IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v. CASE NO. 75,880 and 76,010

ANTHONY LEE WILLIAMS,

Respondent/Cross-Petitioner.

_____/

PETITIONER/CROSS-RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent/Cross-Petitioner Anthony Williams, defendant/Appellant below, will be referred to herein as "Williams". Petitioner/Cross-Respondent the State of Florida, plaintiff/Appellee below, 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(s). References to the transcript of proceedings will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State is in agreement with Williams' statement of the case and facts.

SUMMARY OF ARGUMENT

I. The trial court properly denied Williams' motion to exclude the in-court identification testimony of an eyewitness based on an out-of-court identification where the out-of-court identification procedure was not impermissibly suggestive and there was no likelihood of irreparable misidentification.

II. The trial court properly departed upwardly from the sentencing guidelines in sentencing Williams where some speculation by the trial court in its findings of fact did not affect the written reasons relied on for departure. The trial court properly considered information contained in Williams' presentence investigation report where such facts were not contested and the trial court was authorized to rely on the report.

III. The State requests that this Honorable Court answer the certified question in the negative and hold that where written reasons for departure from the sentencing guidelines are issued within a few days of oral imposition of sentence that, since no prejudice attaches to the defendant, issuing the written reasons at such time is not error, or is at worst harmless error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING WILLIAMS' MOTION TO EXCLUDE THE IN-COURT IDENTIFICATION TESTIMONY OF ARTHUR JERNIGAN. (Restated)

At trial, Williams moved to exclude the in-court identification testimony of an eyewitness who had seen Williams running from the scene of the crime and who had seen Williams again after he was apprehended. The following colloquy occurred between defense counsel Monroe, prosecutor Bateh, and the trial court;

> MR. MONROE: Judge, I would make a motion to exclude Mr. Jernigan's identification, in-court identification, because it was not based on his actual observation of him at the time when he said that he saw the man running. It's based on what he saw after he saw him in custody. In other words, he has already stated if he had not seen him in custody, he would not have been able to identify him.
>
> MR. BATEH: Your Honor, this witness has stated in no uncertain terms that he got a view of the black man during the chase and that he saw him a few minutes later in the custody of the police and he was absolutely certain that the man that the police had in custody was the black man he saw participating in the chase a few minutes earlier.
>
> THE COURT: That's not what he said.
>
> MR. MONROE: That is not what he said.
>
> THE COURT: He said but for seeing him in the car he would not have been able to identify him.
>
> MR. BATEH: Your Honor, I understand that. He saw him, a black man, participating

in the chase. He saw the build. He saw the clothing.

THE COURT: He did say that was identical clothing.

MR. BATEH: Yes.

THE COURT: I will overrule the objection on the identification.

(R 78-80).

Williams contends that the motion should have been granted because the in-court identification of Williams by the witness was based on an impermissible "show up" procedure because the witness was present when Williams was arrested and the witness got a better look at him than when Appellant was running and the witness first saw him.

The State maintains that the trial court properly denied the motion. In Downer v. State, 375 So.2d 840 (Fla. 1979), this Court addressed the identification issue and held that;

> In Freber[1] we concluded that the better rule is to permit testimony of an earlier identification, despite its hearsay characteristics, provided that the identifying witness is present at trial and available for cross-examination. Our decision was based upon two important factors: (1) the fact that the witness was able to make an identification shortly after the offense is of obvious probative value; and (2) the availability of this witness for cross-examination concerning this identification avoids the primary danger of hearsay testimony-unreliability. The true thrust of appellant's attack is to the weight, not the admissibility, of the

[1] State v. Freber, 366 So.2d 426 (Fla. 1978).

> identification of (the witness). The fact that (the witness') identifications were less than conclusive did not render them inadmissible; rather, it was for the jury to determine their relative probative value. Because the criteria of State v. Freber have been satisfied in that (the witness) was available at trial for cross-examination with respect to her out-of-court identifications, the final point before us must fail.

Downer, supra at 846, 847.

Regarding the admissibility of the in-court identification in this case based on the out-of-court identification of Williams by the witness, the U. S. Supreme Court set forth the appropriate two part test: (1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 US 98, 110, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140 (1977).

The factors to be considered in evaluating the likelihood of misidentification include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 US 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

Accordingly, we must first determine whether the "show up" identification was impermissibly suggestive. The witness in question, Arthur Jernigan, testified that he was sitting in the window of his eleventh floor apartment when he heard shouting in the street and saw a white man with a vase of flowers chasing a black man (R 63). The black man was wearing distinctive clothing (T 64). The witness went downstairs after Williams had been arrested, and based on his physical build and distinctive clothing, the witness confirmed that the man he saw running was the same man under arrest (T 66, 84). There was no doubt in the witness' mind that Williams was the man running (T 84).

This Court has held that "(a) show up identification procedure is inherently suggestive in that a witness is presented with only one suspect for identification, but the procedure is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances." Blanco v. State, 452 So.2d 520, 525 (Fla. 1984), cert. denied, 469 US 1181 (1985).

Under the totality of the circumstances in this case the "show up" was not impermissibly suggestive as only a short period of time elapsed between the witness' first view of Williams running and seeing him in police custody. There was no doubt in the witness' mind that the person he saw both times was Williams. The confrontation took place in broad daylight (T 25). Also, there was a virtually uninterrupted chase of Williams by the victim and police leading to his apprehension (See William's statement of the facts).

In State v. Cromartie, 419 So.2d 757 (Fla. 1st DCA 1982), rev. den., Cromartie v. State, 422 So.2d 842 (Fla. 1982), the First District Court of Appeal stated;

> An identification made shortly after a crime is inherently more reliable that a later, in-court identification because the incident is still fresh in the witness' mind. In State v. Freber, 366 So.2d 426, 428 (Fla. 1978), the Supreme Court held:
>
> > In our view, an identification made shortly after the crime is inherently more reliable than a later identification in court. The fact that the witness could identify the respondent when the incident was still so fresh in her mind is of obvious probative value.... It is certainly not unusual for the appearance of a defendant to change in some way between his apprehension and trial. A holding not allowing this sort of testimony as substantive evidence of identity would encourage defendants to change their appearance before trial to avoid being identified in court. Without this proof that the person previously identified by the witness was the defendant, conviction would in some instances be impossible.
>
> We also note that prompt identification of a suspect following the crime allows release of persons wrongly apprehended and immediate continuation of police efforts to capture the real perpetrator. Further, the show-up procedure avoids loss of critical identification information which occurs where victims of offenses succumb shortly after the offense or witnesses become unavailable.

Cromartie, supra at 759, 760.

"Show-ups" are not unnecessarily suggestive unless the police aggravate the suggestiveness of the confrontation.

Johnson v. Dugger, 817 F.2d 726 (11th Cir. 1987). Here, there is no evidence that the police did anything to aggravate the suggestiveness. The record shows that the witness came forth voluntarily to view Williams downstairs from his apartment, presumably at the victim's request. Under these circumstances, the in-court identification based on the out-of-court identification was not unreliable even if it had been impermissibly suggestive (as it clearly was not). There was clearly no likelihood of irreparable misidentification in this case. Even so, any perceived error is clearly harmless as the victim positively identified Williams.

The appellate court below found no error on this point and affirmed the trial court's denial of Williams' motion to exclude the in-court identification of Williams by the eyewitness, citing Downer v. State, supra, and State v. Cromartie, supra. Williams v. State, ___ So.2d ___, 15 F.L.W. D895 (Fla. 1st DCA, April 5, 1990).

Since the in-court identification of Williams was properly allowed, the State urges this Court to uphold the ruling of the district court below.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SENTENCING WILLIAMS AS A HABITUAL OFFENDER. (Restated)

Williams was convicted in this case of aggravated assault (a felony) and resisting an officer without violence (a misdemeanor) (R 21, 22). The trial court entered a written order entitled Sentencing Order Exceeding Guidelines and Determining Defendant an Habitual Offender (R 62-65).

In its Order, the trial court found that Williams was previously convicted of three counts of unarmed robbery and one count of kidnapping (all felonies) in 1985. These convictions were within five years of the commission of the crimes in the instant case (R 62). The previous convictions had not been set aside in any post conviction proceeding nor had Williams received a pardon. The court consequently found that an enhanced penalty pursuant to §775.084, F.S. was necessary (R 63).

The trial court further found that Williams' recommended guidelines sentence of 2½ to 3½ years should be exceeded and gave two written reasons for doing so; recent release from prison and continuing and persistent pattern of criminal conduct (R 63). Accordingly the court sentenced Williams to five years in prison for aggravated assault with a consecutive sentence of five years as an enhanced penalty. Williams received a one year concurrent sentence for resisting an officer without violence (R 65).

Williams contends that the trial court erroneously made findings of fact in its Order. Specifically, Williams contends

that it was error to rely on facts dropped pursuant to plea negotiations in Williams' previous case, and upon speculation about what might have occurred in the instant case.

The State submits that the findings of fact referred to above were not relied on as part of the justification for upward departure from Williams' recommended guidelines sentence, nor as justification for an enhanced sentence pursuant to §775.084, F.S. Under either mechanism, however, Williams' enhanced sentence was proper.

In his Order, the trial judge noted that in 1985 Williams was charged with, inter alia, three separate armed robberies but that pursuant to plea negotiations, Williams was allowed to enter pleas to unarmed robbery. Nevertheless, the judge found that in each of those cases, the presentence investigative report before him showed that the victims were threatened with a weapon (R 64).

Williams contends that since the "fact" that he used a weapon was "dropped" pursuant to plea negotiations that the trial court in this case was precluded from considering the fact. This is incorrect. It is clear that during sentencing, evidence may be presented as to any matters deemed relevant, and a trial judge may consider information such as presentence reports, even if such information was not available to the jury. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 96 S.Ct. 3234 (1976); Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 104 S.Ct. 1430 (1983). A trial court can accept statements of fact set forth in a presentence report unless contradicted by the

defendant. Frank v. State, 490 So.2d 190 (Fla. 2d DCA 1986). Indeed, §775.084(3)(a), F.S. (1988), mandates that the court consider a defendant's presentence investigation report prior to imposition of habitual offender status.

Thus, the fact that Williams used a weapon in the commission of his prior crimes was very relevant to determining Williams' character and status, and was properly considered by the trial court in sentencing Appellant. The cases relied on by Williams involve the situation where a judge relies on facts rejected by a jury. In this case, however, a jury never addressed whether Williams used weapons in his prior robberies as his armed robbery charges were reduced to unarmed robbery pursuant to plea negotiations. Thus the cases cited by Williams in this regard do not apply to the instant case.

Williams next contends that the trial court improperly speculated in finding that:

> Evidence at the trial showed that the defendant accosted the victim on the streets of downtown Jacksonville and brandished a knife at him. The Defendant and victim were strangers. The defendant grabbed the victim and tried to pull the victim toward the Defendant and the knife. The victim was able to break free from the defendant's hold and swung his briefcase toward the defendant. The defendant fled, followed by the victim. After the victim located an officer of the Jacksonville Sheriff's Office, the defendant was arrested. Having heard the testimony of the victim and other witnesses, the Court has no doubt that the defendant intended a robbery and, but for the intervening actions of the victim, would have robbed the victim.

(R 63, 64).

Williams' contention is based on Tillman v. State, 525 So.2d 862 (Fla. 1988), where this Court held that speculation about what might have occurred if a third party had not intervened during an attempted burglary of conveyance with assault or battery, which was expressly predicated upon the defendant's prior rape conviction, was not a clear and convincing reason for departure from the sentencing guidelines. The State agrees that even though the trial court reached the only logical conclusion, that this reason appears to be an invalid reason to support a guidelines departure sentence.

What Williams fails to recognize here is that the speculative language used by the trial court was mere surplusage and was not employed as a reason for departure. In its written order, the trial court specifically laid out its reasons for departure, to wit:

> A. The offense alleged in the instant case occured (sic) shortly after the defendant's release from prison. Williams v. State, 504 So.2d 392 (Fla. 1987).
>
> B. The facts of the instant case indicate a continuing and persistent pattern of criminal conduct. Keys v. State, 500 So.2d 134 (Fla. 1986) and Williams v. State, 504 So.2d 392 (Fla. 1987).

(R 63).

"That Appellant intended to rob the victim" was clearly not a reason used to depart, but was only the trial court's conclusion to the recitation of the facts of the case. Williams does not argue that the real reasons used to depart (above) are

invalid. The departure sentence in this case was properly imposed, as the appellate court below correctly determined. Williams v. State, ___ So.2d ___, 15 F.L.W. D895 (Fla. 1st DCA, April 5, 1990). The State accordingly urges this Court to uphold the enhanced sentence imposed in this case.

ISSUE III

WHETHER A SENTENCE MUST BE REVERSED AND REMANDED FOR RESENTENCING PURSUANT TO THE OPTIONS PROVIDED IN REE V. STATE, 14 F.L.W. 565 (FLA. NOV. 16, 1989), WHEN THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THE REASONS FOR DEPARTURE FROM THE GUIDELINES WHICH WERE ORALLY PRONOUNCED AT THE IMPOSITION OF SENTENCE AND THE WRITTEN REASONS WHICH WERE ENTERED THE SAME DAY OR WITHIN A FEW DAYS OF THE IMPOSITION OF SENTENCE?

The State again urges this Honorable Court to answer the certified question in the negative.

Williams contends that the failure to issue written reasons for departure at the same time that oral sentence is pronounced is per se prejudicial to a criminal defendant. Williams argues, and the State recognizes, that the possibility of prejudice exists where certain reasons for departure are given at the sentencing hearing, but others appear on the written order. This situation, however does not apply to the instant case as it addresses a situation not presented by the certified question or the facts of the case.

Williams can point to no resulting prejudice when written reasons for departure are issued within a few days of sentencing and the written and oral reasons are in agreement. Citing State v. Jackson, 478 So.2d 1054 (Fla. 1985), Williams asserts that orally stated reasons are "fraught with disadvantages" (Respondent's brief, p.6). The State would point out to the Court that Jackson involved the situation where no written reasons for departure were issued at all. The State is not

arguing that written reasons should be done away with, but that where written reasons comporting with the oral pronouncement are issued within a few days of sentencing and no prejudice to the defendant is discernible, that there is no error, or at worst, harmless error.

As a side issue, Williams assumes the invalidity of the departure reasons in this case (even though the district court below held the reasons valid, Williams, supra at D895) and argues that on remand the trial court is restricted to imposing a sentence within the guidelines, citing Pope v. State, ___ So.2d ___, 15 F.L.W. S243 (Fla. April 26, 1990).

This is incorrect, as Pope does not apply to the instant case. In Pope this Court stated "...we hold that when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines." (emphasis supplied). Pope, supra at S244. It is clear that in the instant case written reasons were issued, albeit subsequent to the sentencing hearing. Pope is thus inapplicable.

Consequently, the State respectfully urges this Court to answer the certified question in the negative and hold that where written reasons for departure from the sentencing guidelines are issued within a few days of oral imposition of sentence that, since no prejudice attaches to the defendant, issuing the written reasons at such time satisfies the "contemporaneity" requirement and is not error, or at worst, harmless error.

CONCLUSION

Based on the above citations of legal authority, the State prays that this Honorable Court answer the certified question in the negative and uphold Williams' departure sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of July, 1990.

Bradley R Bischoff

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