

067

IN THE SUPREME COURT OF
FLORIDA

SUPREME COURT NO.: 74,723

GLEN A. WEMETT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

DEC 4 1989

CLERK, SUPREME COURT

By _____
Deputy Clerk

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, The State of Florida, accepted Petitioner's Statement of the Case and Facts with one additional fact, Petitioner agrees with that Statement of the Case and Facts.

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?

1. A life sentence under the guidelines is harsher than a term of years.

Respondent argues the answer to the certified question should be "no" because a life sentence and a term of years sentence (e.g. 260 years with 1/3 retention of jurisdiction) are equivalent. However, Respondent confuses the present meaning of a life sentence under the guidelines and a retention of jurisdiction under the guidelines. Respondent argues a life sentence (with parole) can be less harsh than a term of years with a retention of jurisdiction. See Green v. State, 421 So.2d 508 (Fla. 1982). Petitioner agrees this could have been true before the creation of the Sentencing Guidelines. However, under a guidelines sentence Respondent's argument is without merit because there is no parole and a life sentence means a life sentence without any chance of release. Consequently, Respondent's cited cases do not apply to this case because they involve sentences before the Sentencing Guidelines.

Under a guidelines sentence, a life sentence is, by definition, harsher than a term of years. A life sentence means an individual will serve the rest of his life in prison. Under a

term of years, the trial judge retains the option of permitting or denying a release during the term of retention of jurisdiction. Therefore, by definition, a term of years sentence is less harsh than a life sentence under the Sentencing Guidelines because there is a possibility of earlier release under a term of years sentence.

2. A trial court cannot retain jurisdiction under a guidelines sentence under Carter v. State, 464 So.2d 171 (Fla. 2d DCA 1985).

Respondent's argument is hypothetical because a term of years sentence with a retention of jurisdiction is illegal under the Sentencing Guidelines. Petitioner was sentenced under the Sentencing Guidelines. A trial court cannot impose a term of years and retain jurisdiction for a guidelines sentence. See Coward v. State, 465 So.2d 641 (Fla. 2d DCA 1985). Respondent concedes this point. (~~See~~ Answer Brief of Respondent at page 12) In Carter v. State, 464 So.2d 171 (Fla. 2d DCA 1985), the court reversed a retention of jurisdiction for a guidelines sentence because :

"The purpose of the statute [Section 947.16(3)] is to prohibit parole of a criminal defendant without approval of the trial judge until after that defendant has served a specified portion of his sentence. Williams v. State, 374 So.2d 1086 (Fla. 2d DCA 1979). However, parole is no longer available to the defendant because he was sentenced pursuant to the guidelines. Section 921.001(8). Thus, the Court erred in retaining jurisdiction over defendant's sentence." See Davis v.

State, 458 So.2d 42 (Fla. 4th DCA
1984). 464 So.2d at 173.

The trial court below could not legally impose a term of years with a retention of jurisdiction because Petitioner chose to be sentenced under the guidelines and the trial court sentenced him pursuant to the guidelines. This issue was not raised below because: 1) Petitioner was not originally sentenced under the guidelines and, therefore, a term of years with a retention of jurisdiction was a legal sentence; 2) after Petitioner's original sentence was reversed [Wemett v. State, 529 So.2d 1288 (Fla. 1st DCA 1988)] he chose to be sentenced under the guidelines; and 3) the issue of the legality of a retention of jurisdiction under a guidelines sentence did not arise because the trial court sentenced Petitioner to a life sentence. However, this Court must consider whether a life sentence is harsher than the legal sentence which Petitioner could receive (a term of years without retention of jurisdiction). By definition, **as** discussed above, the life sentence is harsher than a sentence of a term of years without a retention of jurisdiction.

3) This Court's opinion in Blackshear v. State, 531 So.2d 956 (Fla. 1988), controls this case.

The First District below decided that this Court's opinion in Blackshear v. State, supra, required a holding that a life sentence under the guidelines was a harsher sentence than a term of years. Respondent argues Blackshear should not apply because Petitioner elected to be sentenced under the guidelines

and the new sentencing scheme should prevent an application of Blackshear. However, Respondent cites nothing in Blackshear nor in any other authority which supports this argument. The Blackshear court simply decided a life sentence was harsher than a 65 year sentence.

Respondent also argues the original intention of the trial court was to keep Petitioner in jail for the rest of his life. Even if this is true, a life sentence removed the possibility that the trial court would change his mind and allow Petitioner to be released during the period of retention of jurisdiction. Again, by definition, a life sentence is more severe than a term of years with a retention of jurisdiction. Respondent's arguments are contradictory: Respondent argues Petitioner's life sentence is equivalent to a 260 year sentence with a retention of jurisdiction (Answer Brief at pages 6-9). Respondent then argues Petitioner cannot now receive a term of years with a retention of jurisdiction (Answer Brief at page 12). Respondent bases his position on a hypothetical circumstance which does not exist in this case.

Respondent next contends that because Petitioner elected the Sentencing Guidelines, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), does not apply. Respondent bases this argument on dicta in Alabama v. Smith, 490 U.S. ___, 104 L.Ed.2d 865, 109 S.Ct. 2201 (1989). Respondent argues that there is an inference in Alabama v. Smith, supra, that when the sentence scheme changes, the Pearce presumption of vindictiveness (coming from an increase in sentence) does not apply and the

defendant must prove actual prejudice. Assuming that the change in sentencing scheme requires that the presumption of vindictiveness does not apply, Petitioner can demonstrate the actual prejudice.

Petitioner did elect a different sentencing scheme after his original sentence was invalidated; Petitioner merely exercised his right to have an illegal sentence set aside. After Petitioner had his sentence set aside, the trial court increased his sentence. This is the exact type of vindictive retaliation that North Carolina v. Pearce, supra, prohibits. Petitioner should have never received the illegal sentence - he should not be punished for having it set aside. He also should not be punished for electing the Sentencing Guidelines which came into effect a few months after he was originally sentenced.

Respondent essentially argues that because Petitioner elected a new sentencing scheme (Petitioner had an absolute right to be sentenced under the guidelines), the trial court should be able to increase his sentence. Alabama v. Smith, supra, does not support this argument because it involved the setting aside of a guilty plea which resulted in a trial that produced a guilty verdict and a longer sentence than the one given pursuant to the plea. In Alabama v. Smith, the court found that the trial produced ample reasons for a longer sentence apart from vindictiveness by the judge: proof of the charges and the nature and extent of the crimes unknown to the judge at the time of the plea: leniency based upon an admission of guilt was no longer present: defendant's truthfulness; defendant's moral character and

likelihood of rehabilitation. 109 S.Ct. at 2206. None of these factors were present in the instant case. The only thing that changed was the setting aside of Petitioner's original sentence and his election of the guidelines. As the court in Alabama v. Smith noted, "The presumption of vindictiveness triggered by an increased sentence must be rebutted by objective information justifying the increased sentence." 109 S.Ct. at 2204. The trial court punished Petitioner for winning his appeal and electing the guidelines - which removed the possibility of a retention of jurisdiction. There was no objective information which justified an increase in Petitioner's sentence.

The Supreme Court in North Carolina v. Pearce, supra, established the prohibition against increased sentences after appeal to prevent the punishing of individuals who exercise their right to appeal. North Carolina v. Pearce, 395 U.S. at 723-725, 89 S.Ct. at 2079-80. The right to appeal could become meaningless in this context if an Appellant had to worry about an increased sentence after a successful appeal. Petitioner simply availed himself of his appellate rights under the laws of Florida. He should not receive a life sentence instead of a term of years without a retention of jurisdiction merely because he won his appeal and, therefore, won his right to be sentenced under the Sentencing Guidelines. The First District correctly found below that Petitioner's election to be sentenced under the guidelines is not the type of conduct justifying an increased sentence under North Carolina v. Pearce, supra. Consequently, this Court should answer the certified question "yes" under the facts of this case.

Petitioner's life sentence, after a successful appeal, was based upon vindictiveness and was harsher than the sentence which he could have legally received: a term of years without retention of jurisdiction.

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).

Respondent essentially argues that the guidelines departure was valid because the victim was vulnerable due to her age. However, this Court in Williams v. State, 492 So.2d 1308 (Fla. 1986), expressly decided that mere vulnerability of the victim, alone, is not a sufficient reason to depart from the guidelines. Respondent also argues that Petitioner was able to commit his crimes because the victim was vulnerable. However, this Court implicitly rejected this argument in Williams v. State, supra, - the vulnerability of the victim in that case (who was stabbed while sleeping) also facilitated the commission of the crime.

Respondent has simply ignored the **cases** which have interpreted Williams v. State, supra. These cases have held that vulnerability of the victim can support a guidelines departure if the degree of sufferinu from physical or psychological injury is increased by reason of the advanced age, frailty or helplessness of the victim. See Bell v. State, 522 So.2d 989 (Fla. 1st DCA 1988); Byrd v. State, 516 So.2d 107 (Fla. 4th DCA 1987); Guzie v. State, 512 So.2d 289 (Fla. 1st DCA 1987); and Knowlton v. State,

466 So.2d 278 (Fla. 4th DCA 1985). Respondent has not disputed the fact that the victim suffered ~~no~~ physical or psychological injury. Respondent concedes that vulnerability must be coupled with another reason to justify a departure. See Manuel v. State, 542 So.2d 1368 (Fla. 2d DCA 1989). Respondent merely recounts the trial court's position that the crime would not have occurred if the victim had not been vulnerable. However, this Court rejected that argument in Williams v. State, supra. Respondent cites Guzie v. State, supra, as authority for this position. Yet Guzie v. State found that the mere age and vulnerability of the victim did not support a departure.


In summary, if there had been *any* proof of physical or psychological damage to the victim, then a guidelines departure would have been proper. Petitioner does not disagree with any special consideration that should be given to elderly victims of crimes, due to their vulnerability. However, the mere fact that a victim was elderly, without proof of any resultant injury, does not justify a departure. The Sentencing Guidelines have not incorporated increased sentences based upon the age of the victim. This Court should not judicially legislate such a result. The Florida Legislature in Chapter 89-327, Laws of Florida, created increased sentences for crimes committed upon victims 65 years of age or older. This legislation implicitly recognizes the Sentencing Guidelines did not provide for increased sentences based upon age alone. Consequently, this Court should reverse the Sentencing Guidelines departure in this case.

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 30th day of November, A.D., 1989.



JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER