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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY FORNEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,900

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellee and the prosecution, respectively, in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

On July 29, 1988, Petitioner, ANTHONY FORNEY, was charged by information with armed robbery (R274). A jury trial commenced on May 3, 1989.

During trial Petitioner objected to Officer Paige testifying that quite often in other cases witnesses are not able to do composite identifications (R26). Petitioner's objection was overruled (R26-27). Petitioner moved for a judgment of acquittal (R123). Petitioner's motions were denied (R123).

Petitioner was found guilty of robbery with a deadly weapon (R283). Petitioner's guidelines scoresheet recommended a sentence of twelve (12) to seventeen (17) years in prison (R289). On May 26, 1989, the trial court departed from the guidelines and sentenced Petitioner to twenty-four (24) years in prison (R288). On June 12, 1989, the trial court filed the following written reason for departure:

> The defendant was recently released from supervision. *Harmon v. State*, 13 F.L.W. 2162 (1 DCA), *Williams v. State*, 504 So.2d 392 (Fla. 1987) and *Murray v. State*, 512 So.2d 1136 (2 DCA).

(R292).[1]

The written order indicated that the underlying facts supporting the reason were as follows:

> The defendant was recently released from a Department of Health and Rehabilitative Services supervised program on May 13, 1988 and committed the new crime of Armed Robbery on June 24, 1988; a period of less than six (6) weeks. The defendant was also recently re-

[1] The reasons were entered on June 8, 1989 and filed on June 12, 1989 (R292).

> leased from Community Control supervision on April 29, 1987 a period of less than fourteen (14) months.

(R292).

On June 16, 1989, Petitioner timely filed his notice of appeal (R293).

On October 3, 1990, the Fourth District Court of Appeal certified the following question to be one of great public importance:

> DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?

On October 29, 1990, Petitioner timely filed his notice to invoke this Court's discretionary review. On November 15, 1990, this Court set forth a briefing schedule for this review.

STATEMENT OF THE FACTS

Officer Gregory Paige of the Plantation Police Department testified that on June 24, 1988, he was dispatched to a robbery which occurred at the Plantation General Hospital parking lot (R20-21). It took Paige two minutes to arrive (R21). When he did arrive, he observed Susan Levin who indicated that she had been robbed (R22). She described the suspect as a black male of unknown age, five feet ten inches (5'10") tall, one hundred eighty pounds (R180 lbs.), with several gold teeth, and wearing a blue flowered shirt and blue shorts (R24). Levin could not do a composite drawing of the suspect (R25). Levin could only identify the robber by his clothing (R33). Paige did not ascertain whether if prints or other physical evidence was left behind (R27).

Samuel Sigman testified that he was a security guard at Plantation General Hospital (R37). On June 24, 1988, a man was at the hospital asking for help getting a locked car open (R40). Sigman identified this man as Petitioner (R39). Sigman refused to unlock the car because the man could not produce identification (R40). The man explained that his identification was in the locked car (R40). The man indicated that his name was John Hendrix and he lived at 5340 N.W. 5th Terrace (R42). The man gave Sigman a phone number (R42). Sigman called the number but could not verify that Hendrix lived at the address (R42). The man was told to leave (R43). The man walked into the parking area (R44). Sigman discovered that the car the man wanted to open did not belong to him and began looking for him (R44). At this time Susan Levin cam running up to Sigman and said that she had been robbed by a colored

fellow with a gun (R45,47). Sigman asked if the man was wearing a blue Hawaiian flowed shirt and blue shorts and had good teeth (R45-46). Levin said, "Yes" (R46). Sigman couldn't locate the man (R46). Sigman would later pick out Petitioner's photo from a lineup (R49). Before the lineup, Sigman was told by a detective that they had picked up someone matching the description of the robber (R57).

Detective Ken Kilbride of the Plantation Police Department testified that he was notified that the Broward County Sheriff's Office had a black male in custody matching the BOLO on the Plantation robbery (R64). As a result, Kilbride talked with Petitioner (R69). After Kilbride explained that Petitioner was a suspect, Petitioner said that he was not involved in a robbery (R69). Petitioner said that he was asleep at 7 a.m. and did not get up until 9 or 10 (R69). Kilbride testified that both Susan Levin and Samuel Sigman picked Petitioner's photo from a lineup (R75-76).

Susan Levin testified that on June 24, 1988, she went to work at Plantation General Hospital at 7:00 a.m. (R93). As she parked her car a black male approached (R93). The door was open and a gun was in her abdomen (R94). Levin was not sure if she had opened the door (R94). Levin identified Petitioner as the black man (R94). The man said, "Stay cool, give me all your money and nothing would happen to you" (R94). Levin gave the man $10 (R94). The man asked her for her keys (R97). She gave him her car key (R97). There was the sound of another car and the man gave her the key back and said that he was not going to take her car (R98). The man slammed the

door and told her to stay in the car for ten (10) minutes (R98). The man left. Levin testified that she did not notice that the man had an accent or unusual speech pattern such as stuttering (R109). Levin picked Petitioner's photo out of a lineup (R104). Levin was told prior to the lineup that someone had been arrested (R117). There was no doubt in Levin's mind that Petitioner was the robber (R99).

Petitioner testified that he was selling drugs in the month of June 1988 (R125). On June 24, 1988, Petitioner was at his father's house at 3014 N.W. 40th Avenue in Ft. Lauderdale (R126). On that day, Petitioner woke up at 9:30 a.m. (R126). Petitioner then went to sell drugs at 3rd Street and 34th Avenue (R127). He was arrested for selling drugs around 10:00 a.m. (R129). At the time Petitioner was wearing a Hawaiian shirt and blue shorts (R129). When told about the robbery by police, Petitioner said he didn't know anything about it (R131). Petitioner had never seen Susan Levin prior to the trial (R131). Petitioner had two gold teeth -- one with an inscription of a question mark and another with a tear drop (R131). Petitioner has a stuttering problem (R132,135). Petitioner testified that he did not rob Susan Levin (R133).

SUMMARY OF THE ARGUMENT

1. Temporal proximity of crimes alone does not justify departing from the recommended guideline sentence. Such a departure would be arbitrary. Here, there was no such pattern. Petitioner should be resentenced within the guidelines.

2. Over Petitioner's objection, Officer Paige was permitted to testify that quite often in other cases the witness is not able to make a composite identification of the perpetrator but is later able to make an identification. Such evidence as to what occurs in other cases is irrelevant to whether Petitioner committed the crime charged. It was error to admit the irrelevant evidence. The error was not harmless. Petitioner's conviction and sentence must be reversed and this cause remanded for a new trial.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.

Petitioner's recommended guideline sentence was twelve (12) to seventeen (17) years in prison (R289). The trial court departed from the guidelines and sentenced Petitioner to twenty-four (24) years in prison (R288). The trial court's written reason for departure was as follows:

> The defendant was recently releases from supervision. *Harmon v. State*, 13 F.L.W. 2162 (1 DCA), *Williams v. State*, 504 So.2d 392 (Fla. 1987) and *Murray v. State*, 512 So.2d 1136 (2 DCA).

(R292). On appeal the district court upheld the departure and certified the following question of great public importance:

> DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL ACTIVITY?

(A2). As will be explained, the trial court's reason for departure is invalid and the certified question should be answered in the negative.

The purpose of the guidelines is to ensure uniformity and to eliminate unwarranted variation in the sentencing process, and to prevent overcrowding in our prison system. Fla.R.Crim.P. 3.701; § 921.001, Fla. Stat. (1983). Since the propose of the guidelines is to remedy subjective variations int he sentencing process, any exceptions should be narrowly construed. Cf. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957). While the rule does not eliminate judicial discretion, it does seek to discourage departures from the guidelines. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The

reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted. Id. The reason in this case does not justify the guideline departure.

As this Court has unequivocally made clear in State v. Simpson, 554 So.2d 506 (Fla. 1989) temporal proximity of the crimes by itself will not be a valid reason for departure:

> In State v. Jones, 530 So.2d 53, 55 (Fla. 1988), we again held that timing of offenses could be a valid reason for departure under certain conditions. However, we cautioned the trial courts:
>
> > Before temporal proximity of the crimes can be considered as a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.
>
> Id. at 56. Applying this standard in Jones, we held that the defendant did not evince such a continuing and persistent pattern. In Jones, the defendant had committed a burglary and grand theft about one year after release from prison on earlier charges, and then he trafficked in stolen goods five months later.

554 So.2d at 509-510 (emphasis added) (footnotes omitted); see also Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1990); State v. Jones, 530 So.2d 53 (Fla. 1988); Chanquet v. State, 15 F.L.W. D2017 (Fla. 3d DCA Aug. 7, 1990); Mott v. State, 549 So.2d 1128 (Fla. 3d DCA 1989) (2½ month timing does not justify departure). However, timing combined with facts showing an escalating pattern of crime will be a valid reason for departure. See State v. Simpson, 554 So.2d 506 (Fla. 1989) (ftnt. 3 -- holding that timing alone invalid

was "entirely in harmony with Williams v. State, 504 So.2d 392 (Fla. 1987), in which sufficient additional facts were introduced to establish an escalating pattern of criminality").

The use of temporal proximity alone would result in arbitrary and disparate sentences -- as opposed to the goal of the sentencing guidelines -- uniform sentencing. For example, in McKinney v. State, 559 So.2d 621 (Fla. 3d DCA 1990) the timing of six (6) months from release from prison was held to be an invalid reason for departure. Whereas in Jordan v. State, 15 F.L.W. D1535 (Fla. 4th DCA June 6, 1990) a timing of six (6) months was held to be a valid reason for departure. More disturbing is the reasoning behind the holding in Jordan. The district court noted that this Court "spoke of a defendant's release from prison 'only months before'" and from that concluded that temporal proximity of "any period of less than a year" would justify departure.[2] Of course, placing a random number for timing results in arbitrary type of sentencing arrangements.

Without the requirement of an escalating pattern, the use of mere temporal proximity will result in unwarranted disparity in sentencing. Any decision there is as to the specific timing required for departure will be arbitrary. By only considering temporal proximity, there must be some bright-line test which in itself would be arbitrary and contribute to disparity in sen-

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[2] While apparently overlooking this Court's limitation of Williams v. State, 504 So.2d 392 (Fla. 1987) by the necessity of providing facts to establish an escalating pattern of criminal activity (see ftnt. 3 in Simpson, supra), the district court cited Williams for the proposition that a timing of ten (10) months is a valid reason for departure.

tencing. For instance, if the test were 6 months, would it be logical to permit unlimited departure[3] because the offense was committed 5½ months after release from prison as opposed to 6½ months?[4] Without an explanation which can be analyzed objectively, timing is not a valid reason for departure.

In addition to the arbitrary and subjective sentencing which results from considering temporal proximity, it must be noted that temporal proximity is a related aspect of prior offenses which have already been scored. Prior offenses are scored in computing the guidelines. Each offense has to occur at some point in time. Thus, each offense will have some temporal proximity to another event or offense. Of course, the point in time involved is not as

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[3] Appellate review of extent of departure is no longer permitted.

[4] Again, an example of this is where one court has held that a temporal proximity of 6 months justifies departure, Jordan, supra, while another has ruled a temporal proximity of 6 months does not justify departure. McKinney, supra. The temporal proximity sufficient for departure rests with the subjective beliefs of the sentencer. In Gibson v. State, 553 So.2d 701 (Fla. 1989) this Court reversed a sentence which demonstrated the arbitrariness of using solely temporal proximity to justify departure. In Gibson v. State, 519 So.2d 756 (Fla. 1st DCA 1988) the district court held that the timing of the offense 14 months after release from prison was a clear and convincing reason for departure. The 14 month timing was held to be valid not because of any explanation as to why this particular timing was relevant, but because the court had previously held a timing of 10 months to be a valid reason. Without any bright-line test or further explanation, logic would dictate that an 18 month timing would be valid because the 14 month timing was valid. Future cases would then hold that a 22 month timing is valid because the 18 month timing was valid. Using this logic, eventually any timing wold become a valid reason to depart. In other words, it is not logical to base departure merely on timing. There must also be some explanation of its significance.

significant as the fact that the offense occurred.[5] Mere temporal proximity should not be exalted over other aspects of offenses such as nature of the offense, degree and quantity of offenses, legal constraint, victim injury, etc. Mere temporal proximity should not override other factors of the guidelines which have been deemed important enough to be scored.

In summary, temporal proximity of crimes alone does not provide a valid reason for departure without a finding of an escalating pattern of criminal conduct. Simpson, supra; Jones, supra; Frederick, supra. Therefore, Petitioner's sentence must be reversed and this cause remanded for resentencing within the recommended guideline range.

In addition, the trial court sentenced Petitioner outside the guidelines range on May 26, 1989, but did not enter the written reasons for departure until June 8, 1989, and the reasons were not filed until June 12, 1989. The failure to contemporaneously enter and file the reasons at the time of the imposition of sentence requires that Petitioner's sentence be vacated and that Petitioner be resentenced within the recommended guideline range. Ree v. State, 565 So.2d 1329 (Fla. 1990).

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[5] While timing of an offense can be an indication of the recidivism of an offender, the recidivism is more precisely defined by prior convictions which are already factored into the guideline recommendation.

POINT II

THE TRIAL COURT ERRED IN ADMITTING OFFICER PAIGE'S TESTIMONY THAT QUITE OFTEN IN OTHER CASES THE WITNESS IS NOT ABLE TO MAKE A COMPOSITE IDENTIFICATION OF THE PERPETRATOR BUT IS LATER TO MAKE AN IDENTIFICATION.

Because this Court, in acquiring jurisdiction, has authority to dispose of all contested issues, Petitioner submits this argument which was raised by the parties in the district court. See Dania Jai-Alai Palance, Inc., v. Sykes, 450 So.2d 1114 (Fla. 1984); Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Negron v. State, 306 So.2d 104 (Fla. 1974); D'Agostino v. State, 310 So.2d 12 (Fla. 1975) (once Court acquires jurisdiction, the Court may proceed to consider entire cause on the merits).

As can be seen from the Statement of the Facts, the identification of Petitioner was quite weak. One of the circumstances showing the weakness of Susan Levin's identification of Petitioner was her inability to do a composite identification. During trial, over Petitioner's objection (R26), the state was permitted to introduce Officer Paige's testimony that quite often in cases the witness is not able to make a composite identification of the perpetrator but is later able to make an identification (R26-27). It was error to overrule Petitioner's objection and to admit the evidence.

All relevant evidence is admissible unless excluded by law. § 90.402, Fla. Stat. (1987). To be relevant, evidence must prove or tend to prove a fact in issue. Stano v. State, 473 So.2d 1282 (Fla.) cert. den. 474 U.S. 1093 (1985); § 90.401, Fla. Stat. (1987). Evidence of an offense committed by an unrelated third

party is inadmissible as proof that the charged defendant committed the charged crime. State v. Norris, 168 So.2d 541 (Fla. 1964); Hirsch v. State, 279 So.2d 866 (Fla. 1973). Common practice of what may have occurred in other cases has no relevancy to the instant case for it does not tend to prove or disprove the guilt of the defendant. Cf. Osario v. State, 526 So.2d 157 (Fla. 4th DCA 1988). Thus, in a situation analogous to the instant case, it has been held that an officer's knowledge as to what occurs in other cases is not relevant, and the defendant should be tried on the evidence against him or her:

> Generally, the admission of this evidence is nothing more than the introduction of the investigative techniques of law enforcement officers. Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity. Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation. Although this information is valuable in helping drug agents to identify potential drug couriers, we denounce the use of this type of evidence as substantive evidence of a defendant's innocence or guilt. (citation omitted).

United States v. Hernandez-Cuartas, 717 F.2d 552-555 (11th Cir.) rehearing denied, 721 F.2d 822 (11th Cir. 1983).

At bar, Paige's testimony required consideration of investigations conducted in unrelated cases of uncharged third parties. Such evidence is inadmissible. State v. Norris, 168 So.2d at 543. The state is not entitled to rely on what has occurred in other unrelated cases as substantive evidence of Petitioner's guilt. Id.

Moreover, the improper testimony also constitutes a police officer's observation on the reliability of eyewitness identification. This Court has repeatedly held that testimony, be it expert

or non-expert, is inadmissible on the topic of reliability of eyewitness identification. Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 881, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Hooper v. State, 476 So.2d 1253 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 733, ___ L.Ed.2d ___ (1988). The issue involves relevancy and not whether a witness would qualify as an expert. Clearly, Officer Paige's knowledge, that quite often in other cases the witness is not able to make a composite identification of the perpetrator but is later able to make an identification, is not admissible.

Admission of this erroneous evidence which was based on what is usual in other cases, was not harmless error. Harmless error analysis places the burden upon the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even close[r] reexamination of the impermissible evidence which might have influenced the jury verdict.

Id. at 1135. The DiGuilio test was approved in State v. Lee, 531 So.2d 133 (Fla. 1988).

The victim's identification in this case was made under an extremely stressful situation. The victim was hysterical (R26), and could not even do a composite identification (R25). Levin

testified that the robber did not have a speech impediment (R109), while Petitioner stutters (R132,135).

It has been recognized that an eyewitness's identification based on an encounter with a total stranger under an emergency or emotional stress will cause the witness' recollection to be distorted by circumstances or later actions of police.[6] Manson v. Brathwaite, 432 U.S. 98 (1977). That is, when the evidence is based on eyewitness identification which could be distorted by a stressful situation or improper identification procedures, the danger of the jury being influenced by improper evidence increases. Courts have recognized the hazards of eyewitness' identification of strangers made under stress such as in this case:

> We add only that in case such as this, which exemplifies the judicially recognized hazard of brief eyewitness identification of strangers made under stress, see, e.g., United States v. Wade, 388 U.S. 218 (1967); Banks v. State, 380 So.2d 1312 (Fla. 3d DCA 1980) (Hubbart, J., dissenting); Jackson v. Fogg, 589 F.2d 108 (2d Cir. 1978); United States v. Russell, 532 F.2d 1063 (6th Cir. 1976), we must conclude that the error of admitting the hearsay substantially affected Postell's rights to a fair trial.
>
> Reversed and remanded.

Postell v. State, 398 So.2d 851, 856 (Fla. 3d DCA 1981). It should also be noted that Petitioner testified that he was not the robber and indicated that he was asleep at the time of the robbery (R126,132). It cannot be said beyond a reasonable doubt that the improper evidence could not have influenced the jury. Thus, the error cannot be deemed harmless. State v. DiGuilio, 491 So.2d

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[6] While Levin later identified Petitioner out of a lineup, it should be noted that prior to the lineup she was informed that the robber was arrested (R117).

1129, 1139 (Fla. 1986). Petitioner's conviction and sentence must be reversed and this cause remanded for a new trial.

CONCLUSION

Based on the argument and authorities cited in Point I, Petitioner respectfully requests this Court to quash the decision of the district court and to direct that Petitioner's sentence be reversed and that he be resentenced within the guidelines.

Based on the arguments and authorities cited in Point II, Petitioner respectfully requests this Court to direct that Petitioner's conviction and sentence be reversed and this cause remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LYNN WAXMAN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 6th day of December, 1990.

Jeffrey L. Anderson

Of Counsel