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IN THE SUPREME COURT OF FLORIDA

OIA 2-5-92

CORNELIUS C. SIRMONS,	:	
Petitioner,	:	
vs.	:	Case No. 79,754
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Cornelius C. Sirmons, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On August 3, 1990, the State Attorney for the Twentieth Judicial Circuit in and for Lee County, Florida, filed a delinquency petition alleging the Petitioner, fifteen-year-old CORNELIUS C. SIRMONS, committed robbery with a firearm, contrary to section 812.13, Florida Statutes (1989), and shot at, within, or into a building, contrary to section 790.19, Florida Statutes (1989). The crimes allegedly occurred on or about July 10, 1990. (R207) The State moved to waive juvenile jurisdiction over the Petitioner and to certify him for trial as an adult. (R187) On August 22, 1990, after hearing testimony from State and defense witnesses, the juvenile court waived jurisdiction of the cause to adult court. (R14-120, 156-157, 195-202, 203-206)

On November 1, 1990, Mr. Sirmons entered pleas of no contest to the charges in exchange for a sentence with a prison cap of nine years if sentenced as an adult, and a three-year minimum mandatory sentence. (R165-174, 169, 237) The trial court was to make the decision as to whether or not to sentence Mr. Sirmons as an adult, although the Petitioner hoped for a youthful offender sentence. (R167-168) Defense counsel reserved the right to appeal the order waiving juvenile jurisdiction. (R168)[1]

Although juvenile sanctions were recommended in the predisposition report, the trial court declined to impose juvenile or

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[1]The defense stipulated to probable cause. (R54) The crimes at issue involved a weapon. A codefendant was involved. (R14-52) See W.B. v. State, 313 So.2d 711 (Fla. 1975); Davis v. State, 297 So.2d 289 (Fla. 1974).

youthful offender sanctions and sentenced Mr. Sirmons as an adult on December 6, 1990. (R226, 181-182) The court imposed concurrent nine-year terms in prison on the charges, with a three-year minimum mandatory sentence imposed on the charge of robbery with a firearm. (R184, 241-244) The sentence was within the recommended guideline sentence of nine to twelve years in prison. (R239)

Mr. Sirmons timely filed notice of appeal on December 27, 1990. (R245-246) On appeal to the Second District Court of Appeal he argued that the trial court erred in imposing adult sanctions without stating or reducing to writing the reasons for those sanctions as required by section 39.111, Florida Statutes (1989), absent a specific waiver of the statutory requirements. The Second District affirmed the sentence on March 25, 1992. Sirmons v. State, 595 So.2d 582 (Fla. 2d DCA 1992). The appellate court recognized conflict with Lang v. State, 566 So.2d 1354 (Fla. 5th DCA 1990). This Honorable Court accepted jurisdiction of the cause on July 27, 1992, and has scheduled oral argument for February 5, 1993.

STATEMENT OF THE FACTS

At the waiver hearing, the court heard the following testimony:

On the afternoon of July 10, 1990, Mary Cluett was in her real estate office in Fort Myers when she saw two fellows walk by the window. The two were "acting funny" and Cluett and an associate watched them briefly because they did act suspicious. (R14-15) Moments later, Cluett looked up and saw two guns in her face. Cornelius Sirmons held one of the guns. (R16) The other person, a Hispanic, said he wanted money and jewelry, or he would kill Cluett. (R17-18) The Hispanic (Gilbert Rodriguez) then pushed her down and held his gun to her neck. (R18) She heard Cornelius Sirmons threaten her associate, Gladys, in a similar way. (R18) When another associate, Agnes, could not respond to the Petitioner's orders, Mr. Sirmons fired a shot into the ceiling. (R18-19)

Gladys Pacheco, Ms. Cluett's associate, also identified Mr. Sirmons as the man who threatened her. He held a small revolver which he pointed directly at her and at Agnes Myosky before he fired the shot into the ceiling. (R25-30)

After being advised of his rights, Mr. Sirmons told Agent Douglas Van House of the Lee County sheriff's department that Rodriguez and he committed a robbery at Cluett Realty. Rodriguez was the one who removed jewelry from one of the victims. Mr. Sirmons fired a shot into the ceiling. (R47-52) The defense

stipulated and the court found that probable cause was established for purposes of the waiver hearing. (R54)

Randy LaRosa, a HRS counselor at the Southwest Florida Juvenile Detention Center, observed progressively worse behavior by Mr. Sirmons over a six to eight month period, and did not believe the juvenile system was helping him. (R55-63). Lori Lindquist, a HRS counselor, prepared the recommendation that Mr. Sirmons not be waived to the adult system. She felt he had not been afforded adequate opportunities through the juvenile system. She recommended a secure, therapeutic environment such as the Eckerd Youth Development Center or the Florida Environmental Institute. (R69) Al Petz, HRS human services program specialist, recommended training school if Mr. Sirmons remained in the juvenile system, or a withhold of adjudication and placement in a restrictive, secure program if waived to adult court. (R95) Robert Farr, a HRS intake counselor, who had no personal knowledge of Mr. Sirmons but who had reviewed his file, recommended waiver to adult court. (R98-102)

David Knickerbocker, a clinical psychologist at Lee Mental Health Center, reviewed the psychological evaluation of Mr. Sirmons, and agreed with the conclusion that a restrictive, secure setting with the availability of counseling would best serve his rehabilitative needs. (R109-117, R195-202)

SUMMARY OF THE ARGUMENT

When a juvenile enters a plea but does not specifically waive his statutory right requiring the court to make specific findings before imposing adult sanctions, the failure of the court to make such findings is fundamental error and compels reversal. An absence of record evidence for such findings requires reversal for treatment as a juvenile; alternatively, remand for the mandatory findings is required.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN IMPOSING ADULT SANCTIONS AGAINST THE JUVENILE PETITIONER?

The Petitioner, Cornelius Sirmons, was fifteen years old when he allegedly committed two crimes involving a firearm on July 10, 1990. On August 24, 1990, the juvenile court found that it was proper under Section 39.09 (2)(c), Florida Statutes (1989)[2] to waive jurisdiction to adult court. In November 1990, the circuit court entertained a plea from Mr. Sirmons which involved a prison cap if he was sentenced as an adult. The court ordered a predisposition report (PDR). Contrary to the PDR recommendation for juvenile sanctions, (R218-236)[3] the court sentenced Mr. Sirmons as an adult without stating or reducing to writing the reasons for imposing adult sanctions as required under Section 39.111, Florida Statutes (1989).[4] Mr. Sirmons contends that the imposition of sentence without the mandatory, factually specific written findings requires reversal of his case.

In State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984), this Court held that the legislature intended that the decision to impose adult sanctions on a juvenile must be in writing, and the

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[2]Now Section 39.052, Florida Statutes, effective October 1, 1990.

[3]A presentence investigation recommended incarceration as an adult. (R216)

[4]Now Section 39.059 (7)(a)-(d), effective October 1, 1990.

findings required by the statute were mandatory. The purpose for the requirements is to facilitate an intelligent appellate review of such a sentence. The Court said:

> The juvenile justice statutory scheme, as adopted by the Florida Legislature, grants to juveniles the right to be treated differently from adults. The legislature has emphatically mandated that trial judges not only consider the specific statutory criteria pertaining to the suitability of adult sanctions, but that they also reduce to writing their findings of facts and reasons for imposing an adult sentence on a juvenile. A written order is necessary in order to make effective the right of sentence review granted to juveniles by the legislature.
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> * * *
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> The legislature mandated that trial judges consider the statutory criteria in order to protect the rights which the legislature has given to juveniles. . . .

Rhoden, 448 So.2d at 1016-1017.

In Lang v. State, 566 So.2d 1354 (Fla. 5th DCA 1990), the issue before the appellate court was whether a juvenile, because of entering a plea in adult court, could waive his rights under Section 39.111. There a sixteen-year-old with no prior record was charged as an adult with armed robbery, a first-degree felony punishable by life. The juvenile agreed to plead guilty to a reduced charge of robbery with a weapon with a recommendation from the state for a guidelines sentence. A presentence investigation and predisposition report were ordered. Both recommended juvenile sanctions due to lack of prior record, lack of prior exposure to juvenile rehabilitation programs, and a stable home environment.

However, at sentencing, the judge determined adult sanctions were suitable and completed a form check list that recited the criteria set forth in Section 39.111(7)(c).

The appellate court held that a juvenile could waive his statutory rights but the waiver must be manifest in the plea agreement or on the record, facts which were not apparent in Lang. 566 So.2d at 1357. The requisite statutory findings were not preempted by the plea. Additionally, the court's checklist did not meet the statutory requirements. Because of the lack of findings below, the appellate court reviewed the entire record, found no evidence to support findings which would justify adult sanctions, and reversed and remanded the case with instructions to impose juvenile sanctions.

The instant case is similar to Lang because it involves a plea. The Lang court relied on State v. Rhoden, 448 So.2d 1013, 1017 (Fla. 1984), for the proposition that a juvenile must specifically waive the statutory protections of Section 39.111. However, Rhoden did not involve a plea. The Lang court next reviewed cases where a juvenile had entered a plea and followed the reasoning set forth in Sheffield v. State, 509 So.2d 1350 (Fla. 1st DCA 1987):

> Although the supreme court in Rhoden suggested there might be circumstances under which the juvenile may waive that right, there is nothing in the record herein suggesting that appellant waived or bargained away his right to have the court consider the suitability or unsuitability of adult sanctions pursuant to section 39.111(6). Indeed, as referenced above, the transcript of the sentencing hearing reveals that the issue was fully discussed without reference by the state as to the plea

bargain and a possible waiver. (citations omitted)

Lang also noted a different holding in Davis v. State, 528 So.2d 521 (Fla. 2d DCA 1988), rev. denied, 536 So.2d 243 (Fla. 1988). There the court held that the need for written findings for imposing adult sanctions was obviated because the adjudication was entered pursuant to a plea. However, no facts were presented or analyzed in Davis as to a specific waiver of the statutory rights. Nevertheless, in the instant case, the Second District relied on Davis as authority for holding that the Petitioner waived the requirements of section 39.111 by entering a plea.

The Second District has now receded from Davis. In Croskey v. State, 17 F.L.W. D1672, D1673 (Fla. 2d DCA July 10, 1992) (En Banc), the court held that a negotiated plea does not necessarily waive the requirements of section 39.059(7) absent an intelligent and knowing waiver of the rights. The Croskey court noted that a juvenile could enter a negotiated plea in exchange for an adult sentence without being aware that he had the right to have his suitability for such sanctions considered under chapter 39. There was no indication in the record before the court that the trial court considered section 39.059(7) in sentencing Croskey as an adult, or that Croskey intelligently and knowingly waived his right to be considered under that statute. In reversing, the court said if the basis for the statutory findings were present and if the trial court complied with the statute, adult sanctions could be imposed. Croskey, 17 F.L.W. at D1673. See also, Taylor v. State,

534 So.2d 1181 (Fla. 4th DCA 1988); Dixon v. State, 451 So.2d 485 (Fla. 3d DCA 1984), review denied, 458 So.2d 274 (Fla. 1984).

Here as in Lang, Sheffield, and Croskey the Appellant entered a plea but at no point in the plea process is it apparent that he waived his right to have the court fully consider the need for adult sanctions pursuant to Section 39.111.

The facts of this case are similar to Sullivan v. State, 587 So.2d 599, 600 (Fla. 5th DCA 1991). There the juvenile defendant entered a plea with the understanding that if he were sentenced to the Department of Corrections, the term of the sentence would not be more than three years. The trial court ordered a presentence investigation and a PDR, and then sentenced the defendant as an adult without making the statutory findings. The state erroneously argued to the appellate court that written findings were not necessary because the defendant agreed to adult sanctions in his plea agreement. The court found the state's argument unsupported by the record because the plea agreement merely placed a cap of three years in the Department of Corrections. Whether adult or juvenile sanctions were to be imposed was left open. The record clearly indicated that juvenile sanctions were not foreclosed by the plea agreement. Additionally, in Hill v. State, 596 So.2d 1210 (Fla. 1st DCA 1992), the state argued that defense counsel's response that a reasonable sentencing solution would be a youthful offender or an adult sentence did not constitute a knowing and intelligent waiver of the juvenile's right to written findings under section 39.111.

Mr. Sirmons' plea agreement is similar to that in Sullivan, and merely states an agreement to a prison cap if sentenced as an adult. It does not foreclose the possibility of a juvenile or youthful offender sentence. It is noteworthy that the written plea agreement specifically called for a PDR and PSI, indicating that Mr. Sirmons was not waiving his rights under Section 39.111. (R237-238) At the plea hearing the court also referred to sentencing options, the worst being a sentence as an adult, and to the fact that it would consider a PDR and PSI before imposition of sentence. Defense counsel indicated a preference for a youthful offender sentence, which, under Hill, cannot indicate a waiver of the findings. (R167-174)

At sentencing in the instant case the judge indicated he would be inclined to go along with the PDR recommendation that Mr. Sirmons be given juvenile sanctions if there were some way to assure the Appellant would do his minimum mandatory time. (R180) The judge also would not consider a youthful offender sentence because he had no confidence in the system. (R180) He noted that if he sentenced Mr. Sirmons as an adult, he would do the three years as the legislature intended. (R180)

Mr. Sirmons' PDR showed that he had three prior felony adjudications for grand theft auto and robbery, and two misdemeanor adjudications for loitering and prowling and resisting arrest without violence. He had never been committed to the Department of Health and Rehabilitative Services nor had the opportunity to enter or complete a juvenile commitment program. (R225) The PDR also re-

ported Mr. Sirmons had a history of abusing alcohol, cannabis, and cocaine, yet had not had the opportunity for an intervention program. (R220) The PDR strongly recommended placement in a long term program in the juvenile system for purposes of serving community protection as well as encouraging Mr. Sirmons' rehabilitation. (R226) The psychologist's report also recommended removal from his environment and placement in a program of structured supervision and training, with substance abuse counseling. (R199)

Assuming arguendo that the statutory requirements of section 39.111 can be waived, the facts of this case show that a waiver by Mr. Sirmons is not present. Because the Appellant did not waive his statutory rights and the court failed to make proper findings before sentencing him as an adult, reversal is required.

It is noteworthy that the trial court's concern at sentencing was that it wanted Mr. Sirmons to do the minimum mandatory time for a firearm, and that the court otherwise would have sentenced the Petitioner as a juvenile. Mr. Sirmons contends that the statements by the court, coupled with the PDR's recommendation for juvenile sanctions, show there is a lack of record support to make findings adequate to justify adult sanctions in his case. Thus, his cause should be remanded for treatment as a juvenile. Lang, 566 So.2d 1357-1358. Compare, Pope v. State, 561 So.2d 554 (Fla. 1990). Alternatively, resentencing must be in accordance with section 39.111.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner respectfully requests that this Honorable Court reverse the judgment and sentence of the lower court.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CORNELIUS C. SIRMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 90-03713

Opinion filed March 25, 1992.

Appeal from the Circuit Court for Lee County; William J. Nelson, Judge.

James Marion Moorman, Public Defender, and Jennifer Y. Fogle, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Faffel, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See Davis v. State, 528 So. 2d 521 (Fla. 2d DCA), review denied, 536 So. 2d 243 (Fla. 1988). We recognize

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that our decision in Davis is in conflict with Lang v. State, 566 So. 2d 1354 (Fla. 5th DCA 1990).

DANAHY, A.C.J., and PATTERSON, J., Concur.
PARKER, J., Concurs Specially.

PARKER, Judge, Concurring specially.

I concur with the majority. But for this court's opinion in Davis, I would reverse this case because the record fails to show that Sirmons waived the trial court's required findings under Chapter 39, Florida Statutes. See Evans v. State, No. 91-01685 (Fla. 2d DCA Feb. 26, 1992) (concurring opinion).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14th day of August, 1992.

Respectfully submitted,

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