IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY FORNEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,900

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

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

ARGUMENT

POINT I

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

In its brief Respondent claims that based on Williams v. State, 504 So.2d 392 (Fla. 1987) a departure merely based on temporal proximity is valid. However, this Court in State v. Simpson, 554 So.2d 506 (Fla. 1989) specifically rejected such a notion and in fact indicated that timing alone being 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". Simpson, supra, 554 So.2d 506, ftnt.3.[1]

More importantly, Respondent does not satisfactorily explain why temporal proximity should justify a departure sentence. Respondent merely states that temporal proximity represents an inability to learn from past punishment. Assuming this is true, the fact that one has not been rehabilitated and does not live a life free of criminal activity after his release from prison does not warrant a departure sentence. This would be true of anyone with a prior record. By scoring the prior criminal record, the guidelines take into account that the defendant has not learned from his past experiences.

The fact that temporal proximity has not been factored into the guidelines advances the proposition that it is not deemed appropriate to use in calculating a guidelines sentence. Respon-

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[1] See also Frederick v. State, 556 So.2d 471, 473 (Fla. 3d DCA 1990) ftnt.1.

dent concedes that use of temporal proximity yields a lack of uniformity in sentencing due to a certain degree of uncertainty in what constitutes sufficient temporal proximity.[2] However, Respondent next notes that there are "obvious" limits as to what constitutes a valid temporal proximity and that a standard bright line test can be established to define temporal proximity. Respondent's brief at 8. Respondent notes that several of the lower courts have "grappled" with setting such a bright line test and specifically notes Jordan v. State, 15 F.L.W. D1535 (Fla. 4th DCA June 6, 1990) as an example. As explained at pages 10 and 11 of Petitioner's brief on the merits, a bright line test defining the required temporal proximity would be arbitrary. The conclusion in Jordan that temporal proximity of "any period less than a year" justifies departure is a demonstration of the arbitrariness of a bright line test.[3]

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[2] Respondent also correctly notes that a continuing and persistent pattern of criminal behavior also suffers from a degree of uncertainty for departure purposes. Petitioner agrees because the terms "continuing" and "persistent" are totally subjective. Unlike an "escalating" pattern, a "continuing" and "persistent" pattern has not been defined by the legislature or the courts. (Escalating pattern has been defined in § 921.001(8), Florida Statutes (1987) and by caselaw. See Keys v. State, 500 So.2d 134 (Fla 1986) (commission of four crimes escalating from property to persons)). Indeed, the highly subjective terms result in one finding a "continuing" or "persistent" pattern because "I know a continuing or persistent pattern of criminal activity when I see it." See Liscomb v. State, 15 F.L.W. D227, 229 (Fla. 5th DCA Sept. 6, 1990) (Cowart, J., dissenting). Unlike an escalating pattern, a continuing or persistent pattern should not be used in departing from the guidelines.

[3] Using this standard the temporal proximity of a year would be valid, but the temporal proximity of a year and a day would not be valid. Yet, there is nothing logically differentiating the two, but for the arbitrary setting of a bright line. Such arbitrary standards violate the very premise of the guidelines -- uniformity. Moreover, assuming arguendo that such a standard for temporal

Finally, Respondent's claims that Ree v. State, 565 So.2d 1329 (Fla. 1990) does not apply to this case is without merit. The law at the time of the appeal applies to cases that are on appeal. State v. Stafford, 484 So.2d 1244, 1245 (Fla. 1986) (defendant entitled to the law in effect at the time the district court was deciding his appeal). Thus, the application of Ree to Petitioner's case is appropriate. Petitioner relies on his brief on the merits for further argument on this point.

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proximity could be a legitimate test, then it could be factored into the guidelines. For example, if the temporal proximity was less than one year, 100 extra points, or whatever is deemed appropriate, could be added to the guideline score. Any reason which could be factored into the guidelines, but was chosen not to be, cannot logically be used to usurp the recommended guidelines range.

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.

In its answer brief Respondent claims that there was no error because Officer Paige was merely testifying as to his investigative experience in other cases and not as to the explicit facts in other cases. However, the defendant should be tried on the evidence against him or her, and not based on investigative experience or techniques:

> 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) (emphasis added); see also Osario v. State, 526 So.2d 157 (Fla. 4th DCA 1988).

Appellee also cites such cases as Johnson v. State, 497 So.2d 863 (Fla. 1986) to claim that qualifications for police officers as experts are relaxed under § 90.702, Fla. Stat. (1987). Such a

claim, whether true or not,[4] is totally irrelevant to the instant issue. This Court has repeatedly held that testimony, be it expert or non-expert, is inadmissible on the topic of the 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 relevant to the instant case.[5]

Respondent next claims that there was no prejudice to Petitioner's case. However, the key issue in this case was the witness's ability to identify the perpetrator. Officer Paige's testimony improperly mitigates the fact that the witness could not make an initial identification. As noted in Mills v. Redwing Carrier, Inc., 127 So.2d 453 (Fla. 2d DCA 1961), improper testimony from a police officer which gives evidentiary significance to

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[4] It does not appear that the caes cited by Respondent actually state that there is a special police officer exception under § 90.702. Rather, the cases merely show a situation where a witness may be considered an expert.

[5] Reduced to its essence, Respondent's claim is that a witness can testify to irrelevant matters as long as he is an expert on those matters. Of course, such a claim is without merit.

irrelevant or improper evidence is prejudicial and cannot be deemed harmless:

> This lay testimony concerning the pivotal point of the case by a highway patrolman could have unduly influenced the jury in its interpretation of the facts. As we said in Padgett v. Buxton-Smith Mercantile Co., 10 Cir. 1958, 262 F.2d 39, 42:
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> > "The expression of the highway patrolman did not serve to enlighten the jury in respect to a matter outside its competence and should not have been admitted. While we are loath to interfere with the broad discretion of the trial courts in matters of this kind, the opinion came from an officer of the law whose badge of authority gave it evidential significance which may not be dismissed as harmless or nonprejudicial. As an official opinion of a fact matter within the knowledge or comprehension of the members of a jury it carries weight which tends to usurp the judicial function.

(emphasis added). Id. at 457.

Respondent's claim that the error is harmless due to cumulative identifications is without merit. The harmless error test is not a sufficiency of the evidence test, cumulative evidence test, or even a test of whether other overwhelming evidence exists. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). Rather, it must be proven beyond a reasonable doubt that the error could not affect the jury. Id. The victim was the sole eyewitness to the crime.[6] She was hysterical in a highly stressful situation (R26). She failed to do a composite identification and testified that the robber did not have a speech impediment (R109); whereas Petitioner stutters (R132,135).

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[6] The other witnesses identified Petitioner as being in the area, but they did not see the crime.

The jury certainly did not believe that the identification was conclusive. This is demonstrated by their question asking to see a police report to verify the address (R235), which indicates that the jury was not certain that Petitioner was not asleep at the time of the robbery as he claimed. Their doubts were also fueled by the hazards of identification under stressful conditions. See Manson v. Brathwaite, 432 U.S. 98 (1977); Postell v. State, 398 So.2d 851, 856 (Fla. 3d DCA 1981).

In the instant case it cannot be said beyond a reasonable doubt that the officer's improperly giving evidential significance to the fact that the victim could not do a composite identification was harmless error. Petitioner relies on his brief on the merits for further argument on this point.

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 MELVINA RACEY FLAHERTY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 28th day of December, 1990.

Jeffrey L. Anderson

Of Counsel