IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 74,723

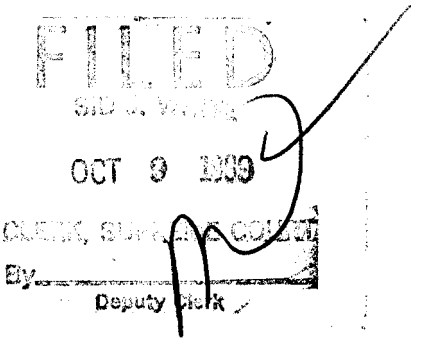
GLEN A. WEMETT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



AMENDED
PETITIONER'S BRIEF ON THE MERITS

LOUIS O. FROST, JR.
PUBLIC DEFENDER
FOURTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Glen A. Wemett, was the Appellant before the First District Court of Appeal and the Defendant in the Circuit Court proceedings. Respondent, the State of Florida, was the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court. Petitioner will designate any references to the Record on Appeal (which contains the pleadings filed in this case) filed in the First District Court of Appeal as "R.", followed by the appropriate page number. References to the transcript of the trial and sentencing proceedings filed with the First District Court of Appeal will be designated as "T.", followed by the appropriate page number. References to the Supplemental Record of the trial in this cause will be designated as "Supp.", followed by the appropriate page number.

A

STATEMENT OF THE CASE AND FACTS

This case involves a decision of the First District Court of Appeal which certified the following question to this Court: Is a life sentence imposed under guidelines sentencing always a harsher sentence than a term of years, regardless of the length of the sentence for a term of years? In the appeal below, Petitioner challenged his consecutive life sentences for two counts of burglary with an assault, Petitioner had originally received a sentence of a total of **260** years with a retention of jurisdiction for one-half of that sentence. In Wemett v. State, 529 So.2d 1288 (Fla. 1st DCA 1980), Petitioner argued the retention for one-half of the sentence was illegal. The First District agreed and remanded the case for resentencing.

Upon remand for resentencing, the trial court held a new sentencing hearing. Petitioner elected to be sentenced under the guidelines. The guidelines scoresheet indicated a guideline sentence of between ***5*** 1/2 and 7 years (R, 27). Respondent stated it relied upon the trial testimony to support its argument that the trial court should exceed the guidelines (Tr. **22-23).** Petitioner then submitted a transcript of the victim's testimony into evidence (Tr, **23).** The trial court received the transcript into evidence (Id).

Respondent argued there were two reasons to exceed the sentencing guidelines: 1) age and vulnerability of the victim, (2) timing of the offenses (Tr, 24). Respondent essentially argued Petitioner would not have committed the offenses if the victim had

not been old (84) and frail (Tr. 26). Petitioner argued vulnerability, alone, was an insufficient reason to depart from the guidelines (Tr. 32-34). In support of this argument, Petitioner cited the case of Guzie v. State, 512 So.2d 289 (Fla. 1st DCA 1987). Petitioner noted that in Guzie, supra, this Court rejected the vulnerability of the victim as a reason to depart from the guidelines. Petitioner then entered the sentencing order of the trial court into evidence (Tr. 35). The victim in Guzie was 82 years old, lived alone and was well-known to the defendant.

Petitioner then reviewed the trial transcript of the victim's testimony. Counsel noted the victim testified:

1. She suffered no physical harm.

2. She received no marks or bruises or other physical injury.

3. She sought no medical help.

4. There was no evidence of any psychological trauma.

5. The victim, in responding to the prosecutor's questions about if she was put in fear by Petitioner's action, stated she "felt funny" (Tr. 35-36).

Petitioner argued there was no proof of any physical or psychological injury or trauma, in addition to the victim's vulnerability, required by the case law. (Citing Byrd v. State, 516 So.2d 107 (Fla. 4th DCA 1987); Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985); Wheeler v. State, 525 So.2d 1008 (Fla. 3d DCA 1988); Bell v. State, 522 So.2d 989 (Fla. 1st DCA 1988) and Guzie v. State, supra) (Tr. 33-34).

The victim in this case, Eula Mae Riley, testified at trial to the following relevant facts:

Ms. Riley is 84 years old (Supp. 3). Her health is pretty good and she was not taking any medication (Supp. 4). She had only fair eyesight due to a recent eve operation. (Id) On the day in question, Ms. Riley stated a white boy was knocking on her back door (Supp. 5). She saw him come across the street to her home. (Id) Ms. Riley identified Petitioner as the person who was at her door (Supp. 22). Riley asked the person, "What you want? What you come here for?" (Tr. 5). Petitioner answered, he came "to inspect the house, to see what could be done inside so we could start work tomorrow." (Supp. 5-6). Petitioner said he was "The Inspector"; Ms. Riley said, "you can't be the inspector" (Tr. 8). Ms. Riley thought Petitioner was the bug inspector - Petitioner told her he was the inspector. (Id)

Petitioner then looked in all of the rooms (Supp. 5-6). He said, "There was lots that could be done and it would be fixed." (Supp. 5-6). Ms. Riley noted that she did not get a really good look at the person because he was always holding his head down (Supp. 7). His voice was "funny," according to Ms. Riley. (Id) After Petitioner looked through the rooms, he asked Ms. Riley if she wanted to die (Supp. 8). She said she did not want to die (Id). Ms. Riley testified, at this point, "she wasn't so [sic? afraid." (Id) Petitioner then said, "Don't you make no noise and you better not holler, if you do, I'm going to kill you." (Id) Petitioner had no weapons; Ms. Riley testified she did not see a pistol, knife or gun (Supp. 35).

Respondent asked Ms. Riley how she felt when she heard Petitioner say he would kill her (Supp. 9). She answered, "I felt real funny." (Id) Petitioner then supposedly said "Where is your money? - Turn over your money." (Supp. 9). Petitioner then took Riley's billfold, which had about 13 dollars in currency and 7 dollars in food stamps (Supp. 10). Petitioner left out the back porch (Supp. 11). Ms. Riley was locked out of her back door, so she walked around to the front of her house (Supp. 11). Ms. Riley did not call the police that day (Supp. 12). Although she learned from a neighbor the next day that her phone was disconnected, Ms. Riley made no attempt to call the police (Id).

The next day a man brought Ms. Riley's billfold back to her (Supp. 13-14). Ms. Riley described the man as a "colored boy" (Supp. 13-16). The man said, "Is this your billfold?" (Supp. 14). The man had come to Ms. Riley's house earlier (Supp. 13-14). The man and Ms. Riley examined the billfold "because it was tore [sic] into two pieces." (Supp. 14). The man said he found it by a tree (Tr. 14). The two then sat on the porch and looked at the contents of the wallet (Id).

The black man then asked Ms. Riley if he could use the bathroom (Supp. 115). The man went into the house and used the bathroom (Id). When he came out of the bathroom, and he grabbed Ms. Riley's hands (Id). He then asked, "Tell me where the money is?" (Id) Ms. Riley told him to leave her alone (Id).

Petitioner then came into the house and locked the door behind him (Supp. 16). He told the black man, "Kill her, kill her." (Id) When Petitioner said this, Ms. Riley testified she

was scared. (Id) Petitioner then looked through a bureau's drawers and a chiffarobe and turned over the bed (Supp. 16-17). While Petitioner was doing this, the colored boy was holding down Ms. Riley (Supp. 17). When she tried to get up, the black man would grab her arms and push her back down (Id). A man named Johnny Williams then came to Ms. Riley's home and knocked on the door (Supp. 18). Petitioner and the black man then ran out of the house (Supp. 18-19).

Petitioner argued at the sentencing hearing that if the trial court sentenced Petitioner to two life sentences, he would receive a harsher sentence than previously imposed (Tr. 37-38). Petitioner would have been eligible for parole under the prior sentence and the trial court retained the authority, within the retention of jurisdiction period, to determine that Petitioner could return to society (Tr. 45). Consequently, the life sentence under the guidelines with no chance of parole or release by the court was a harsher sentence than 260 years with a retention over 1/3 of that sentence (Tr. 44-45).

The trial court then sentenced Petitioner to life in prison on the first Burglary with Assault charge, followed by 15 years for the Unarmed Robbery charge, followed by life for the second Burglary with Assault, followed by 5 years on the Attempted Unarmed Robbery offense (Tr. 22-25). The written order for the reasons to depart from the guidelines sentence stated:

"The age and vulnerability of the victim - The victim in this case was an eighty-four year old female living alone. The Court finds that the age and extreme vulnerability of this

particular victim which was known to the defendant made it possible for the defendant to terrorize the victim, not once, but twice within a twenty-four hour period. It was clear from the victim's demeanor and presence at trial, and the testimony presented by the State, that the defendant picked this victim strictly because of her helplessness." Hadley v. State, 488 So.2d 162 (Fla. 1st DCA 1986); Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985) (R. 28).

The First District upheld the departure from the sentencing guidelines. The Court stated the departure reasons were valid and amply supported by the record. Judge Joanos also noted, "This Court has held that when a victim's vulnerability is increased by virtue of advanced age, frailty, or helplessness, the combination of factors which have made the victim particularly vulnerable will support a departure sentence. Bell v. State, 522 So.2d 989, 990 (Fla. 1st DCA 1988); Guzie v. State, 512 So.2d 289, 290 (Fla. 1st DCA 1987); Hadley v. State, 488 So.2d 162 (Fla. 1st DCA 1986); Von Carter v. State, 468 So.2d 276, 279 (Fla. 1st DCA 1985). Moreover, we conclude that the added factor that Appellant committed separate and distinct offenses against the same victim on two consecutive days is also a valid reason for departure, in the circumstances of this case."

The First District then concluded that under North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and Blackshear v. State, 531 So.2d 956 (Fla. 1988), the life sentences were harsher than the original sentence of 260 years. The life sentences were reversed with directions that

Petitioner be resentenced to a term of years which does not exceed the trial court's original sentencing goal.

SUMMARY OF ARGUMENT

A life sentence under the sentencing guidelines is harsher than a term of years (260 years in this case). Under a life sentence, Petitioner will serve the rest of his life in prison, Under a term of years, Petitioner could earn enough gain time under Section 944.275, Florida Statutes (1987), to be released before the end of his life. By definition, a life sentence (with no chance of release) is harsher than a term of years (with some chance of release by the earning of statutory and administrative gain time). The First District Court of Appeal also correctly decided that the trial court could not impose a life sentence, after the original sentence of 260 years was vacated due to an illegal retention of jurisdiction. Upon resentencing, Petitioner elected to be sentenced under the sentencing guidelines. This election was not a change in circumstances which would permit a harsher sentence after appeal under North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The trial court improperly departed from the sentencing guidelines because of victim's age and vulnerability. Although the victim was elderly (82 years), there was no proof of psychological or physical injury due to that vulnerability. This Court in Williams v. State, 492 So.2d 1308 (Fla. 1986), decided mere vulnerability of the victim is not sufficient reason to depart from the guidelines, Courts have subsequently interpreted Williams v. State, supra, to mean the victim's age and

vulnerability, can support a guidelines departure. The victim in this case suffered no physical or psychological injury.

ARGUMENT

ISSUE I

WHETHER A LIFE SENTENCE IMPOSED UNDER GUIDELINES SENTENCING IS ALWAYS A HARSHER SENTENCE THAN A TERM OF YEARS, REGARDLESS OF THE LENGTH OF THE SENTENCE FOR A TERM OF YEARS?

The First District Court of Appeal correctly decided that under Blackshear v. State, 351 So.2d 956 (Fla. 1988), and North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), two concurrent life sentences followed by a consecutive 15 year and 5 year sentences under the sentencing guidelines are harsher than a term of years of 260 years. This Court in Blackshear, supra, decided a related question. In Blackshear, the original sentence was two concurrent 65 years sentences for armed sexual battery and armed kidnapping. The 65 year sentences were illegal because the maximum term of years for the charges was 40 years. The 65 year sentences were set aside by the First District. Blackshear v. State, 480 So.2d 207 (Fla. 1st DCA 1985). Upon resentencing, the trial court then sentenced Blackshear to two concurrent life sentences.

Justice Grimes, writing for this Court, decided the two life sentences were harsher than the original sentencing goal of 65 years. This Court decided a 40 year sentence on one charge followed by a 25 year consecutive sentence was proper; this type of sentence could effectuate the original sentencing goal of 65 years. However, this Court explicitly found that the trial court, under North Carolina v. Pearce, supra, could not sentence

Blackshear to a term greater than 65 years, absent some intervening event which would justify a greater sentence.

The First District in its decision below applied Blackshear, supra, to the facts of this case. Judge Joanos concluded Blackshear and North Carolina v. Pearce, supra, required a finding that a life sentence was harsher than a 260 year sentence. The First District obviously had some doubt about whether a life sentence is harsher than a 260 year sentence because it certified the question to this Court. A close examination of the effects of a life sentence and a 260 year sentence under the guidelines will reveal that the decision below was correct.

A life sentence under the guidelines means Petitioner will spend the rest of his life in prison. A 260 year sentence, although longer than the natural life span of human beings, is still shorter than a life sentence under the guidelines. Upon resentencing, the trial court cannot retain jurisdiction over the 260 year sentence because Petitioner was sentenced under the guidelines after the original sentence of 260 years with a retention of jurisdiction for one-half. This Court in Hansborough v. State, 509 So.2d 1081 (Fla. 1987), held a trial court could not retain jurisdiction over a sentence under the guidelines. Consequently, for the purposes of this appeal, Petitioner can only receive a maximum sentence of 260 years without any retention of jurisdiction. He is eligible for gain time. Under Section 944.275, Florida Statutes (1987), Petitioner must receive a maximum sentence expiration date. Petitioner could earn enough

gain time to finish his sentence before the end of his life. Under a life sentence, Petitioner has no chance to finish his sentence before the end of his life, except for a release pursuant to executive clemency. Section 944.30, Florida Statutes (1987). Even if the trial court could retain jurisdiction over the 260 year sentence, it is still less severe than a life sentence. A trial court could decide to end his retention of jurisdiction and permit the earning of gain time. See Section 947.16(4), Florida Statutes (1987). A sentence for a term of years even with a retention of jurisdiction is less harsh than a life sentence because of the possibility of release under a term of years sentence.

Respondent argued below that North Carolina v. Pearce, supra, did not apply to this case because Petitioner elected to be sentenced under the guidelines and such election was a change in circumstances which permitted an increased sentence. The First District was correct in deciding that Petitioner's exercise of a statutory right (the election to be sentenced under the guidelines) could be punished by a higher sentence. North Carolina v. Pearce attempted to prevent this precise evil: an increased sentence after the exercise of a constitutional or statutory right. Although the sentencing scheme did change once Petitioner chose the guidelines, that change alone cannot permit an increased sentence because Florida law permitted Petitioner to choose that option.

ISSUE II

THE FIRST DISTRICT COURT OF APPEAL IMPROPERLY DECIDED THAT THE TRIAL COURT COULD DEPART FROM THE SENTENCING GUIDELINES SOLELY BECAUSE OF THE VICTIM'S AGE AND VULNERABILITY WITHOUT ANY PROOF OF PHYSICAL OR PSYCHOLOGICAL INJURY CONTRARY TO Williams v. State, 492 So.2d 1308 (Fla. 1986), and Bell v. State, 522 So.2d 989 (Fla. 1st DCA 1988).

Under the authority of Reed v. State, 470 So.2d 1382 (Fla. 1985), Petitioner will present the second issue discussed in the opinion of the First District Court of Appeal: Whether the trial court properly departed from the sentencing guidelines because of the victim's age and vulnerability. The First District decided the departure was valid because of the increased vulnerability due to advanced age, frailty or helplessness (citing Bell v. State, 522 So.2d 989, 990 (Fla. 1st DCA 1988); Guzie v. State, 512 So.2d 289 (Fla. 1st DCA 1987); Hadley v. State, 488 So.2d 162 (Fla. 1st DCA 1986); Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985). This Court in Williams v. State, 492 So.2d 1308 (Fla. 1986), explicitly held that mere vulnerability of the victim, alone, was not a valid reason to depart from the guidelines. Petitioner does not dispute that the fact that aged persons may be more vulnerable due to age, frailty or helplessness. However, this fact alone is not a reason to depart from the guidelines under Williams v. State, supra.

The First District did not follow its own precedents in this case. In Bell v. State, supra, the First District decided

vulnerability, due to age, could support a guidelines departure, if the degree of suffering from physical or psychological injury is increased by reason of the advanced age, frailty or helplessness of the victim. 522 So.2d at 990 (emphasis supplied). See also Guzie v. State, 512 So.2d 289 (Fla. 1st DCA 1987). The other cases cited by the First District also have the element of substantial physical or psychological injury coupled with vulnerability. Hadley v. State, 488 So.2d 162 (Fla. 1st DCA 1986); Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985). For some unknown reason, the First District did not require this proof in the instant case.

The Fourth District Court of Appeal has also held that a victim's age and vulnerability, coupled with resultant psychological or physical injury, can support a guidelines departure. Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985). In Byrd v. State, 516 So.2d 107 (Fla. 4th DCA 1987), the Fourth District decided some additional element like psychological or physical injury must be coupled with age or vulnerability to justify a departure sentence.

The facts of this case unequivocally demonstrate the victim suffered no physical or psychological injury due to her age or vulnerability. Ms. Riley, the victim, was 84 years old (Supp. 3). Her health was good and she was not taking any medication (Supp. 4). Her eyesight was only fair due to a recent eye operation (Id). The victim in this case suffered no injury. Petitioner did not physically touch the victim. She sought no medical help (Tr. 35-36). Although Petitioner threatened her, he

did not have a weapon nor did he physically assault the victim (Supp. 35). The victim did not testify she was afraid because of the threats - she felt funny (Supp. 9). After the first offense, the victim did not call the police (Supp, 12).

The First District decided the victim's vulnerability permitted Petitioner to commit separate and distinct offenses against the same victim on two consecutive days. There was no direct proof of this in the record. See testimony of Ms. Riley (Supp. 3-35). Even if this fact was true, it does not support a departure from the guidelines. This Court in Williams v. State, supra, decided the vulnerability of the victim (which facilitated the commission of the crime) does not support a departure. See also Brown v, State, 511 So.2d 719 (Fla. 1st DCA 1987). In Williams, supra, the victim was stabbed while sleeping. This condition certainly enabled Williams to kill easily his victim (this act also eliminated a potential witness if the victim had lived). The vulnerability of the victim contributed to the commission of the offense. Notwithstanding this fact, this Court decided mere vulnerability (even if it contributed to the commission of the crime) of the victim did not justify a guidelines departure, The above-cited cases from the First and Fourth Districts have correctly interpreted Williams to require something more than vulnerability which leads to the offense - psychological or physical injury because of the vulnerability. Therefore, even if the victim's vulnerability did lead to the commission of the offenses, this fact alone does not support a departure.

The First District's conclusion that the vulnerability made it possible for Petitioner to terrorize the victim is simply not supported by the record. Although Petitioner did threaten the victim (these acts formed the basis of the burglary with assault charges), there was no proof whatsoever that these acts traumatized or terrorized the victim. A fair reading of the record demonstrates Ms. Riley was not actually aware of what was happening to her. There was no proof of psychological or physical injury (Tr. 35-36). Petitioner did not touch Ms. Riley. When asked whether Petitioner's actions put her in fear, Ms. Riley testified she felt funny (Tr. 35-36). The victim did not call the police after the first incident; a "terrorized" victim would have called the police (Supp. 12).

Petitioner does not contest, in any way, the special consideration that should be given to elderly victims of crime. Petitioner readily concedes a victim because of her age and vulnerability could suffer the requisite physical or psychological injury which would support a guidelines departure. If there had been any evidence in this case that Ms. Riley had suffered physical or psychological injury, then the departure would have been justified. However, this Court cannot assume there was such injury merely because the victim was elderly.

This Court should adopt the holding of Bell v. State, supra, and Byrd v. State, supra, and require an increased physical or psychological injury due to the victim's age and vulnerability. The Court should also find that under this standard, there was insufficient proof of physical or

psychological injury to the victim. Consequently, the Court should reverse the life sentences and remand for a sentence within the guidelines range.

CONCLUSION

This Court should vacate and set aside Petitioner's life sentences and remand for resentencing within the Sentencing Guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050 this 6TH day of October, A.D., 1989.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER