

10-5

IN THE SUPREME COURT OF FLORIDA

BYRON ANTHONY HARRIS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 70,983

SEP 10 1987
CLERK OF THE SUPREME COURT
By _____

BRIEF OF PETITIONER ON THE MERITS

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II STATEMENT OF THE CASE

By amended information, petitioner BYRON ANTHONY HARRIS, was charged with one count of armed robbery, two counts of sexual battery with a deadly weapon, and one count of armed kidnapping (R-44).

Petitioner was tried by jury and on July 25, 1986, petitioner was convicted of one count of robbery, two counts of sexual battery with slight force, and one count of kidnapping (R-88).

On August 1, 1986, the trial court sentenced the petitioner to 15 years in state prison on each count, each count to run consecutively to the other (R-125).

On August 6, 1986, petitioner timely entered his notice of appeal and the Public Defender was appointed for appellate purposes (R-128,133).

On July 15, 1987, the First District Court of Appeal issued its opinion in which it affirmed appellant's convictions and affirmed the trial court's upward departure sentences.

The District Court of Appeal certified the following question as one of great public importance:

Whether a defendant's infliction of an extraordinary amount of emotional trauma can be a valid reason for departure where the defendant has committed robbery, kidnapping and sexual battery upon the victim.

On or about August 14, 1987, petitioner filed his notice to invoke the discretionary jurisdiction of this Court in the First District Court of Appeal.

III STATEMENT OF THE FACTS

[REDACTED] (the victim) testified that on January 12, 1986, she was working the "[e]leven to seven in the morning" shift at the Majik Market on Blanding Boulevard (R-260-261). At about ten until twelve on the evening of the 12th, she was stacking drinks in the drink cooler (R-262).

While stacking drinks in the drink cooler, she heard a low voice behind her and turned and saw a black man with a gun about a foot from her face (R-263). The man asked her who else was in the store with her and she replied that she was the only one there (R-264). He then directed her to put the juice bottles that she had in her hands down and to place the store's money in a bag for him (R-264). As she walked out of the cooler, the man attempted to hurry her up and told her that if she tried anything, he was going to blow her head off (R-265). The man followed her out of the cooler to the cash register (R-266). There, she took some rolled coins out of the cash register and placed them on the counter. The man slammed his hand down on the counter and told her to put the money in a bag and to hurry up (R-266).

After this admonition, she obtained a grocery bag and began to place the money in the grocery bag (R-267). The man kept telling her to hurry up and that if she tried

anything, he would blow her head off (R-267).

After she emptied the cash register drawer, the man told her that he knew that she had some more money and she lifted up the change compartment of the cash register to show the man that she didn't have anymore money (R-268). He then directed her attention to the safe at her left and demanded that she obtain the money from it (R-268). She told him that she did not have the key to the safe and that all that was in the safe was change (R-269).

Apparently, she was able to open the safe and began to place the change from the safe into the bag. The man continually threatened her and told her that if she didn't have the money in the bag by the time that he counted to five he would blow her head off (R-269).

The man began to count "one", "two", and by the time that he reached "three" the victim handed him the money in the bag (R-269).

The money bag also contained three one dollar bills, which were used as a trigger to the automatic camera which was disguised as a stereo speaker (R-270). The camera was located behind the cash register counter and pointed in such a fashion as to get a good view of the customer (R-270).

During the time in which this individual was in the store he continually threatened to blow the victim's head off (R-271).

After he had received all of the money from the victim, he asked where the keys to her car (which was parked in the parking lot) were (R-272). She told him that her car could not be started with keys and that she didn't have the keys (R-272-273). She attempted to explain to him how to start the car without the key (R-273). He directed her out of the store and to the car where he told her to get into the car (R-273). The individual then forced her to enter the car through the driver's door and to sit in the passenger's seat (R-274). The individual then attempted to start the car pursuant to her directions but was unable to do so (R-274-276). The individual did not appear to know how to start a manual transmission car (R-275-276).

After unsuccessfully attempting to drive the car, the individual then directed the victim to drive and they exchanged places in the car (R-277).

With the victim driving, the individual directed the victim to ultimately drive to a fairly secluded wooded area and stop (R-279-281). Once they were stopped, the individual told the victim that if she tried anything he would blow her head off (R-281). He then directed her to take her clothes off, which she did (R-281-282). He then kissed her, fondled her, and placed his fingers into her vagina (R-282). He then directed her to have oral sex with him, which she did (R-282-283). At the conclusion of this activity, he indicated to the victim that she was "...all right" and

allowed her to put her clothes back on (R-284).

Afterwards, he told the victim that if she told anyone about this he was going to find her and kill her (R-285). The victim promised not to tell anyone (R-285). He then told her to tell "them" that it was "a white man that done it (sic)." (R-285).

He then wiped the condensation off the windshield and directed the victim to do the same (R-285). After this, he then threatened her about telling anyone about the evening's occurrences (R-286).

At his direction, she started the car, and he indicated that he was leaving (R-286). As he was getting out of the car, the victim apparently glanced at this individual and he told her not to look at him and to look the other way (R-286).

After he got out of the vehicle, she turned the headlights on and drove very slowly back to the store (R-287). When she got to the store, there were two black men and one white lady in the parking lot when she drove up (R-287). One of the black men asked her whether she was okay and she told him to call the police (R-287). He replied that he had already called the police (R-287).

When she got out of her car, she went into the store and went to the bathroom, where she washed her face and washed her mouth out with soap (R-287).

While she was in the bathroom, a police woman arrived (R-288). Other police officers eventually arrived and took her statement (R-288).

On or about February 19, 1986, she had the opportunity to view a lineup (R-289). This lineup was held by the Jacksonville Sheriff's Department in Duval (not Clay) County (R-289). There were six black males in this lineup of similar height, weight, and age (R-290).

Each was directed to read the phrase "You try anything and I'm going to blow your head off." (R-291).

She selected individual number four in the lineup, who was the petitioner (R-291-292).

At trial, she was also shown some photographs which were taken by the automatic camera and identified herself in three of the photographs as well as the petitioner in some of the photographs (R-293-294).

She also identified the jacket that she had on the night of January 12, and pointed out to the jury a semen stain on the jacket (R-294-296).

In identifying petitioner in the lineup, she had noticed a white spot on his head. Her assailant had a white spot on his head which she had failed to tell crime scene officers about (R-297-298).

Lloyd Godwin testified that he and Danny Chapman drove to the Majik Market on Blanding Boulevard on January

12, 1986, at about 10 or 15 minutes after midnight (R-329-330). When they went into the Majik Market, they found the cash register open and no one there (R-331). There was no money in the cash register (R-331). Mr. Chapman called the police (R-331).

As they were waiting for the police to arrive, the victim arrived, with her bra hanging down (R-332). She was crying (R-332).

The victim went inside the store and then locked it (R-332-333). About five minutes later, the police arrived (R-333).

Patrol Sergeant Nancy Scherer testified that on January 12, 1986, she was a deputy with the Clay County Sheriff's Office, that she arrived at the Majik Market around midnight, and was directed by two black males to the victim who was inside the store (R-337-339). The victim was close to being hysterical; she was crying, her clothing was disarranged, and she was totally disorganized (R-339).

Ms. Scherer noticed that the cash register and safe were all opened and that neither one of them had any money in them (R-340).

As a result of what she learned, Deputy Scherer put out a BOLO (R-340).

Lethenia Jane Meadows testified that she was a crime analyst for the Florida Department of Law Enforcement, and that her area of expertise was forensic serology (R-360-362).

She had examined blood samples and saliva samples and had determined that the defendant had type "O" blood and was a secreter (R-366,385). Defendant's enzyme type is PGM type 1 (R-385). Someone with those characteristics represented 27 percent of the population (R-386).

Paul Doleman testified that he was also a Florida Department of Law Enforcement crime laboratory analyst and that he had examined the semen stains on the victim's jacket (R-398; 402). His examination revealed that the semen stain came from someone who was a type "O" secreter and who also was a "PGM type 1" (R-403).

Thomas Waugh, an investigator for the Clay County Sheriff's Department, testified about the details of the lineup which involved petitioner and in which the victim identified petitioner as her assailant (R-416-419).

Because of the certified question, the following is pertinent:

██████████ (the victim) testified that because of the crimes perpetrated by petitioner upon her, she had had psychological problems which occasioned the necessity of seeking a "therapist" (R-536). She testified that she was presently seeing a "psychologist", Jane Keene. Since February of 1986, she had had 13 appointments with Ms. Keene.

Subsequent to the crime, she had been taking a mood elevation drug, codeine to help her sleep, and butabarbital for headaches (R-537).

She was no longer employed with the corporation that ran the Majik Market and was receiving worker's compensation (R-537).

Prior to the incident contained in this brief, the victim felt that she was a friendly person who enjoyed contact with other individuals (R-538). Subsequent to this incident, she was unable to have normal communication with people (R-538).

According to the victim, the incident that occurred to her also had affected her sexual relationship with her husband. However, no details of this sexual disfunction with her husband were given (R-539).

Her family physician had told her that her headaches were expected and that they would go away and that she was otherwise physically healthy (R-540).

Because of her psychological problems, she was seeing "doctor" (sic) Keene and also a Dr. Harrison (R-540).

The victim felt that petitioner was not fit to live among normal people because he would "hurt someone" (R-541).

Because the victim felt that her life was in danger on the night and morning of the incident, she could not (at the time of sentencing) leave her house without being afraid (R-541).

Ray Meyer testified at petitioner's sentencing that he was a police officer with the City of Jacksonville in Duval County, that he was the lead detective involved in the

investigation of the "crime" involving petitioner and that he felt that petitioner had come down from New York to prey upon people "down her" (R-542-543). In Detective Meyer's opinion, petitioner "...should not be allowed to walk the streets of this nation anymore." (R-543).

IV SUMMARY OF THE ARGUMENT

A defendant's "infliction of an extraordinary amount of emotional trauma" is not a valid reason for departure where (1) an extraordinary amount of emotional trauma did not exist and (2) this so-called "extraordinary amount of emotional trauma" did not result in objective, quantifiable physical manifestations.

V ARGUMENT

ISSUE PRESENTED

THE DISTRICT COURT OF APPEAL'S
CERTIFIED QUESTION SHOULD BE
ANSWERED IN THE NEGATIVE.

The District Court of Appeal's certified question in this case evinces an indication by that court to disregard the existing law, to restate the facts of this case, and to rehash an old question already decided by this Court.

Several facts should be pointed out to this Court. First, the "evidence" regarding the "infliction of an extraordinary amount of emotional trauma" to the victim came from two sources: (1) the victim, who obviously had an interest in the outcome of the proceedings and (2) the un-cross examined letter of a mental health professional who did not bother to show up at the sentencing and expose herself to cross-examination as to her credentials and her opinion.

The victim did testify that she was "physically healthy" and that the headaches that she allegedly suffered from as a result of this incident were "to be expected and would go away eventually." (R-540).

The hearsay and un-cross examined letter submitted by the victim and allegedly written by Jane Keene, M.S., licensed marriage and family therapist, only indicated

that the victim initially "...displayed the classic symptoms of Sexual Assault syndrome, Phase I,...." In other words, the victim was an ordinary victim of sexual assault (see R-110).

The record then, does not, as the First District Court of Appeal has indicated in its certified question, show beyond a reasonable doubt that the victim suffered from the "infliction of an extraordinary amount of emotional trauma" See, for example, Parsons v. State, 491 So.2d 1247 (Fla. 2d DCA 1986).

Emotional trauma in a sexual battery case is already considered by the nature of the crime itself and is not a sufficient or proper reason to depart from the sentencing guidelines. Lerma v. State, 497 So.2d 736 (Fla. 1986). Moreover, psychological trauma to the victim is not a valid reason to depart unless the trauma results from extraordinary circumstances which do not normally accompany the crime. Lumpkin v. State, 12 FLW 1955 (Fla. 3d DCA 1987) [robbery and burglary].

In State v. Rousseau, 12 FLW 291 (Fla. June 11, 1987), this Court did hold that a departure from the sentencing guidelines may be appropriate where psychological trauma to the victim results in a "discernible physical manifestation". What this language means is not clear, but it is clear that the use of "psychological trauma" as a reason to depart from a guideline sentence is always suspect because "psychic injury" is too subjective. See Florida Rules of Criminal

Procedure Re Sentencing Guidelines, 12 FLW 163 (Fla. 1987).

Whatever (specifically) this Court meant in Rousseau, is just inapplicable to this case. The victim here testified that she was physically healthy. The trauma that she experienced in this particular case was neither extraordinary (for rape victims) nor "objective", resulting in physical manifestations which can be discerned from this record.

Presumably, this Court in Rousseau intended an objective test, that is, a test wherein it could be conclusively determined that the psychological trauma suffered resulted in some type of verifiable or quantifiable physical damage.

Here, there is only the subjective testimony of the victim in the record. The so-called "therapist" (who, at any rate, would not be qualified to testify about physical injury) did not subject herself and her qualifications to cross-examination. Clearly, Rousseau is inapplicable to this case.

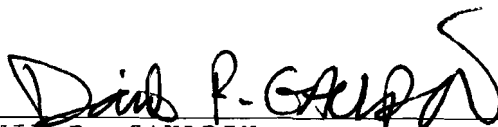
The truth of the matter is that the judge writing the opinion for the First District Court of Appeal doesn't agree with Lerma and seeks a way to escape from its requirements.

VI CONCLUSION

Based on the foregoing arguments and authorities, the First District Court of Appeal's opinion in this case, insofar as sentence is concerned, should be quashed.

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 Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Byron Harris, at his last known address, this 10th day of September, 1987.



DAVID P. GAULDIN