D/a 5-26-88

IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT BLACKSHEAR,

Petitioner,

v. CASE NO. 71,440

STATE OF FLORIDA,

Respondent,

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent will accept the designations of the Petitioner as set forth in his Brief on the Merits with the following additions. The Supplemental Record on Appeal shall be referred to as "SR" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions.

In addition to the Petitioner's statement of diagnosis Dr. Ernest C. Miller, M.D. also testified that the Petitioner suffers from a pscho-sexual disorder (SR p. 94) and that he claims a little green man named Mark told him he could have sex with anyone he wanted to without breaking the law (SR p. 93). Dr. Miller testified that manifestations of the Appellant's behavioral disorder have been present since he first saw the Appellant on court order after he committed a sexual assault at school (SR pp. 90-91).

The Appellant's sister testified that the Appellant's fighting was a problem in the home and on cross-examination admitted it was a never ending problem (SR pp. 121,122). The Appellant's grandmother testified that the Appellant had problems and they included mental problems and problems with fighting including at school (SR p. 123) and that nothing has changed with regard to his behavior (T p. 10). The Appellant's mother testified that Appellant had a history of mental problems, hospitalizations, and committment to juvenile facilities (T p. 12).

The victim testified as to the facts of the robbery, kidnapping and sexual assault (SR pp. 108-118) including testifying regarding being choked (SR p. 109), being knocked to the floor, being dragged to the back room, and being beaten (SR pp. 111, 115).

SUMMARY OF ARGUMENT

Issue I

No Pearce presumption arose when the trial court imposed a life sentence on remand because: there was no showing the penalty was harsher; no showing that the resentencing departed from the trial court's initial sentencing plan, no showing that the court increased the sentence more than the minimum amount to make the sentence legal, and most of all, no showing of judicial vindictiveness.

Issue II

The violent behavior pattern of the Petitioner is a proper ground for departure as it was based on testimonial evidence of his violent actions at home and in school; and demonstrated by his behavior which resulted in his being convicted of crimes, sent to juvenile facilities, and placed in mental hospitals.

Issue III

The Petitioner has twice failed to raise this issue on direct appeal and thus, has waived it. If the court determines that review on the merits is appropriate, Petitioner has failed to show that the trial court abused its discretion.

ARGUMENT

ISSUE I

NO DUE PROCESS VIOLATION OCCURRED IN THE RESENTENCING OF THE APPELLANT.

There are two interrelated constitutional principles identified and discussed in North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656 (1969). Those are (1) double jeopardy, and (2) due process.

The court found in Pearce and subsequently reaffirmed that a more severe sentence after a retrial does not violate double jeopardy. In fact, the Court went to great lengths to clarify Pearce in United States v. DiFrancesco, 449 U.S. 117, 66 L.Ed.2d 328 (L980), when it reaffirmed the proposition that a sentence imposed which is less than the statutory maximum is not an implied acquittal of any greater sentence.

Pearce held that due process (not double jeopardy) required that a defendant being resentenced after a successful appeal and subsequent retrial, not be the victim of judicial vindictiveness.

Thus, in situations where a defendant is given a more severe sentence after a successful appeal, Pearce created a rebuttal presumption of vindictiveness. The United States Supreme Court said:

> . . . we have concluded that whenever a judge imposes a more severe sentence

> upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

The Supreme Court has recognized in Wasman v. United States, 468 U.S. 559, 82 L.Ed.2d 424 (1984), that "Pearce is not without its ambiguities." (82 L.Ed.2d at 434).

The Court also recognized that:

> It it was not clear from the Court's holding in **Pearce**, it is clear from our subsequent cases applying **Pearce** that due process does not forbid enhanced sentences or charges but only enhanced sentences modivated by actual vindictiveness. 82 L.Ed.2d at 435.

As noted previously the United State Supreme Court, in Wasman, supra, identified several problems in applying Pearce because it contains conflicting language.

Problems identified by it and other Federal courts include:

(1) How to determine when sentences are more harsh.

(2) What to do with sentences which are part of an interlocking plan.

(3) What to do when it is impossible (illegal) to impose the exact same sentence.

In one case analogous to the case sub judice the United States Supreme Court, in Bozza v. United States, 330 U.S. 160, 91 L.Ed.2d 818 (1946), found that where the sentence was less than the statute required, resentencing was permissible even though resulting penalty was harsher.

The Federal Circuit Courts of Appeal have also had to deal with these problems of resentencing in various contexts. In United States v. Busic, 639 F.2d 940 (3d Cir. 1981), cert. denied 452 U.S. 918, it was found permissible to increase a penalty on re-sentencing when one count of an interdependent sentencing plan was vacated and where the sentencing judge's intentions were clear. The Court found the concerns of judicial vindictiveness simply did not exist. The Third Circuit continued to follow that interpretation in United States v. Guevremont, 829 F.2d 423 (3d Cir. 1987).

The case sub judice presents the same dilemma faced by the trial court in United States v. Jefferson, 760 F.2d 821 (7th Cir. 1985). In Jefferson, the trial judge's sentencing scheme involved a 30-year sentence consisting of a series of shorter terms strung together to amount to 30 years. The reason for this was the judge's desire to have a minimum period without eligibility for parole followed by parole eligible sentences. On remand from an appeal, which set aside certain convictions, the trial judge could not fashion an equal punishment. In solving

the dilemma, the court indicated that when faced with such a problem, no Pearce presumption arises when the court

> "imposes the lowest of the possible sentences which is (are) consistent with giving the defendant the full sentence he intended to impose on (her) in the first place." Id. at 828.

Other federal circuits, in facing this problem, have resolved it in the same manner. In doing so, the Ninth Circuit in United States v. Kenyon, 519 F.2d 1229 (9th Cir. 1975) said

> Accordingly we hold that if the additional punishment imposed on corrective resentencing exceeds the minimum addition necessary to make the prior sentence valid the record must show that the court resentenced the defendant solely upon the facts of his case and his personal history . . . and not for asserting his legal rights. Id. a p. 1233.

In analyzing these cases involving resentencing and illegal sentences, two principles become clear and before a court applies an automatic presumption it has to:

(1) Look to the intent of the original sentencing judge. If his intent is clear and on resentencing he followed that initial plan, no Pearce presumption arise even if the sentence is harsher in some respects.

(2) If the original sentence was illegal or invalid, you examine the record to see if if was increased only enough to make

it legal. If that was the extent of increase, no Pearce presumption applies.

Like the Federal Court's, this Court has struggled with this problem. This Court noted in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981), cases which involve illegal sentences pose special problems. It is impossible for the court to impose the exact same sentences. It is often difficult to determine when a sentence is harsher. In Villery, this Court looked to the sentencing judge's original plan to determine whether to apply the Pearce presumption. If the new sentence was within the judge's original plan (in Villery the combined total years of incarceration and probation), no presumption applied. In Beech v. State, 436 So.2d 82 (Fla. 1983), the court followed the Villery approach. The District Courts have also looked to the sentencing intent of the trial court and approved increased sentences where such intent was clear. Cruz v. State, 458 So.2d 826 (Fla. 3d DCA 1984.

Applying these standards to this resentencing the trial court clearly did not penalize the defendant for asserting his right to appeal. All parties agreed that the court's choices were forty (40) years or life.[1] In his original sentencing, the trial court (apparently believing) that §775.082 (3). Florida Statutes, which authorized any term of years over thirty (30), was the applicable law, rejected all terms of years less than sixty five (65).

It is clear that in choosing to impose a sentence of sixty-five (65) years under a guideline system with no parole, that the Appellant was sentenced to a term of years longer than his expected natural life. Therefore, on remand in imposing a life sentence, he did not impose a harsher sentence and in fact, may have imposed a lighter sentence because Appellant is now eligible under §944.30, Florida Statutes (1987) for clemency review.

However, if this Court were to find the sentence to be harsher; it was imposed to correct an illegal sentence, was within the judge's original sentencing intent, and did not exceed the minimum increase necessary to make the sentences legal. Therefore, no Pearce presumption arose.

Therefore, as the presumption of Pearce does not apply, the Appellant has not shown his sentence was harsher and no vindictiveness exists. This court should affirm.

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[1]Appellant now argues the trial court should have fashioned an esoteric mix of forty and twenty-five years consecutively imposed. Having failed to present the trial court with such an option, he has waived it. His argument does emphasize the State's point it its jurisdictional brief that the trial court be given all options prior to this Court accepting jurisdiction.

ISSUE II

THE APPELLANT'S VIOLENT NATURE WAS A PROPER GROUND FOR DEPARTURE.

As to the court's basis for departure, it is clear that the trial court was deeply concerned about the Petitioner's history of violence. Petitioner's argument on this point limits the court's findings to the violent nature of his criminal record and this is plainly far too narrow an interpretation.

In discussing Petitioner's violent nature, the trial court refers first to Petitioner's "history of violence in his home. His sister and grandmother testified that he has been violent and fought members of his family most of his life" (R 55). The court then refers to the Petitioner's prior "arrests" which reveal "a violent nature in the community" (R 55). Finally, the court found that the Petitioner's violent nature "as revealed in his home life and in his short adult life was further evidenced in the manner in which he committed the offense of Sexual Battery and Armed Kidnapping" in that in the course of committing these offenses he "violently and viciously beat the victim about the face and head" (R 55).

The violent theme of Petitioner's home life is certainly a factor the trial court could properly take into account as a basis for departure inasmuch as it reveals a clear inability on the part of the Petitioner to adapt to societal norms even in a sheltered environment. Moreover, the violent nature of

Petitioner's home life further supports the court's ultimate conclusion that "[t]here is no evidence that the Defendant will ever by anything but violent." (R 56). In fact, Appellant's oldest sister agreed that at home his fighting and his behavior was a never ending problem (SR pp. 121, 122) and his grandmother said his behavior had not changed (R p. 10) and he had been fighting in school (SR p. 123). The Court properly found the Appellant had a violent home life and early years.

As to the violent nature of Petitioner's prior record, the Petitioner, relying on Hendrix v. State, 475 So.2d 1218 (Fla. 1985), simply contends that Petitioner's prior history of violence cannot be used as a basis for departure because his prior record has already been taken into account in arriving at his recommended guidelines sentence. Additionally, Petitioner asserts that if the court's findings as to prior violence relate to mere arrests or prior crimes for which no conviction was entered, they cannot be used as a reason for departure under Florida Rule of Criminal Procedure 3.701(d)(11). (Appellant's brief at p. 11-13).

It is the State's response, first, that, although the trial court in its order used the word "arrests" in describing Petitioner's record, it is obvious from the court's statements at Petitioner's original sentencing hearing that Petitioner had received convictions for most, if not all, of the offenses listed. Specifically, at Petitioner's first sentencing hearing,

the trial court listed in detail Petitioner's prior record and Petitioner's disposition as to those offenses. (SR pp. 139, 141). V, pp. 139-141, Blackshear v. State, case no. BD-393). Only one offense was noted by the judge as not showing any disposition on Petitioner's prior record. Id. at 140. Thus, it is the State's position that the court's statement in the original sentencing transcript clearly indicates that the "arrests" to which the court referred in its departure order were in actuality convictions. It is also clear that some of the information received regarding this violent behavior resulted in the juvenile commitment to Marianna mentioned by the mother (T p. 12), the commitment to North Florida Hospital at McClenny, referred to by Dr. Miller when he discussed the prior sexual assault occurring at school and the Appellant's psycho-sexual disorder (SR pp. 90, 91, 94).

Given that the original record supports the conclusion that the trial court's reference to Petitioner's prior record was intended to be a reference to his prior convictions, the Petitioner's reliance upon Florida Rule of Criminal Procedure 3.701(d)(11) and his cited case law is misplaced.

Accordingly, a trial court may properly consider the nature of a defendant's offense(s) in departing from a recommended guidelines sentence, and, indeed, the Sentencing Guidelines themselves clearly allow such a consideration.

Specifically, the Committee Note to Florida Rule of Criminal Procedure 3.701(d)(11) provides in part:

> The court is prohibited from considering offenses for which the offender has not been convicted. Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge. (Emphasis supplied).

The Statement of purpose provides that the "sentencing guidelines embody," inter alia, the following principle:

> The severity of the sanctions should increase with the length and nature of the offender's criminal history. (Emphasis Supplied).

Fla.R.Crim.P. 3.701(b)(5). This language makes it plain that the trial court effectively complied with the purpose of the guidelines when it relied upon the underlying violent nature of Petitioner's acts for which convictions were obtained to depart. Consequently, that aspect of the court's departure order was clearly proper.

As to the violence Petitioner exhibited in committing the instant offenses, this factor, too, was an appropriate basis for departure. It is well settled that a trial court may rely upon the facts and circumstances surrounding the commission of an offense as a basis for departure. Bailey v. State, 11 F.L.W. 1664 (Fla. 1st DCA July 31, 1986); Stewart v. State, 489 So.2d 176 (Fla. 1st DCA 1986); Roberge v. State, 484 So.2d 82 (Fla. 2d

DCA 1986); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984); Fla.R.Crim.P. 3.701(b)(3), state that "[t]he penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." (Emphasis supplied.)

The trial court did not have to rely on a bare record or mere assertion from the prosecutor as to the quantum of proof available, he heard witnesses. He heard the victim describe the assault (SR pp. 108-115), he heard Dr. Miller describe the Appellant's justification: a little green man named Mark told him he could have sex with anyone he wanted without breaking the law. (SR p. 93).

The trial court considered the violence in the home, the violence underlying the convictions and commitments. The opportunity given to the Appellant by juvenile commitment and the hospitalizations to modify his behavior prior to determining the need for departure.

Under the facts and circumstances of this case, departure on the ground of the violent behavior of the Petitioner was warranted and should be affirmed. However, the trial court's departure was based on several factors. We do not know if the trial court would depart on this issue alone. Again, as stated in Appellee's Brief on Jurisdiction, this case is fraught with speculative issues which should not be resolved until ruled on by the trial court.

ISSUE III

EXTENT OF THE DEPARTURE WAS NOT AN ABUSE OF DISCRETION.

The Petitioner states this case is controlled by Booker v. State, 514 So.2d 1079 (Fla. 1987), and that under Booker, the extent of departure is reviewable. He is partially correct.

The extent of the departure issue is not properly before this Court as the Petitioner has never timely and properly raised it. Petitioner did not raise it on his first direct appeal nor did he raise it on his second direct appeal. He has, therefore, not properly preserved this issue for this Court's review.

In the event that this Court considers the issue in spite of this procedural bar, the standard of review is abuse of discretion. Albritton v. State, 476 So.2d 158 (Fla. 1985).

This Court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), described abuse of discretion:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris at p. 1203.

As established previously, the trial court had before it information that (1) Appellant was violent and abused and assaulted his own family (R 121,122,123); (2) Appellant, in 1977, committed a sexual assault as a juvenile at school; (3) Appellant had juvenile mental health commitments; (4) Appellant commited this sexual assault with a knife (box cutter); (5) Appellant had been diagnosed by Dr. Miller as having a psycho-sexual disorder and one manifestation of which was that the Appellant felt he had no responsibility for his actions because Mark [little green man] told him he could have sex with anyone he chooses without breaking the law; (6) Appellant fluctuates between competency and periods of incompetency.

The court did not act in an arbitrary or capricious manner. It inquired of the doctor, asking questions related to the effect of incarceration on Petitioner's mental condition. He asked questions of the symptoms when the Petitioner had been found incompetent. It applied the information it obtained in a rational manner and concluded that lengthy incarceration was needed. Appellant has not shown abuse of discretion.

CONCLUSION

Based on the foregoing arguments, the opinion of the District Court of Appeal should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 30 day of March, 1988.

EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL