

IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE,

Petitioner,

v.

CASE NO. 70,446

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE, :
 Petitioner, :
v. :
STATE OF FLORIDA, :
 Respondent. :
_____:

CASE NO. 70,446

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to as petitioner in this brief. A one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. A two volume transcript will be referred to as "T". Attached hereto as an appendix is the opinion of the First District.

STATEMENT OF THE CASE AND FACTS

By third amended information filed December 4, 1985, petitioner was charged with lewd assault upon a child (R 38). At trial, [REDACTED], age 14, testified that he was riding his bike down Atlantic Boulevard, in Jacksonville when petitioner asked [REDACTED] to help him get a motorcycle out of the mud in the woods. [REDACTED] agreed and walked down a trail to where he saw only the front end of a motorcycle. Petitioner offered [REDACTED] a cigarette and asked if he could such [REDACTED] dick. Petitioner than got on top of [REDACTED] and made [REDACTED] masturbate petitioner. Petitioner ejaculated onto [REDACTED] s shirt. [REDACTED] ran off and saw a police car and reported the incident (T 49-62).

Petitioner presented an alibi defense (T 166-270) but was found guilty as charged (R 39; T-354-55). At a sentencing hearing, [REDACTED] [REDACTED], the victim's mother, testified in aggravation that between the date of the crime and the trial, [REDACTED] had been suspended from school, had run away, and had become moody. Since the trial, however, he had been better (T 366-77). [REDACTED] testified that he had been scared to go back into the woods and had lost all of his girlfriends. People from school called him names and treated him strangely (T 378-81).

The court imposed a ten year sentence, departing from the recommended guidelines range of 5 1/2 to 7 years (R 62-65). As justification therefor, the judge wrote on the bottom of the scoresheet:

The defendant's violent physical and sexual assault on a 14 year old boy, unknown to him and enticed into the woods for purposes of the assault, has caused the victim to suffer great and emotional trauma.

(R 66; appendix at 2).

On appeal, petitioner argued that emotional trauma could not be a valid reason to depart from the recommended guidelines range, on authority of Lerma v. State, 497 So.2d 736, 739 (Fla. 1986). The First District disagreed and held that the reason was valid (appendix at 3).

On April 24, 1987, a timely notice of discretionary review was filed. On September 15, 1987, this Court granted review.

SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the decision of the lower tribunal in the instant case is incorrect because the First District is not following Lerma, or is construing its holding too narrowly. As a result, a defendant who is convicted of lewd assault within the jurisdiction of the First District will have to accept a departure sentence based upon emotional trauma. This Court found in previous cases that emotional trauma is inherent in many crimes; where it is inherent, it cannot be used as a reason for departure. Lewd assault is a crime from which emotional trauma will always result. This Court must vacate the departure sentence and order the imposition of a guidelines sentence.

ARGUMENT

THE LOWER TRIBUNAL WAS INCORRECT IN HOLDING THAT EMOTIONAL TRAUMA WAS NOT INHERENT IN LEWD ASSAULT AND SO COULD BE USED AS A REASON FOR DEPARTURE.

In Lerma v. State, supra, this Court held:

The state cites Hankey v. State, 485 So.2d 827 (Fla. 1986), to support its contention that emotional hardship on the victim may support a departure sentence. Hankey was convicted for burglary. Our holding in Hankey was premised upon the fact that emotional hardship is not an inherent component of the crime of burglary. In contrast, emotional hardship can never constitute a clear and convincing reason to depart in a sexual battery case because nearly all sexual battery cases inflict emotional hardship on the victim. This same reasoning forces us to conclude that physical trauma cannot support a departure sentence in a sexual battery case.

497 So.2d at 739.

The First District has read Lerma too narrowly, has limited its holding to only sexual battery departure sentences, and has not applied Lerma to other crimes which, like sexual battery, always cause emotional trauma on a victim. See, e.g., Kokx v. State, 498 So.2d 534 (Fla. 1st DCA 1986) (Lerma not applicable to aggravated child abuse) and Lawson v. State, 498 So.2d 541 (Fla. 1st DCA 1986) (Lerma not applicable when both the victim of a sexual battery and her child suffer emotional trauma). The Second District has recognized that Lerma also applies to lewd assault. Connell v. State, 502 So.2d 1272 (Fla. 2d DCA 1987).

While lewd assault may not be technically a lesser offense of sexual battery, Hightower v. State, 488 So.2d 106 (Fla. 5th DCA 1986), review denied, 509 So.2d 1078 (Fla. 1987), the two crimes almost always cause emotional trauma to their victims, particularly because the victim of a lewd assault must be a child.¹ Medical experts, legal commentators, and courts of other jurisdictions have recognized that there exists a "child sexual abuse syndrome", which describes the changes in emotional behavior, including those suffered by the victim in the instant case, common to children who have been the victims of any type of sexual abuse, and which is not limited to traditional sexual intercourse. See, e.g., State v. Middleton, 657 P.2d 1215 (Ore. 1983); State v. Myers, 359 N.W. 2d 604 (Minn. 1984); and Smith v. State, 688 P.2d 326 (Nev. 1984). See, e.g., Note, Rape Trauma Syndrome, 70 Va. Law Rev. 1657 (1984). See, especially, Sgroi, Clinical Intervention in Child Sexual Abuse, at 40-41, which lists 20 common indicators of child sexual abuse:

1. Overly compliant behavior.
2. Acting-out, aggressive behavior.
3. Pseudo mature behavior.
4. Hints about sexual activity.
5. Persistent and inappropriate sexual play with peers or toys or with themselves, or sexually aggressive behavior with others.
6. Detailed and age-inappropriate understanding of sexual behavior (especially by young children).
7. Arriving early at school and leaving late with few, if any, absences.

¹Section 800.04, Florida Statutes.

8. Poor peer relationships or inability to make friends.
9. Lack of trust, particularly with significant others.
10. Non-participation in school and social activities.
11. Inability to concentrate in school.
12. Sudden drop in school performance.
13. Extraordinary fears of males (in cases of male perpetrator and female victim).
14. Seductive behavior with males (in cases of male perpetrator and female victim).
15. Running away from home.
16. Sleep disturbances.
17. Regressive behavior.
18. Withdrawal.
19. Clinical depression.
20. Suicidal feelings.

The victim in the instant case suffered from at least seven of these conditions (no. 7,8,10,11,12,15, and 18).

Thus, it is obvious that the First District is in error in not recognizing that lewd assault also includes in its victims some degree of emotional trauma, just like sexual battery.

This Court has held that emotional trauma is inherent in other crimes, in addition to sexual battery. State v. Rousseau, 509 So.2d 281 (Fla. 1987) (burglary of a dwelling); Ochoa v. State, 509 So.2d 1115 (Fla. 1987) (kidnapping); State v. Cote, 487 So.2d 1039 (Fla. 1986) (aggravated assault). Where emotional trauma is inherent in the crime, and is not excessive, it cannot be used as a reason for departure. Casteel v. State, 498 So.2d 1249 (Fla. 1986). The First District's simplistic view that Lerma does not apply to the crime of lewd assault ignores the reality that almost all crimes carry with them some degree of emotional trauma.


Since emotional trauma was the only reason cited by the sentencing judge to support the departure sentence, and since there are no other facts in the record which would have justified departure, the proper remedy is to vacate the 10 year departure sentence and remand with directions that a guidelines sentence be entered. Williams v. State, 492 So.2d 1308 (Fla. 1986).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court hold that emotional trauma cannot serve as a valid reason for departure in a lewd assault sentence, and direct that petitioner be resentenced within the guidelines range of 5 1/2 - 7 years.

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 Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, this 2 day of October, 1987.


P. DOUGLAS BRINKMEYER