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IN THE SUPREME COURT OF FLORIDA

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DONALD LEWIS SMITH, :
Petitioner, :
v. :
STATE OF FLORIDA, :
Respondent. :
_____ :

CASE NO. 80-552

REPLY BRIEF OF PETITIONER ON THE MERITS

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DONALD LEWIS SMITH, :
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VS. : CASE NO. 80,551
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_____ :

REPLY BRIEF OF PETITIONER ON THE MERITS

I SUMMARY OF ARGUMENT

The question here boils down to this: if a defendant, convicted of second-degree murder, hides the body and lies about the crime, may the judge double his sentence under the guidelines? The state managed to identify certain distinctive facts of this case, but it utterly failed to show how these facts justify a departure sentence. First, the facts are not as unique as the state would have this court believe. Concealing the body is not that unusual a fact. Rather, attempting to conceal a crime and/or one's involvement in it, including making false statements, is quite common an occurrence. Second, as the facts complained of occurred after the murder, they did not aggravate the murder.

To buy the state's arguments, this court would have to find that concealing the body and lying about the crime demonstrate a "depravity" over and above the amount required to prove the "depraved mind" element of second-degree murder.

II ARGUMENT

ISSUE PRESENTED

THE SOLE REASON GIVEN FOR DEPARTURE FROM THE GUIDELINES, THAT DEFENDANT ENGAGED IN AN ELABORATE COVERUP OF HIS WIFE'S DEATH, WAS NOT VALID.

It is not every day that one sees a "Christian burial" argument in an appellate brief, but the state makes one here (State's Brief (SB), 5); see Hudson v. State, 538 So.2d 829, 830 n.3 (Fla.), cert. denied 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989). The state also mentions Jimmy Hoffa's disappearance (SB-10). These arguments are obviously not an appeal to reason. When the state makes this type of argument, it may be concluded that no rational argument supports the state's position.

The same is true of the state's pervasive attempts to malign petitioner Smith's character, and its corollary, to show that the victim, his estranged wife, Judy, was a "fantastic" mother to her children and was of good character (SB-1). These arguments are cheap shots by the state. The facts of the murder have little or no bearing on the propriety of a departure sentence predicated on events which occurred after the killing.

Smith was convicted by a jury of first-degree murder in the death of Judy. On appeal, the district court found the evidence of premeditation to be legally insufficient, reduced his conviction to second-degree murder and remanded for resentencing. Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990).

Smith has no prior criminal record. The guidelines recommended a sentence of 12 - 17 years. On remand after appeal, the trial court imposed a sentence of 30 years in prison. The sole reason for departure was the alleged elaborate coverup of the killing. The only issue on this appeal after remand is the propriety of the departure sentence.

The central question is whether the second-degree murder here is worse, that is, deserving of more severe punishment, than the "typical" second-degree murder. By definition, any second-degree murder evinces a depraved mind. § 782.04(2), Fla.Stat. Petitioner argues that his case is indistinguishable in any legally meaningful way from a "typical" second-degree murder, and he should have received a guidelines sentence. Instead of presenting legal or logical arguments in response, the state seeks to distract this court from the true issues on appeal, by bringing up things like Christian burial, Jimmy Hoffa and Smith's alleged bad character.

The state strenuously argues that the coverup made this crime worse than the typical second-degree murder, and that Smith's telling family and friends that Judy had left him make him worse than the ordinary second-degree murderer. But, Smith's actions were not that unusual, and more importantly, as they occurred after the murder, they cannot reasonably be found to have aggravated the murder itself.

The alleged coverup consisted of two parts: the physical act of disposing of the body, and Smith's statements to family and friends that Judy had left him. As argued in his initial

brief on the merits, disposing of the body meets the definition of a crime prohibited by section 406.12, Florida Statutes. Since no conviction was obtained, it cannot be used to justify departure. State v. Tyner, 506 So.2d 405 (Fla. 1987). Moreover, this court is aware no doubt of numerous cases in which bodies were hidden in some way, placed in a body of water or in a shallow grave in a remote location, for example. There have even been cases prosecuted without the bodies having been found. E.g., Davis v. State, 582 So.2d 695 (Fla. 1st DCA 1991). Undersigned counsel has found no case in which hiding the body has justified an enhanced sentence.

More numerous than those who hide a body are the defendants who, rather than attempting to conceal the crime itself, attempt in some fashion to conceal their participation in it. This type of concealment often includes false statements. Lying about the crime is hardly a unique factor. Rather, Smith's alleged false statements to family and friends do not aggravate the murder in any meaningful way. The fact that it is a factor common to many, many crimes alone makes it invalid as a reason for departure. See Hall v. State, 517 So.2d 692, 695 (Fla. 1988) (court will not permit "built-in" reason for departure).

The state argued that Smith "willfully obstructed the administration of justice by disposing of the victim's body" (SB-5). Assuming this were true, then he could have been charged with obstructing justice under section 843.02, Florida Statutes. As he was not, this is not a valid reason for departure. Tyner. The state argued that, but for disposal of the

body, there would have been proof of from which premeditation could have been proved. As argued in his initial brief, this argument is built on sheer speculation.

The state distinguishes Tyner from the instant case on its facts. Tyner is distinguishable on its facts, but that is not the point. Tyner's interpretation of Rule 3.701(d)(11), Florida Rules of Criminal Procedure, shows how Everage's interpretation of the same rule was wrong. Everage v. State, 504 So.2d 1255 (Fla. 1st DCA 1986), review denied 508 So.2d 13 (Fla. 1987). The state did not even address the semantical errors on which the Everage decision is based, a glaring omission in its argument. Everage is the only case besides this one to say that an elaborate coverup is a valid basis for departure, but if this court approves this reason, it could well lead to more and more departure sentences based on concealing a crime or lying about it.

Some of the state's arguments are illogical. For example, the state argues that "[b]y implication, the Everage court did not consider the concealment conduct to be criminal" (SB-9). The state means this to be a distinction between Everage and Tyner, but instead, it sounds like the state is arguing that noncriminal conduct justifies departure from the guidelines. This is nonsense, and it demonstrates the weakness of the state's position.

The state argues that aggravating factors in death sentences also justify a departure under the guidelines (SB-7). (Petitioner would concede this is sometimes true, but doubts it

is always true.) On the other hand, according to the state, departures are not limited reasons authorizing imposition of the death penalty. Even if that were true, it is a general argument which without explanation means nothing here.

Nor is the issue here whether the destruction, suppression or fabrication of evidence gives rise to a presumption of guilt (SB-9). The issue here is not guilt, but sentencing. Contrary to the state's argument, petitioner has never claimed it is a defense to a crime that other criminals have not yet been caught (SB-10). His claim is only that attempting to conceal a crime does not aggravate the crime.

The state has succeeded in identifying certain distinctive facts of this case, but it utterly fails to show how these facts justify a departure from the guidelines. First, the facts are not nearly as unique as the state would have this court believe. Concealing the body is not that unusual a fact, and attempting to conceal a crime and/or one's involvement in it, including making false statements, is quite common a fact in the annals of criminal justice. Second, even if certain facts here are relatively distinctive, as they occurred after the murder, they did not aggravate the murder.

The question here boils down to this: if the defendant, convicted of second-degree murder, hides the body and lies about the crime, may the judge double his sentence under the guidelines? The state attributes vast amounts of evil intent and conduct ("sinister state of mind" (SB-6); "wickedness" (SB-10)) to the concealment of the body, but this occurred

wholly after the killing, and attempts at some manner of concealment are quite a common factor in crimes.

Moreover, conviction of second-degree murder requires proof of a "depraved mind." To put the state's argument in context, the state is necessarily arguing that Smith's alleged "sinister state of mind" and "wickedness" somehow merit a greater sentence than that imposed on the run-of-the-mill second-degree murderer, who necessarily acted with a "depraved heart." If Smith's "depravity" is no greater than that of the typical murderer, it does not support departure. Cf. Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds 509 So.2d 281 (Fla. 1987) (in sexual battery cases, psychological trauma is not a valid reason for departure, unless there is proof of trauma greater than the (great) amount present in a typical case).

When viewed in this context, the triviality of the matters of concealment and lying, as compared to the murder, are apparent. The state fails to keep these matters in proper perspective: the murder was a serious crime; concealing the body was trivial by comparison. The state, to the contrary, argues as though the two matters are of equal importance, that the concealment, though occurring wholly after the killing, aggravated the killing. This is just not true.

The decision in Everage is based on a semantical distinction which does not in fact exist in the English language. The state failed even to address this issue in its answer brief. Instead, the state asserts that "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" (SB-9). Just like thousands, if not millions, of others before him. This is anything but a unique factor. Given an opportunity to avoid the consequences, it is probably more unusual that a defendant would not take the opportunity than that he would. This court should consider how many defendants of which the state could make a similar argument.

It is easy enough to see of what the "elaborate coverup" here consisted. If this court were to approve this decision, it would be inviting the imposition of departure sentences based on all manner of concealment of crimes or false statements to families and police, even though such things occur after the crime and do not aggravate the crime itself, and are factors common to many crimes. Surely, this is not a step this court wishes to take.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, reverse his sentence and remand for resentencing within the guidelines.

Respectfully submitted,

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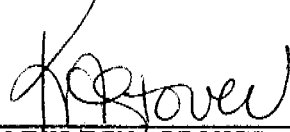


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand-delivered to Carolyn Mosley, Assistant Attorney General, Criminal Division, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Donald Lewis Smith, inmate no. 114876, Baker Correctional Institution, P.O. Box 500, Olustee, Florida 32072, this 15 day of December, 1992.



KATHLEEN STOVER