12-9

IN THE SUPREME COURT OF FLORIDA

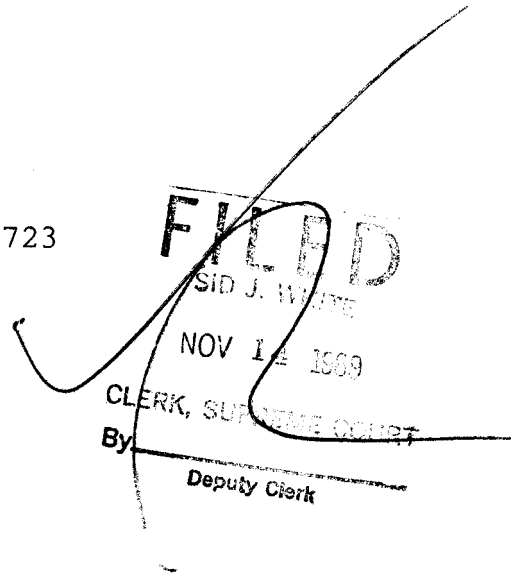
GLEN A. WEMETT,

Appellant, Petitioner

v. CASE NO. 74,723

STATE OF FLORIDA,

Appellee, Respondent.



ANSWER BRIEF OF APPELLEE

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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STATE OF FLORIDA,

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_____/

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant, GLEN A. WEMETT, defendant below, will be referred to herein as "Appellant." Appellee, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcript will be by the letter "T" followed by the appropriate page number; references to the supplemental record will be by the letters "SR" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee is in substantial agreement with Appellant's version of the case and facts with the following additions.

The Appellant Court found that the resentencing was not a vindictive act on the part of the trial judge (Opinion Appendix page 7.)

SUMMARY OF ARGUMENT

ISSUE I

Respondent asserts that the certified question should be answered in the Negative. The sentences that the defendant received were equivalent. In each instance the court chose the harshest penalty available. As to each sentence, the court chose a method designed to ensure the defendant spent the rest of his life in jail. The sentence was as equivalent as possible, considering that the defendant chose a new sentencing scheme which totally altered the type of sentence which the judge could impose. This altered sentencing mechanisms rendered inapplicable any presumption of vindictiveness imputable to the trial judge. Further the District Court finding of no actual vindictiveness obviates even the need for the application of any presumption. Therefore this court should find that the sentence imposed was not harsher, and the presumption of vindictiveness did not come into play and therefore reverse the decision of the District Court.

ISSUE II

This court should affirm ruling of District courts which founding the departure reasons valid in this case. The reason used, vulnerability of the victim, is a valid reason when coupled with evidence that the victim was in fact more vulnerable than the average person. The evidence supports the

courts finding that the 84-year-old woman was helpless, and was twice targeted as a victim because of her helplessness. This court should affirm the departure.

ARGUMENT

ISSUE I

The District court certified the following question:

> IS A LIFE SENTENCE IMPOSED UNDERGUIDELINES SENTENCING ALWAYS A HARSHER SENTENCE THAN A TERM OF YEARS, REGARDLESS OF THE LENGTH OF THE SENTENCE FOR A TERM OF YEARS.

The answer to this question is fundamental to the analysis which the District Court used to reverse the sentence imposed by the trial court.

This court should answer this question in the negative and remand the case to the district court for further proceedings.

At the time of the commission of this crime 3775 Fla. Stat. provided two alternate punishments for a life felony they were (1) life imprisonment; (2) a term of years not less than 30. Each of these sentences were subject to the jurisdiction of the Fla. Parole Commission which based upon its matrix, and a parole interview would determine a presumption parole release date. Chapter 947 Fla. Stat.

However §947.16(4) provided the authority for the retention of jurisdiction by the trial court over certain offenders. If a trial court retained jurisdiction the court had the authority to veto the parole release of an individual for the 1st 1/3 of his total sentence §947.16(4).

Informative in answering the certified question are the cases of Green v. State, 421 So.2d 508 (Fla. 1982); Harmon v. State, 438 So.2d 369 (Fla. 1983); State v. Watson, 453 So.2d 510 (Fla. 1984) all of which deal with the distinction between a life sentence and a term of years with retention of jurisdiction. In Green, supra. the court held that a long term of years with a retention of jurisdiction was substantially harsher than parole eligible life sentence Green, Id. p. 510. In Harmon, supra. at 371 the court specific recognized that a long term of years with a retention of jurisdiction would likely result in the defendant spending the rest of his life in jail.

In these decisions this court recognized that the legislative sentencing scheme authorized a trial judge to combine consecutive sentencing with a retention of jurisdiction in such a manner as to insure that a defendant would remain incarcerated for the rest of his life. Therefore the preguidelines ranking of sentence severity would be:

1. Death.
2. A term of years exceeding 100 with a retention of jurisdiction (in essence, life with a mandatory 33+).
3. Life with a mandatory 25 years.
4. Life parole eligible.
5. Term of years.

Thus, prior to the guidelines, the harshest sentence a person could receive (other than the death penalty) was a long term of years with a retention of jurisdiction. Essentially, it was a sentence which would keep you in jail until your death. This is the sentence the defendant received, 260 years, with jurisdiction retained for 86 years.

The sentence the defendant received on resentencing was two guideline life sentences each running concurrent. These guideline life sentences were not eligible for parole so they were harsher than a parole eligible life sentence. Under the guidelines, the severity ranking of sentence would be:

1. Death.
2. Life with no parole (guidelines life).
3. Life with a mandatory 25 years.
4. A term of years (now capped at 40).

Thus, in evaluating the severity of each sentence, it is clear that in each instance the second ranked sentence was imposed. In each case, a sentence was imposed which was and was intended to be the harshest available.

A person serving a guideline life sentence may be released as provided in §921.001(10) Fla. Stat.

(a) Upon expiration of his sentence:

(b) Upon expiration of his sentence as reduced by

accumulated gain-time: or

(c) As directed by an executive order granting clemency.

Thus the only basis upon which a defendant could ever realisticly be eligible for release was if his sentence was reduced by means of executive clemency, formerly 8944.30 Fla. Stat. (1987), now 8940.03 Fla. Stat. (1988). Respondant asserts that the 260 year sentence with the retention of jurisdiction was similar in that only by way of Judicial (a waiver of retention) clemency would the defendant have a realistic possibility of release during his lifetime.

Therefore Respondent asserts that the sentence imposed on the defendant at resentencing was equivalent to the sentence he initial received as under each sentence he could expect to live out his life behind bars.

Appellant's and the Courts assertions regarding the holding of Blackshear v. State, 531 So.2d 956 (Fla. 1988), are incorrect. Blackshear does not control the situation presented by this case. Blackshear was given two concurrent 65-year sentences by the trial court when the legal maximum was a term of 40 years or life. The district court reversed for resentencing, Id. 480 So.2d 207 (Fla. 1st DCA 1985), and the trial court, believing its only choice was 40 years or life, gave a life sentence. In Blackshear v. State, 513 So.2d 174 (Fla. 1st DCA 1987), the district court approved the life

sentence but remanded for resentencing based on the validity of the departure reasons used. In the Florida Supreme Court, Blackshear argued that the trial court, on resentencing, could run the two sentences consecutively and thus give the defendant the 65 years envisioned by the trial court.

In Blackshear, supra., this Court approved the holding of Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982), stating that on remand of a challenged illegal sentence, a court is operating on a clean slate and that on resentencing a court is free to resentence on all counts to accomplish the initial sentencing plan. Thus in Blackshear, by sentencing the defendant to 40 years on one could and 25 years on the other with the sentences to run concurrently, the court reasoned that the trial judge's initial 65 year sentence could be reimposed and the issue of vindictiveness would never have to be reached.

Appellants argument and the lower court application of Blackshear to the facts was wrong. In Blackshear the trial judge originally choose a term of years without a retention of jurisdiction, and without imposing the harshest penalty possible. Further Blackshear did not involve a change in the methodology of sentencing. In the instant case the defendant by his actions made it impossible for the trial court to correct the illegal length of the retention of jurisdiction[1] and leave

[1] The length of time over which jurisdiction could be retained was changed in June 1983, Chap. 82-131 Laws of Fla, the defendant was sentenced in July 1983. (R 16).

the sentence intact. The defendant chose to be sentenced under the guidelines. In other words, he chose a whole new sentencing scheme a scheme with new and different rules and methods. Thus unlike Blackshear the same sentence could not be fashioned.

Further Blackshear turned on this courts application of the principles enunciated in North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969). Since Blackshear, supra. the U.S. Supreme Court decided Alabama v. Smith, 490 U.S. __ 104 L.Ed.2d 865, 109 S.Ct. __ (1989).

In Smith, supra. the court set out how and when the North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), presumption applies. In doing so, it interpreted and explained how its previous decisions in Texas v. McCullough, 475 U.S. 134, 89 L.Ed.2d 104, 106 S.Ct. 976 (1986), in United States v. Goodwin, 457 U.S. 368, 73 L.Ed.2d 74, 102 S.Ct. 2485 (1982), Wasman v. United States, 468 U.S. 559, 82 L.Ed.2d 424, 104 S.Ct. 3217 (1984), were to be applied, and specifically overruled Simpson v. Rice, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969) (companion case of Pearce).

In Alabama v. Smith the court recognized that while Pearce announced a rule of sweeping dimensions, subsequent cases have significantly limited Pearce, stating:

> Because the Pearce presumption "may operate in the absence of any proof of an improper motive and thus ... block a legitimate

> response to criminal conduct," United States v. Goodwin, supra, at 373, **we have limited its application,** like that of "other 'judicially created means of effectuating the rights secured by the [Constitution],'" **to circumstances "where its 'objectives are thought most efficaciously served,'"** Texas v. McCullough, supra, at 138, quoting Stone v. Powell, 428 U.S. 465, 482, 487 (1976). Such **circumstances** are those **in which there is a **reasonablelikelihood,"** United States v. Goodwin, supra, at 373, that **the increase** in sentence **is the product of actual vindictiveness** on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, see Wasman v. United States, 468 U.S. 559, 569 (1984).

Alabama v. Smith, 104 L.Ed.2d 872 873 (emphasis added).

Further, the court held that the evil Pearce sought to prevent, was not enlarged sentences but vindictiveness of a sentencing judge. Alabama v. Smith, supra at 872.

In its opinion the lower Court states that it rejected the state's argument that a change in the methods employed in sentencing this defendant made the Pearce presumption inapplicable. In ruling in that fashion, the lower Court has overlooked the fact that the United States Supreme Court, in McCullough v. Texas, supra, has recognized that when different sentencing mechanisms are employed, the presumption of Pearce does not apply.

For example, in Chaffin v. Stynchcombe, 412 U.S. 17, 36 L.Ed.2d 714, 93 S.Ct. 1977 (1973), when a second jury, on

retrial, imposed a higher sentence than the first jury no Pearce presumption applies; further, in McCullough v. Texas, supra, when, after retrial, a judge imposed a more severe penalty than the jury did initially, the court held that no presumption arose.

In Alabama v. Smith, the court stated that in Pearce, in both the initial sentencing and on resentencing, the judge was operating in the context of roughly the same sentencing considerations. The court inferred that when the sentencing consideration change the Pearce presumption dissolves and the defendant must prove actual prejudice. Alabama v. Smith, 104 L.Ed.2d at 874.

In this case the lower Court overlooked the changes in the sentencing considerations that occurred making Pearce inapplicable. First, the defendant moved for an entire new sentencing hearing based on the institution of the sentencing guidelines. By electing the guidelines the defendant precluded the court from imposing a retention of jurisdiction because that applied only to parole eligible sentences. Thus, the defendant by his actions altered the sentencing mechanism and prohibited the court from imposing the same or a similar sentence. This alone is sufficient enough of an act to be an intervening circumstance which renders Pearce inapplicable. However, it is not necessary to reach that proposition because Smith makes it clear that the presumption of Pearce does not apply when the sentencing scheme is significantly changed, as it was here.

The import of the post-Pearce cases is clear. Pearce is not a bright line rule to be blindly applied and this Court should not apply it in such a fashion.

Further, the district court specifically found that no actual vindictiveness existed. To emphasize a court created rule designed to deter vindictiveness when the appellate court found no vindictiveness occurred simply makes no sense.

By finding no vindictivness the Dictricts Court should have applied Moon v. Maryland, 398 U.S. 319, 26 L.Ed.2d 262 90 S.Ct. 1730 (1970). In Moon, supra. just as in this case it was established that there was no vindictiveness on the part of the trial judge when the defendant was resentenced. (SR 18-20)(T 45-47).

In Moon the same court which decided Pearce, supra. found that the Pearce presumption did not require reversal. Another way of stating Moon would be to say that even if a Pearce presumption arises evidence that the trial court was not vindictive on resentencing can refute the presumption, in the same manner as proof of an intervening event can visciate any Pearce, supra. presumption.

Therefore, Respondent requests this court to answer the certified question in the negative, to correct the District Courts misapplication of the Pearce presumption, and to remand for the reinstatement of the life sentences imposed by the trial court.

ARGUMENT

ISSUE II

THE FIRST DISTRICT COURT OF APPEAL COURT DID NOT ERR IN ALLOWING DEPARTING FROM THE GUIDELINES BASED ON THE VULNERABILITY OF THE VICTIM.

In a guidelines departure case, there are two issues. The first one is, is the departure reason valid? The second one is, is there record support for the reason? In this instance, the reason is valid and is supported by the record. Therefore, the departure should be upheld. State v. Mischler, 488 So.2d 523 (Fla. 1986).

Appellant's argument that vulnerability, in order to be used as a departure reason, must be accompanied by physical or psychological injury is incorrect.

The State acknowledges that a vulnerable victim will often suffer incredible emotional or physical injury as a result of her assailant's unmerciful attacks. However, such is not necessary to support a valid departure and the cases which Appellant cites do not require it.

The first case the Appellant relies on, Guzie v. State, 512 So.2d 289 (Fla. 1st DCA 1987), sets out of the appropriate test. It holds that vulnerability is a valid reason for departure when the facts show that the victim was more vulnerable than a person who was younger or stronger.

The second case the Appellant cites, Byrd v. State, 516 So.2d 107 (Fla. 4th DCA 1987), establishes the inappropriateness of Appellant's argument. Byrd holds that vulnerability must be coupled with an additional element to support departure and lists as examples two such elements. The first element listed was that the defendant stood in a position of trust; the second element, that the degree of suffering was increased due to the age, frailty or helplessness of the victim.

The Fourth Districts holding in Byrd, supra., must be considered in light of its holding in the case of Grant v. State, 510 So.2d 313 (Fla. 4th DCA 1987). In Grant, the Fourth District Court of Appeal found that the vulnerability of the victim was a valid reason for departure. The court found the fact that the defendant had done yard work for the victim and knew her helplessness, coupled with fact that the defendant returned a second time to rob her again, and the fact that he terrorized her with a shotgun, were sufficient supporting facts to prove vulnerability.

The Fourth District's position expressed in Byrd, supra, and Grant, supra. is the similar to that of the First District Court of Appeal expressed in Guzie, supra. The position is that vulnerability is a valid reason by itself for departure, however, there have to be facts and circumstances which show that the victim was more vulnerable than the average person.

This position is now uniformly adopted by the District Court of Appeal. In Manuel v. State, 542 So.2d 1368 (Fla. 2nd DCA 1989), the court adopted the position that the victim advanced age coupled with another factor will support a departure sentence. In Monroe v. State, 468 So.2d 1081 (Fla. 3rd DCA 1985), the third district upheld a departure sentence on similar grounds. The First District has repeatedly followed Guzie, supra. and upheld departure under factual circumstances similar those in the instant case. Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988), Bell v. State, 522 So.2d 989 (Fla. 1st DCA 1988).

The facts in this case are very similar to those in Grant, supra. and support a finding that the victim was vulerable. Appellant posed as an inspector, a person in a position of authority and trust to obtain entry to the victims house. He threatened to kill the victim, took her money, and cut the phone line, yet the victim did not call the police. Realizing he had easy pickings, the appellant and a friend returned a couple of days later. Again, they preyed upon her confusion by pretending that they were returning the stolen wallet under the pretext of having found it. This time, while his cohort pinned her to the ground, Appellant ransacked the house all the time telling his cohort to kill the helpless victim. When the victim's 19-year-old godson showed up at the door, Appellant and his cohort ran.

The trial judge who had an opportunity to observe the condition, the confusion and the dependance of this victim, stated at resentencing:

> ...I, unlike the cold transcript there, got to listen to your victim testify about what you did to her. I do find from the evidence in this case that is was this lady's age and vulnerability that actually was the cause and means and the ultimate consummation of the commission of this crime. You are a person who picked on a victim who is weak and elderly and helpless and only that. When this lady's godson, who was no giant, an certainly not by an indication a person of experience in physical combat, came in the house you fled like a frightened puppy. When it was just you and the 84-year-old lady you were Mr. Macho in the house. I think that the circumstances of this particular crime indicate that the unique age and vulnerability of this victim led to, in my experience, the unique situation in this series of crimes. I don't believe any of this would have happened or could have happened if this lady weren't totally helpless. She wasn't helpless because she was asleep. She wasn't asleep because she was old. It was a combination of her age, her size, her physical infirmities, and I heard her testify and saw her walk in and out of this courtroom, and I am convinced that an average reasonably healthy female in that house would never have been bothered by you. (T 45-47).

The trial court found that the women was specifically targeted due to her vulnerability. She became a multiple victim due to that fact, and her resulting inability to see through Appellant's various subterfuges. The Court found unlikely that an average, reasonably healthy female would have been a victim of the Appellant.

Further the court found that the temporal proximity of the crimes in this case just as in Grant, supra. lent credence to the existence vulnerability.

Since the trial court's reasons are more than mere vulnerability and the facts establish support for the reasons in the record, the trial court's departure should be affirmed.

CONCLUSION

Based on the above cited legal authorities, Appellee prays this Honorable Court answer the certified question in the Negative affirm the departure and remand the case to the trial court to reinstate the life sentences.

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 James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida 32202, this 14 day of November, 1989.

EDWARD C. HILL, JR.
Assistant Attorney General

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APPENDIX