

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

NOV 24 1992

CLERK, SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

DONALD LEWIS SMITH,

Petitioner,

v.

CASE NO. 80,551

STATE OF FLORIDA,

Respondent.

_____ /

MERITS BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii-iii
STATEMENT OF THE CASE AND FACTS	1-2
SUMMARY OF ARGUMENT	3
ARGUMENT	
<u>ISSUE</u>	
[REPHRASED TO REFLECT CERTIFIED QUESTION] DOES A DEFENDANT'S EFFORTS TO COVER UP A CRIME ALLOW SENTENCING GUIDELINES DEPARTURE?	4-11
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Everage v. State,</u> 504 So.2d 1255 (Fla. 1st DCA 1986), <u>rev. denied</u> , 508 So.2d 13 (Fla. 1987)	4,8,9
<u>Hallman v. State,</u> 560 So.2d 223 (Fla. 1990)	7,10
<u>Hernandez v. State,</u> 575 So.2d 640 (Fla. 1991)	10
<u>Jackson v. State,</u> 575 So.2d 181 (Fla. 1991)	8,9
<u>Johnson v. State,</u> 465 So.2d 499 (Fla. 1985)	9
<u>Pendleton v. State,</u> 493 So.2d 1111 (Fla. 1st DCA 1986), <u>rev. denied</u> , 504 So.2d 768 (Fla. 1987)	9
<u>Phelps v. State,</u> 490 So.2d 1284 (Fla. 5th DCA 1986), <u>rev. denied</u> , 500 So.2d 545 (Fla. 1986)	7,8
<u>State v. Sachs,</u> 526 So.2d 48 (Fla. 1988)	7
<u>State v. Obojes,</u> 604 So.2d 474 (Fla. 1992)	7
<u>Staten v. State,</u> 519 So.2d 622 (Fla. 1988)	5
<u>Tyner v. State,</u> 491 So.2d 1228 (Fla. 2d DCA 1986), <u>approved</u> , <u>State v. Tyner</u> , 506 So.2d 405 (Fla. 1987)	8,9
<u>Vanover v. State,</u> 514 So.2d 1140 (Fla. 5th DCA 1987)	9
<u>Wilson v. United States,</u> 162 U.S. 613, 620-21 (1896)	9
<u>Wright v. State,</u> 586 So.2d 1024 (Fla. 1991)	8,9

FLORIDA STATUTES

Chapter 406

5,6

STATEMENT OF THE CASE AND FACTS

With respect to the issue raised, the State accepts Smith's statement of the case and facts with the following additions.

Smith and the victim were divorced but still living together as husband and wife in Kissimmee, Florida. (T. 146, 197, 220-222, 344-345, 360-361, 363, 440, 463)¹ They had two children, ages six and eight. (T. 362) The victim was a fantastic mother. (T. 334, 345, 378)

After wrapping the victim's body up in a heavy padlocked chain and covering it with a blue bedspread which he secured with black duct tape, Smith dumped the body into the Tampa Bay. (T. 97-100, 111-112, 277) The medical examiner was certain that the victim died from asphyxiation, and he explained that a person can be asphyxiated by anything that prevents him from breathing, such as strangulation or drowning. The physical evidence demonstrated that the victim was asphyxiated by the chain around her neck and the water in her lungs. (T. 276-282) The chain was wrapped around her neck "real tight." (T. 281) When the victim's body was found, she had been dead about 6 to 8 days. (T. 278-279)

Commencing the day after the murder, Smith circulated the story that the victim had deserted him, even telling some people the victim said she was tired of being a wife and a mother. (T. 334, 349-352, 382, 460-461) Smith did not file a missing

¹ The symbol, "T," refers to the trial transcript.

person's report and urged his next door neighbor not to report the victim missing. (T. 390-392, 487-488)

About noon on Saturday, the day after the murder, Smith called his mistress and invited her over. (T. 462) Less than one week later, the mistress moved in with Smith. (T. 459-460)

SUMMARY OF ARGUMENT

The departure reason was valid. Smith is situated differently from most other second-degree murderers. He engaged in an elaborate cover-up, first by wrapping a long and heavy chain around the victim's body, making it "real tight" around her neck, transporting the chained and covered body in his vehicle from Kissimmee to the Tampa Bay, dumping the body into the Tampa Bay, and finally by fabricating a story that the victim had deliberately abandoned the family, including her two small children.

ARGUMENT

ISSUE

[REPHRASED TO REFLECT CERTIFIED QUESTION]
DOES A DEFENDANT'S EFFORTS TO COVER UP A
CRIME ALLOW SENTENCING GUIDELINES DEPARTURE?

Smith was sentenced for commission of second-degree murder. The trial court went beyond the recommended sentence of 12 to 17 years' imprisonment and imposed a 30-year sentence based on Smith's conduct in the immediate aftermath of the murder. The court relied on Everage v. State, 504 So.2d 1255, 1257 (Fla. 1st DCA 1986), rev. denied, 508 So.2d 13 (Fla. 1987) in which the First District affirmed a departure sentence based on the defendant's "elaborate cover-up to perpetuate the nondisclosure of his wife's death and his involvement in it." The defendant in Everage had put his murdered wife in a freezer in storage and then told everyone she had left home without a forwarding address. The trial court in the instant case properly imposed a departure sentence based on this reason.

The circumstances of the instant case are significantly different from those surrounding the average second-degree murder. A person who kills in the heat of passion generally does not take such elaborate steps to make certain that the victim is dead and the body concealed. A portion of the chain, weighing 31 pounds and approximately 30 feet in length, was wrapped around the victim's neck "real tight." (T. 281) Even if appellant had believed that the victim was dead before he disposed of the body, he took this additional step to make certain that this was true.

A murderer's disposal of the body is analogous to an accessory after the fact situation. Since a murderer cannot be convicted as both a principal and an accessory after the fact, Staten v. State, 519 So.2d 622 (Fla. 1988), it is critical that his concealment of the crime be considered in fashioning a proper sentence for the murder.

Smith willfully obstructed the administration of justice by disposing of the victim's body. Had the body remained concealed, Smith would be a free man today, and the children would have been deprived of a Christian burial for their mother. As it was, the condition of the body when found prevented the medical examiner from determining whether any wounds (like strangulation marks) had been deliberately placed at vital areas of the body (T. 283), from which premeditation could have been inferred.

Relying on section 406.12, Florida Statutes, Smith asserts that his actions in covering up the crime constituted an offense for which he was not convicted. The State respectfully disagrees.

Chapter 406 is known as the "Medical Examiners Act." Section 406.11 requires the medical examiner to determine the cause of death of persons who die under certain specified circumstances, most of which are unrelated to criminal violence. Section 406.12 requires anyone who becomes aware of the death of such a person to report it to the medical examiner. It is a first-degree misdemeanor for anyone (1) to knowingly fail or refuse to report such death, (2) to refuse to make available

prior medical or other information pertinent to the death investigation, or (3) without permission from the medical examiner, to willfully touch, remove, or disturb the body, clothing, or any article upon or near the body, with the intent to alter the evidence or circumstances surrounding the death. Id. The penalty for committing a first-degree misdemeanor is imprisonment up to one year.

The class of persons affected by section 406.12 are those who become aware of the death of a person. The statute is designed to deter these persons from interfering with the medical examiner's ability to determine the cause of death. It is not designed to deter murderers from destroying evidence to escape punishment.

Characterizing Smith's conduct as constituting a misdemeanor does not even remotely take into consideration his sinister state of mind immediately after the murder. Supposedly Smith killed his wife in a heat of passion, but yet immediately thereafter he was able to plan and execute an elaborate cover-up, which took a considerable amount of time and energy. He had ample opportunity for further thought and a turning over in the mind; yet, he proceeded with his evil conduct.

Even if a murderer's disposal of the body technically satisfies the elements of the offense defined in section 406.12, Smith's conduct went well beyond this offense. Commencing the day after the murder, appellant circulated the story that the victim had deserted him, even telling some people the victim said

she was tired of being a wife and a mother (T. 334, 349-352, 382, 460-461) Appellant did not file a missing person's report and urged his next door neighbor not to report the victim missing. (T. 390-392, 487-488)

Smith asserts, at least implicitly if not explicitly, that events occurring subsequent to commission of the crime cannot be considered in fashioning a sentence. The State respectfully disagrees. Sentencing considerations have never been limited to circumstances occurring prior to or simultaneously with the criminal act. Indeed, this court has approved a downward departure reason based on the defendant's subsequent conduct. State v. Sachs, 526 So.2d 48 (Fla. 1988) (remorse for committing crime valid downward departure reason).

Smith's reliance on death-penalty jurisprudence is misplaced. A death sentence must be based on at least one of the enumerated statutory aggravating factors. Section 921.141(5), Florida Statutes. Since concealment of the crime, such as by disposing of the body, is not an enumerated aggravating factor, no death sentence will ever be upheld for this reason. Aggravating factors justifying a death sentence also justify a departure sentence under the guidelines. Hallman v. State, 560 So.2d 223 (Fla. 1990); State v. Obojes, 604 So.2d 474 (Fla. 1992). However, guidelines departure reasons are not restricted to those authorizing imposition of the death penalty.

Contrary to Smith's assertion, the decisions in Phelps v. State, 490 So.2d 1284 (Fla. 5th DCA 1986), rev. denied, 500 So.2d

545 (Fla. 1986), Tyner v. State, 491 So.2d 1228 (Fla. 2d DCA 1986), approved State v. Tyner, 506 So.2d 405 (Fla. 1987), Jackson v. State, 575 So.2d 181 (Fla. 1991), and Wright v. State, 586 So.2d 1024 (Fla. 1991) do not conflict with the decision in Everage.

The trial court in Phelps departed from the guidelines because (1) the victim was killed while lying defenseless in bed; (2) the survivors of the victim suffered horrendous mental anguish and grief resulting from the manner in which the crime was committed and covered up; and (2) there was no pretense of legal justification for the killing. Id., at 1285. The Fifth District concluded that the murder was not excessively brutal because the mutilation "apparently" occurred subsequent to the victim's death. This conclusion is consistent with death-penalty cases interpreting the heinous, atrocious, or cruel aggravating factor, which relates to the manner in which the crime (which is complete on death of victim) was committed. Except for this analysis, the court did not address the reasons listed by the trial court, and in particular, it did not address the concealment of the crime.

The defendant in Tyner was indicted for two counts of first-degree murder and one count of armed burglary. The trial court dismissed the two murder counts, and the defendant was convicted on the burglary count. He received a departure sentence because, inter alia, two persons were killed. This reason was held invalid because the defendant had not been convicted of murder.

In Everage, the First District stated that a departure sentence could not be based on crimes for which no conviction had been obtained or on factors relating to charges that had been dropped. Id., at 1257-1258. By implication, the Everage court did not consider the concealment conduct to be criminal. Id. There is no conflict between Tyner and Everage.

In Jackson and Wright, the evidence did not support a flight instruction. The relevancy of these cases to the instant appeal is not apparent to the State. The law is well established that "[t]he destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt, to be dealt with by the jury." Wilson v. United States, 162 U.S. 613, 620-21 (1896). See, also, Johnson v. State, 465 So.2d 499, 504 (Fla. 1985) (trial court properly instructed jury that consciousness of guilt could be inferred from inconsistent exculpatory statements). In the instant case, the only reasonable inference to be drawn from Smith's concealment of the body was that he desired to obstruct the administration of justice and escape punishment.

Citing Vanover v. State, 514 So.2d 1140 (Fla. 5th DCA 1987) and Pendleton v. State, 493 So.2d 1111 (Fla. 1st DCA 1986), Smith asserts that flight from the crime scene is an invalid departure reason. The Vanover court misunderstood the departure reason given by the trial judge who stated that the defendant's motive for committing the crime was to avoid apprehension for commission of a prior crime. Subsequent to publication of the Vanover

decision, this court approved this departure reason, Hallman at 227-228. In Pendleton, without any analysis, the First District concluded that the defendant's apprehension in another state was not a valid departure reason.

Smith contends that the cover-up is not a valid departure reason because it was unsuccessful. (I.B. 19) The State respectfully disagrees. Criminals are convicted and punished because they get caught. It is no defense to a crime that other criminals have not yet been caught. No doubt there are murderers walking around free in our society today because they successfully disposed of the victim's body. Jimmy Hoffa's disappearance immediately comes to mind. Smith deserves a departure sentence because of his evil conduct. He fully intended that the murder of his children's mother go undetected, and the fact that he got caught does not diminish his wickedness one iota.

Smith's reliance on Hernandez v. State, 575 So.2d 640 (Fla. 1991) holding that commission of a crime in a professional manner is an invalid departure reason is misplaced. The instant case has nothing to do with professionalism. It has to do with a person's unwillingness to accept responsibility for his criminal conduct and the great lengths to which he will go to escape punishment. Society is entitled to greater protection from a person with this mindset, particularly where the crime committed is murder.

Permitting departure based on aggravating circumstances which are common, either in kind or degree, to most crimes would defeat the goal of uniform sentencing for defendants similarly situated. The instant case does not involve such a common factor, inasmuch as most murderers do not engage in as elaborate a cover-up scheme as did Smith, if indeed they conceal the crime at all. He deserves greater punishment.

Smith criticizes the prosecutor's conduct at sentencing. Since the prosecutor's conduct is irrelevant to the issue before this court, the State respectfully declines to waste its and the court's time addressing it.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm Smith's departure sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL



JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 23rd day of November, 1992.



Carolyn J. Mosley
Assistant Attorney General