IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,900

ANTHONY FORNEY

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

PRELIMINARY STATEMENT

Respondent was the appellee in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record on Appeal

All emphasis has been added by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in Petitioner's Brief as an accurate nonargumentative recitation of the trial court proceedings with the following corrections and/or additions:

1. Officer Paine testified that it was not ascertained what fingerprints were left behind because the victim, Susan Levin, indicated that there was no physical evidence at the scene (R. 27). Paine also testified that a subject matching the assailant's description was in the hospital asking for assistance earlier (R. 28). The security guard also described this person as five foot ten inches, 180 pounds, gold teeth, blue flowered shirt and dark blue shorts (R. 29). Paine testified that Ms. Levin described the gun used in the robbery as a four inch long silver pistol (R. 29). Although police searched for the weapon, it was never found (R. 29).

2. Samuel Sigman, the hospital security guard, testified that he knew in his mind that he could identify the suspect because Sigman had seen him for quite a while in the hospital parking lot (R. 47).

3. Detective Kilbride first advised Petitioner of his Miranda rights before speaking with him (R. 68). Kilbride photographed Petitioner, which photograph was ultimately used for the photo-lineup in the instant case (R. 67, 70-72). Kilbride testified that he did not tell witness Samuel Sigman that the police had arrested

a person matching the robber's description before Sigman identified Petitioner's photograph from the line-up (R. 84). According to Sigman, he told Sigman after Sigman had identified Petitioner's photo in the lineup (R. 84).

4. Susan Levin testified that Petitioner's gun was small and silver with a barrel (R. 95). Levin looked Petitioner right in the face (R. 99). He wore blue shorts, a Hawaiian shirt with flowers and sneakers (R. 99). He also had a gold tooth (R. 100). Ms. Levin testified in court that she had not been told by Detective Kilbride prior to the photo lineup that a suspect was arrested (R. 116, 121). On deposition, Levin had testified that she was informed of the arrest before viewing the lineup (R. 117).

SUMMARY OF ARGUMENT

POINT I:

The certified question must be answered in the affirmative: the temporal proximity of crimes alone constitutes a valid ground for departure from the recommended guidelines sentence. Williams v. State, 504 So.2d 392 (Fla. 1987). Contrary to Petitioner's argument, the timing of the offenses evidences the defendant's inability to learn from his past experience and furthermore, is not already factored into the sentencing guidelines. Thus, since Petitioner committed the armed robbery in the instant case some forty-two days after his release from supervision on a burglary charge, the district court correctly upheld the use of the temporal proximity of crimes as a valid departure ground.

POINT II:

The trial court correctly allowed the admission of Officer Paige's testimony that a victim who cannot complete a composite identification of her assailant often has no problem with later identification. Such opinion testimony was based upon the officer's experience and expertise in police investigation. Additionally, because Petitioner was unequivocally identified in a photo lineup and in court by both witnesses, the objected-to testimony did not prejudice Petitioner.

I. TEMPORAL PROXIMITY OF THE CRIMES ALONE IS A VALID DEPARTURE GROUND.

Petitioner incorrectly maintains that the temporal proximity of crimes alone does not provide a valid ground for departure from the sentencing guidelines and thus, the certified question must be answered in the negative. Contrary to Petitioner's argument, temporal proximity of crimes is a valid ground for departure pursuant to this Court's decisions in Williams v. State, 504 So.2d 392 (Fla. 1987); Gibson v. State, 553 So.2d 701 (Fla. 1989); and Jones v. State, 553 So.2d 702 (Fla. 1989). Thus, the trial court in the instant case correctly departed from Petitioner's recommended sentence based upon Petitioner's commission of armed robbery on June 24, 1988, some forty-two days after his release from supervision on burglary charges.

Petitioner was charged in the instant case with robbery with a deadly weapon on June 24, 1988, and found guilty after jury trial on May 4, 1989 (R. 282-83). Petitioner's recommended guidelines sentence was twelve to seventeen years imprisonment, but the State motioned for an aggravated sentence due to Petitioner's commission of the instant robbery shortly after his release from supervision (R. 285-86, 289). At sentencing, the State presented evidence of Petitioner's commitment to HRS in March, 1988, for a February 1988, burglary (R. 250). As part of that commitment, Petitioner was sent to a drug treatment center (R. 250). He was released on May 13, 1988, and committed the instant offense on June 24, 1988, forty-two days later (R. 250). Petitioner, a juvenile, was then sentenced as

an adult pursuant to §39.111(6)(d), Fla. Stat. (1987), and an aggravated sentence of twenty-four years was imposed (R. 269, 290, 288). The trial court recited at the hearing, as well as in the written order, that departure was justified because of Petitioner's commission of the instant robbery after his recent release from supervision (R. 267-270, 292).

In Williams v. State, 504 So.2d 392, 393 (Fla. 1987), this Court upheld the use of the timing of the offense in relation to prior offenses as a valid ground for departure. Also, in Williams this court upheld the ground of "continuing and persistent pattern of criminal activity" as a separate and distinct ground for departure. Williams, 504 So.2d at 393. In rejecting the defendant's argument that these grounds were already factored into the guidelines, this Court stated:

> Neither the continuing and persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and release from incarceration or supervision are aspects of a defendant's prior criminal history which are factored in to arrive at a presumptive guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors. Williams, 504 So.2d at 393.

It is clear from this Court's treatment of the two factors in Williams that each is a separate and distinct departure ground.

Subsequent to Williams, this Court issued the Jones and Simpson decisions relied upon in Petitioner's Initial Brief, both of which blur the distinction between temporal proximity and "continuing and consistent pattern of criminal activity" grounds for departure. State v. Jones, 530 So.2d 53 (Fla. 1988); State v. Simpson, 554 So.2d 506 (Fla. 1989). Nevertheless, just one month

before this Court's Simpson decision was released, this Court issued Gibson v. State, 553 So.2d 701 (Fla. 1989); and Jones v. State, 553 So.2d 702 (Fla. 1989). Although scant facts are included in these opinions, when read in conjunction with Justice Barkett's special concurrences, both cases imply that temporal proximity ground alone continues to exist as a departure ground.

In Gibson, the trial court departed from the recommended guidelines sentence for "prior record within a short time." Gibson, 553 So.2d at 701. While finding the fourteen month span between crimes in Gibson too long, this Court noted that "timing may, under appropriate circumstances, be an appropriate reason to depart." (emp. added) Gibson, 553 So.2d at 701. Likewise in Jones, this Court addressed both temporal proximity and continuing and persistent pattern of criminal activity as separate grounds for departure and, relying upon Williams, affirmed the use of both grounds. Jones, 553 So.2d at 703. In both cases, Justice Barkett specially concurred, noting her disapproval with timing alone as a departure ground. Gibson, 553 So.2d at 702; Jones, 553 So.2d at 703. Thus, notwithstanding the blending of the two grounds in a several of this Court's decision, each remains a separate viable ground where the facts would so support.

Clearly the trial court should be permitted to depart from the recommended guidelines where, as in the instant case, the crimes were committed such a short time after the Petitioner's release. The record indicates that just forty-two days after his release from supervision on a burglary charge, Petitioner committed the

instant offense of armed robbery (R. 250). Although the two offenses alone are insufficient to establish a continuing and consistent pattern ground, the close timing of the offenses clearly evidences an inability or unwillingness to learn from past punishment and remain free of the law. Thus, an extended period of incarceration is necessary where, as here, the defendant commits the new offense a short time after being released from supervision. Accordingly, the use of temporal proximity of the crime as a separate and distinct grounds for departure should be upheld.

Petitioner maintains that the guidelines purpose of uniformity and elimination of unwarranted variation in the sentencing process require that temporal proximity be rejected as a departure ground. However, many of the departure grounds, including "continuing and persistent pattern of criminal conduct," suffer to a degree from uncertainty. While the State recognizes Justice Barkett's concern for the absence of a bright-line time period, the State maintains that this should not be fatal. Obviously there is an inner and outer limit to continuing and persistent criminal activity as well. Since it is the close proximity crimes which form the basis for temporal proximity as a departure ground, a standard could likewise be established which would guide the courts in application of this factor. Several of the lower courts which have grappled with this issue have already attempted to do so. See Jordan v. State, 15 F.L.W. 1535 (Fla. 4th DCA June 6, 1990).

Petitioner also argues that temporal proximity is in fact already factored into the sentencing guidelines and thus, should

not constitute a departure ground. However, Petitioner's argument overlooks that it is not the fact that the two offenses were committed, but rather the close proximity of time between the two offenses which give rise to this departure ground. While the guidelines incorporate the number of offenses committed, they do not take into consideration the time which elapsed between the commission of those offenses and the defendant's release from incarceration on the previous offense. Accordingly, as this Court recognized in Williams, the timing of each offense in relation to prior offenses is not an aspect of a defendant's prior criminal history which is factored in to arrive at a presumptive guidelines sentence. Williams, 504 So.2d at 393.

In summary, temporal proximity of crimes alone constitutes a valid departure ground which may or may not be incorporated in the "continuing and persistent pattern of criminal activity" ground for departure. Since this factor is not encompassed in the presumptive guidelines sentence and reflects substantially upon the defendant's inability to learn from his prior experience, this ground should once again be approve by this Court as a valid departure ground. Accordingly, the certified question must be answered in the affirmative and Petitioner's sentence must be affirmed.

As an additional point, Petitioner maintains that his sentence must be reversed because the trial court failed to contemporaneously file the written departure reasons at the time of sentencing pursuant to Ree v. State, 565 So.2d 1329 (Fla. 1990). Petitioner failed to raise this issue in the district court below

and thus should not be permitted to do so now. Furthermore, this Court specifically stated in Ree that the Ree decision is to apply prospectively only. Ree, 565 So.2d at 1331. Since Petitioner's sentence and departure grounds were entered in May and June of 1989, well prior to the Ree decision, Ree does not apply to the instant case. Thus, Petitioner's departure sentence must be affirmed.

II. THE TRIAL COURT CORRECTLY ALLOWED THE ADMISSION OF A POLICE OFFICER'S TESTIMONY THAT VICTIMS WHO CANNOT COMPLETE A COMPOSITE IDENTIFICATION OFTEN MAKE A LATER IDENTIFICATION.

Petitioner argues that the trial court reversibly erred in permitting Officer Paige to testimony that, although a victim cannot make an initial composite identification of her assailant, often the victim is able to make a later identification. According to Petitioner, the admission of such testimony was erroneous because the victim's identification was distorted. This Court should not review this claim since it is distinct from the bases upon which Petitioner invoked this Court's jurisdiction. See e.g., Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988). Additionally, the State asserts that the officer's opinion testimony, based upon his law enforcement experience, was admissible, relevant evidence and therefore properly admitted.

Petitioner was charged by Information dated July 26, 1988, with armed robbery of Susan Levin on June 24, 1988, pursuant to §812.13(1), (2)(a), Fla. Stat. (1988) (R. 274). The trial testimony established that a black man wearing a blue Hawaiian flowered shirt, with blue shorts and sneakers, was observed by two security guards in the hospital parking lot trying to get into a locked car (R. 39-41, 46). After falsely identifying himself to the guard (R. 41-43), Petitioner was told to leave the premises (R. 43-44). Thereafter Susan Levin approached the guards screaming that she had been robbed (R. 45). A black male had approached

Levin's car and stuck a gun in her abdomen (R. 93-94). Levin gave the man money and her car keys as demanded (R. 94-97). She also described him as wearing blue shorts, a Hawaiian shirt with flowers, and sneakers (R. 94). He was five feet, ten inches tall, weighed one hundred and eighty pounds, and also had a gold tooth (R. 24, 100). Ms. Levin gave a description of her assailant to Officer Paige but was unable to do a composite drawing of the suspect (R. 24, 25). Levin was still very hysterical when questioned at the crime scene (R. 26). A BOLO was issued for a suspect based upon this description (R. 24).

Detective Kilbride was notified that a black male meeting the BOLO description was in custody (R. 64). Kilbride then questioned Petitioner and took his photograph for a photo lineup (R. 67). Petitioner admitted that he was wearing a blue Hawaiian shirt and blue shorts when arrested on other charges (R. 129). Petitioner also had two gold teeth (R. 131).

Both Susan Levin and Samuel Sigman, the security guard, identified Petitioner from a photo array (R. 49, 104). Sigman was able to identify Petitioner in the picture because of his clothing and gold teeth (R. 50-51). Sigman's identification was based upon his remembrance of Petitioner from the parking lot and was not influenced by Detective Kilbride's remarks (R. 47-48). Additionally, Detective Kilbride testified that only after the photo lineup had he explained to Mr. Sigman that a suspect had been

arrested (R. 84). Sigman also positively identified Petitioner in court as the man he encountered in the parking lot on June 24 (R. 51).

Susan Levin looked her assailant right in the face and had no trouble seeing him at the time of the robbery (R. 99, 107). She was able to give the police a description of the robber but was unable to complete a composite because she did not want to discuss the incident any longer with the police (R. 108). Levin identified Petitioner as the robber both in the photo lineup and in court (R. 94, 104-05). She testified at trial that she was not aware of an arrest before viewing the lineup, while in deposition she did remember knowing that an arrest had occurred prior to seeing the lineup (R. 116, 117, 121).

It is fundamental that any fact relevant to prove a material fact in issue is admissible into evidence unless its admissibility is precluded by another specific rule of evidence. Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981); §90.401 and §90.402, Fla. Stats. (1987). Wide discretion is accorded the trial court concerning the admission of evidence, and its rulings will not be disturbed absent an abuse of discretion. Welty, 402 So.2d at 1163. All evidence is subject to the relevancy determination that its probative value must not be outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.404, Fla. Stat. (1987).

The testimonial qualifications required by the Florida Evidence Code for an expert witness, §90.702, Fla. Stat. (1987),

are relaxed for the admission of police officers' opinion testimony based upon their experience. Johnson v. State, 497 So.2d 863, 870 (Fla. 1986); Jones v. State, 440 So.2d 570, 574 (Fla. 1983); A.A. v. State, 461 So.2d 165 (Fla. 3d DCA 1984). When police officers possess a working knowledge of a subject, gained through their training and expertise, their opinions in such areas are properly admissible testimony. Johnson, 497 So.2d at 870. The credence and weight to be accorded such testimony remains with the trier of fact. Jones, 440 So.2d at 574. Additionally, absent an obvious error, the trial court's determination of the admissibility of such evidence shall not be disturbed. Jones, 440 So.2d at 574.

In the instant case, Officer Paige was opining that victim identification through a composite was uncommon, even though later identification was possible (R. 26). Such opinion was testimony based upon his investigative experience as a police officer, and was not testimony about other cases. (R. 26); See Johnston, 497 So.2d 863; Jones, 440 So.2d 570. This was substantiated by the victim's testimony that because of stress, she refused to comply with the request for a composite identification (R. 108). Since Petitioner's defense was misidentification, testimony probative of the identification was both material and relevant. Welty v. State, 402 So.2d 1159 (Fla. 1981). Additionally, Petitioner failed to demonstrate at trial how such evidence would have been inadmissible under §90.404 due to prejudice.

Petitioner also fails to explain in his brief why such testimony prejudiced him. The testimony complained of merely

explained that victims who are unable to do a composite can later identify their assailant. Ms. Levin's later photo and in-court identification was neither tenuous nor improper. The complained of testimony was necessary to enhance her credibility. The other eyewitness also unequivocally identified Petitioner.

Additionally, even were such testimony error, its admission was clearly harmless. Roman v. State, 475 So.2d 1228 (Fla. 1985), cert. denied, 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986). There was abundant unequivocal identification testimony of Petitioner by both Levin and Sigman. Both identified him in the photo array (R. 49, 104), and in court (R. 51, 94). There is, thus, no reasonable probability that the error complained of may have contributed to the guilty verdict. The Fourth District's opinion and the Petitioner's conviction must both be affirmed.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities cited herein, the Respondent State respectfully requests that the certified question be answered in the AFFIRMATIVE and that the judgment and sentence of the trial court be AFFIRMED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by Courier to: JEFFREY L. ANDERSON, Counsel for Defendant, Fifteenth Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 14th day of December, 1990.

Of Counsel