florida, Case No. 67,589, June 5, 1986. In that case, like ours, the family member was present in the area but did not actually witness the shooting. On these circumstances, this Court found as follows:

> "Reason one, even if we were to find it clear and convincing, is not proved. There is insufficient evidence in the record that family members actually witnessed the shooting although they were nearby."

* * *

C. Abuse of the trust of a family relationship.

What is characterized as breach of the trust of a family relationship is nothing more or less than spousal homicide.

The unlawful taking of a life by shooting is contemplated by Second Degree Murder With A Firearm and the guidelines relating thereto. Obviously, therefore,

the taking of a life by shooting cannot be used as a basis for departure. Hendrix vs. State, 475 So.2d 1218 (Fla. 1985). And, there is no separate category created for spousal homicide.

* * *

D. Presence of victim's son in the house.

The only testimony before the sentencing court regarding the welfare of the Defendant's son was that he was doing well while living with his paternal grandparents. Nonetheless, in its original Opinion, the court approved this reason as a basis for departure:

> "It is clear that a possible long lasting traumatic effect on a child of the victim is a valid reason for departure from the guidelines. See Casteel vs. State, 11 FLW 128 (Fla. 1st D.C.A., January 3, 1986), and Scurry vs. State, supra. That the judge would be able to immediately ascertain whether or not there was such damage is inconceivable so testimony that Davis' son is doing well while living with his paternal grandparents is not dispositive. The Davis child was removed from the house by police officers after having been awakened during the murder of his father. Upon his mother's arrest he has been deprived of not only his father, but his mother too."

In effect, the District Court held that in the absence of definitive proof to the contrary, the trial court could base its departure on its unsupported concern that the child suffered long-term damage.

Shortly following that original Opinion, this Court published its Opinion in State vs. Mischler, 488

So.2d 523 (Fla. 1986), imposing the proof beyond reasonable doubt standard on any asserted basis for guideline departure. Thus, in its further Opinion denying rehearing in this cause, the District Court sought to avoid the apparent conflict with Mischler by holding as follows:

> "The appellant then urges that the holding in Mischler vs. State, 11 FLW 139 (Florida Supreme Court, April 3, 1986) warrants reconsideration of our decision that the presence of the victim's son in the house at the time of the homicide constituted a clear and convincing reason to depart from the guidelines. Davis emphasizes, and with good reason, that the proof of long-lasting traumatic effect on the son is not proven beyond a reasonable doubt. But this argument misses the point. The point is that Mrs. Davis killed her husband and is subject to sanction. That she chose to do so in the presence of her (and the victim's) son is a factor considered by the judge as one making the commission of the crime more horrible, a factor which justified exceeding the sentence normally imposed for second degree murder." [Emphasis added].

Petitioner would strongly suggest that the conflict with Mischler was not thereby resolved. Scurry vs. State, supra, makes clear that even assuming this might be a valid reason if the family member actually witnessed the crime, a departure is not justified where the family member was merely present in the area (here in another room of the house). Thus, if this circumstance is to form a basis for departure, it must be premised upon proof of

the traumatic effect on the child. The Opinion explicitly recognizes that there was no proof of long-lasting traumatic effect. Indeed, the only proof before the trial court was to the contrary.

Moreover, the attempted clarification by the District Court brings this case very sharply in conflict with the recently decided Chandler vs. State, 11 FLW 1443 (Fla. 2nd D.C.A., June 25, 1986). In that case, the defendant was convicted of Sexual Battery With Great Force, Burglary Of A Dwelling While Armed, Possession Of A Firearm By A Convicted Felon and Petit Theft. The trial court departed from the guidelines on the basis, inter alia, of the rape having been witnessed by the victim's infant child. The Second District Court of Appeal disapproved that basis for departure specifically upon a finding that while it was shown that the child was a witness, there was no showing of any traumatic effect on the child. And, unlike the case at bar, the child was an actual witness to the crime.

More broadly, the Opinion of the District Court is in conflict with Carter vs. State, 11 FLW 895 (Fla. 4th D.C.A., April 16, 1986). In that case, the trial court offered as a basis for departure his finding that "the victim's family has suffered emotionally and financially because of his death". In its disapproval of that

asserted basis, the Fourth District recognized that which the First District did not:

> "As to the second reason, the emotional and often financial suffering of the victim's family will occur in the vast majority of murder cases. . . . This court [has] recognized that factors which are inherent in any crime of a similar nature are not proper reasons for departing from the sentencing guidelines. This is because such factors have already been taken into consideration in determing the guidelines' recommended ranges. We conclude that the suffering of the victim's family is not a proper reason for departing from the guidelines, unless exceptional circumstances are present, such as where family members actually witness the crime. See, Casteel vs. State, 481 So.2d 72 (Fla. 1st D.C.A. 1986)."

Of course, this latter exception to the general rule is inapplicable on our facts.

* * *

E. The "invalid" reason.

As justification for departure, the trial court asserted the "Defendant's sanity and absence of 'abused spouse syndrome'". Of course, the legal mental capacity to commit a crime is an essential requisite to criminal responsibility. 21 Am.Jur.2d, Criminal Law, Section 26. Thus, the trial court used an inherent component of the crime, i.e., legal mental capacity to commit a crime, as a basis for guideline departure.

The District Court disapproved this asserted reason by finding only that "the statements do not meet

the clear and convincing standard required by 3.701, Florida Rules of Criminal Procedure". However, the District Court's failure to remand for resentencing is in apparent conflict with the mandatory language of State vs. Mischler, supra. In Mischler, this Court established what appears to be a per se reversible error rule for three categories of reasons for guideline departure, including the use of an inherent component of the crime. This Court held that "if any of the reasons given by the trial court to justify departure fall into any of the three above-mentioned categories, an appellate court is obligated to find that departure is improper".

This apparent "per se reversible error rule" has been recognized in Rousseau vs. State, 11 FLW 1234 (Fla. 1st D.C.A., May 30, 1986), which certified to this Court the question of the applicability of the harmless error rule to one of those three prohibited categories. If, indeed, Mischler did create such a per se rule, the failure of the District Court to remand for resentencing is in clear conflict therewith.

Respectfully submitted,

OFFICES OF ROBERT STUART WILLIS

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, State of Florida, Executive Branch, The Capitol, Tallahassee, Florida, 32301, by mail, this 19th day of July, 1986.

ROBERT STUART WILLIS