IN THE SUPREME COURT OF FLORIDA

FILED
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JUL 26 1995
CLERK, SUPREME COURT
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Chief Deputy Clerk

WILLIE B. HARRIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 85,297

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

R = Record on appeal and sentencing transcript

T = Transcript of jury trial

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with attempted first degree murder of his wife, Emmaline Harris, in an information which alleged that he struck her with a hammer causing her great bodily harm (R 6). The case proceeded to a jury trial resulting in a verdict against Petitioner for the lesser included offense of attempted second degree murder with a weapon (R 45). At his sentencing hearing Petitioner unsuccessfully challenged the scoring of a prior offense, a 1966 murder, as a life felony on his guideline scoresheet (R 63, 86-91). Petitioner's permitted range as scored was 12-27 years imprisonment (R 63). The court departed from the guidelines, adjudging Petitioner to be guilty and sentencing him to a term of 30 years imprisonment (R 56-61). As its reason for departure the court wrote on the scoresheet "extensive emotional trauma that is continuing and excessive brutality." (R 63). Notice of appeal was timely filed (R 64).

On appeal the Fourth District rejected Petitioner's argument that the trial court erred in approving a departure for "excessive brutality" but initially agreed that the 1966 second degree murder conviction should have been scored as a third degree felony. Harris v. State, 19 Fla. L. Weekly D2139 (Fla. 4th DCA October 5, 1994). Sua sponte the court later modified its opinion, again upholding the departure but this time finding the prior murder should have been scored as a first degree felony. Harris v. State, 650 So. 2d 639 (Fla. 4th DCA 1995).

This court granted jurisdiction based on conflict with Johnson v. State, 525 So. 2d 964 (Fla. 1st DCA 1988).

STATEMENT OF THE FACTS

Petitioner and his wife Emmaline were separated; Mrs. Harris was living with their children at her father's house (T 131-132). Mrs. Harris said she moved from their home in July after an incident wherein Petitioner accused her of having an affair with her church pastor (T 156-158). According to Mrs. Harris, at about 4:30 a.m. on September 30, 1992, she received a telephone call from Petitioner wherein he threatened to kill her if she and the children did not return to the family home (T 159). She hung up on him (T 160). She went to work at Publix about 7:00 a.m. that morning (T 160). Mrs. Harris testified that when she pulled into the parking lot, Petitioner pulled in behind, blocking her car (T 187). She rolled up the windows and locked the door but Petitioner approached with a hammer and broke out the window (T 188). When she got out of the car she was hit on the head with the hammer (T 190). Mrs. Harris was able to get up and tried to run but she was struck again (T 190). Petitioner allegedly said he was going to kill her for not coming home (T 190). She put her hands up to shield the blows but she got hit in the eye (T 190). She was unsure how many times she was hit but afterward she had "about" six round spots on her head where her hair had not grown back (T 193). She stated the last time she was hit she felt her skull crack and then heard a voice (T 191-193).

The voice was that of window-washer Richard Feak who heard screams and ran over (T 208-210). He saw Petitioner straddling Mrs. Harris and hitting her with "full swing blows" of a hammer (T 210-212). He said "Hey, stop that" and Petitioner stopped the second time he was told (T 213). Petitioner said "she's no good" and left the area in his car (T 214). Later police found the broken claws from a 16 oz. hammer next to Mrs. Harris's car (T 252). There was no evidence of blood or hair on the hammer pieces however (T 276).

When Petitioner left Mrs. Harris ran into Publix where she was assisted by various store personnel until an ambulance arrived and took her to the hospital (T 121-123). At the hospital she was treated by Drs. Austin and MacMillan. When Dr. Austin met Mrs. Harris in the emergency room she was coherent and able to give him a clear medical history (T 232). He

described her main injuries as a cut through her right eyebrow, a fracture of the bone in her right cheek and eye socket, a possible eye injury and injury to one hand (T 234-235). She did not have a fractured skull, rather a maxillary sinus fracture (T 243). None of the injuries required surgery though the cut may have required stitches (T 235) and according to Mrs. Harris she had a cast on her thumb (R 194). When Dr. Austin saw Mrs. Harris in his office two weeks later she was healing well, though there was some limitation on her upward gaze in one eye (T 236). Dr. Austin believed that it would heal itself in time (T 237). Dr. MacMillan confirmed that Mrs. Harris had suffered no brain or intracranial injury (T 247). She did have at least one broken bone in her face and a "gash" on the back of her head (T 243). Though blows to the head always have the potential to be lethal, both doctors agreed the injuries Mrs. Harris received were not life threatening (T 248).

Petitioner was arrested and interviewed by Detective Bach (T 305). Petitioner told Bach that Mrs. Harris called and asked him (Petitioner) to meet her at Publix (T 308). He said they got into an argument and he hit her with a stick about two feet long (T 309). He broke her car window with the stick (T 309).

Petitioner testified at his trial to an account of events very different than that of his wife. He said on the morning of September 30, 1992, he was on his way to the food stamp office when he heard a car horn and saw his wife's car (T 285). She told him she wanted to talk and he pulled into the Publix lot as directed (T 285). She told him to change his life and turn it over to the Lord (T 287). They argued (T 287). He hit her with a stick, not a hammer, when he saw her reaching into her pocketbook (T 294). He said he only hit her once in the head, but agreed she fell down several times (T 300). Petitioner said the car window broke when they fell against the car (T 299). He denied calling her or threatening to kill her (T 297).

SUMMARY OF ARGUMENT

The trial court departed from the sentencing guidelines for "extensive emotional trauma that is continuing and excessive brutality." The district court agreed there was no testimony presented to support a claim of emotional trauma but upheld the departure based on excessive brutality. Excessive force and excessive brutality are terms which the court's seem to use interchangeably. Generally, those reasons will not support a guideline departure because in most circumstances the result of such force or brutality is victim injury which is itself scored and thus already considered by the guidelines. This court has approved departures however in those highly unusual cases wherein there is particularly egregious conduct going well beyond what can be scored as victim injury. The court has stressed however that, except in the most extreme circumstances, the guidelines are to be followed.

The evidence presented here demonstrated a violent though unfortunately not a-typical attack of one spouse on another; though certainly sufficient to constitute an attempted second degree murder it was not so extraordinary as to justify a departure sentence. This was a single incident, quickly ended, involving approximately six blows. The medical testimony presented was that the injuries Mrs. Harris received were not life threatening nor did they cause any permanent damage. Further, they needed neither surgery nor extensive hospitalization to treat. The injuries were scored as severe on the scoresheet, thus considered in the sentencing range allowed by the guidelines. The district court therefore erred in affirming the departure sentence.

Next, Florida Rule of Criminal Procedure 3.701(d)(5)(a)(3) provided that when it is impossible to determine the degree of a prior felony offense, it must be scored for guideline purposes as a third degree felony. Petitioner was convicted in 1967, of a 1966 second degree murder. At that time felonies in Florida were not divisible into degrees. Under the applicable rule, that prior offense had no degree and must therefore be scored as a third degree felony, not a first degree felony as the district court allowed.

ARGUMENT

POINT I

THE DISTRICT COURT'S OPINION APPROVING A DEPARTURE FROM THE RECOMMENDED SENTENCING GUIDELINE RANGE BASED ON EXCESSIVE BRUTALITY WAS ERROR UNDER THIS COURT'S OPINION IN STATE v. MCCALL.

"The general rule in sentencing is to sentence within the guidelines; departure from the guidelines is the exception to the rule" and must be based on extraordinary circumstances. Wemmett v. State, 567 So. 2d 882, 886 (Fla. 1990). In the instant case Petitioner was convicted for the attempted second degree murder of his estranged wife. His recommended guideline range was 17 to 22 years, with the permissive range extended to 27 years[1] (T 63). Rule 3.988(a), Fla. R. Crim. P. The trial court however sentenced petitioner to 30 years imprisonment, the statutory maximum, giving two written reasons for the departure, "extensive emotional trauma" and "excessive brutality." (R 63). The departure sentence was challenged on appeal. The district court agreed there was no evidence to support the first reason but upheld the second citing State v. McCall, 524 So. 2d 663 (Fla. 1988), and Vara v. State, 546 So. 2d 1071 (Fla. 2d DCA 1989). Petitioner's case was not sufficiently egregious to qualify for the exception this court created in McCall. Of perhaps equal importance to this Court however is the inconsistent application of the rule by the various district courts.

In Mathis v. State, 515 So. 2d 214 (Fla. 1987), this court held that "...excessive force...is not a valid reason for departure when the force used results in victim injury and the extent of the injury already has been calculated in the guidelines."[2] 515 So. 2d at 216, citing VanTassell v. State, 512 So. 2d 181 (Fla. 1987), and Vanover v. State, 498 So. 2d 899 (Fla. 1986). See also Hendrix v. State, 475 So. 2d 1218 (Fla. 1985) (factors already taken into

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[1] The district court's correction of prior record scoring will reduce the range further making 22 years the maximum allowable sentence.

[2] The trial and district court's appear to use the terms "excessive force" and "excessive brutality" interchangeably and frequently together.

account in calculating guidelines cannot support departure.) This court has also held a sentencing departure cannot be based on factors which are inherent components of the crime for which a defendant is convicted. State v. Mischler, 488 So. 2d 523 (Fla. 1986). To be guilty of attempted second degree murder a defendant must, by definition, commit an act "...imminently dangerous to another and evincing a depraved mind regardless of human life...." § 782.04(2), Fla. Stat. (1991). The Florida Standard Jury Instructions define the elements of "imminently dangerous to another and evincing a depraved mind" as an act or series of acts that:

> 1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
>
> 2. is done from ill will, hatred, spite or an evil intent, and,
>
> 3. is of such a nature that the act itself indicates an indifference to human life.

Fla. Std. Jury Instr. (Crim): Homicide-Murder-Second Degree. Thus, not only is a second degree murder an forceful crime, it is usually brutal as well. As the district court recognized in Harris v. State, 533 So. 2d 1187 (Fla. 2d DCA 1988), the trial court's ground for departure, the savage nature of the killing, was inherent in the definition of second degree murder. See also Robinson v. State, 589 So. 2d 1372 (Fla. 4th DCA 1992) (mother beating 17 day old infant to death is type of depraved act contemplated by second degree murder thus no basis for departure sentence).

In Petitioner's case the extent of the victim injury was of course calculated in the guidelines; Petitioner's scoresheet was for category 1, the murder category, and he was given 21 points, the most possible, for victim injury (R 63). To be guilty of attempted second degree murder Petitioner necessarily committed an act evincing a depraved mind, here beating his wife with a hammer. Allowing a departure based on the same facts that gave rise to the injury and conviction is the type of duplicative scoring which both Mathis and Mccall sought to prohibit.

Both the Second and Fifth Districts have rejected excessive force/brutality as a departure reason when applied to murder convictions since death is necessarily the result of the force. Holden v. State, 487 So. 2d 1199 (Fla. 5th DCA 1986) (victim shot twice, lethal force is

necessary element); Lamond v. State, 500 So. 2d 342 (Fla. 5th DCA 1986) (seven stab wounds to neck); Lovett v. State, 569 So. 2d 904 (Fla. 2d DCA 1990) (third degree murder of 17 month old child by blow to abdomen). In McCall this Court approved that reasoning as a correct application of Hendrix, to the extent that the trial court's reason relies on the injury suffered by the victim. State v. McCall, 524 So. 2d at 664. The same reasoning applies to attempted murders as well. In Allen v. State, 604 So. 2d 23 (Fla. 5th DCA 1992), a defendant with no provocation or warning hit a police officer in the back of the head with a concrete block. As a result the officer suffered apparently permanent blurred vision, hearing loss, and equilibrium impairment. 604 So. 2d at 23. Like Petitioner here, that defendant was convicted of attempted second degree murder as a lesser included offense of attempted first degree murder and a departure sentence imposed based in part on excessive use of force. Id. The district court found the reason invalid. "In general, where 'severe' victim injury has been factored into the scoresheet, the use of extreme force may not be used as a basis for departure." 604 So. 2d at 24.

In State v. McCall, the trial court's reason for departure was "excessive force." The district court had rejected the reason because a death had occurred, citing Holden. This Court, though acknowledging that the extent of the injury would be an improper reason for departure, stated that trial courts can depart when the conduct of the defendant is so clearly extraordinary and egregious as to be beyond the ordinary case. 524 So. 2d at 665. In allowing what was clearly intended by the court to be a narrow exception, this court stressed the "highly extraordinary and extreme means by which that murder was perpetrated" including

> ...the victims' skull had one fracture which began at the left ear and crossed to the right side of the skull which pulled the bone on the floor of the skull apart. A second, larger fracture extended from the back of the skull down to where the spinal canal began, from which a two and one half inch square of bone had been torn loose. The injuries were inflicted by striking the victim in the head with a two inch by four inch piece of lumber and concrete blocks which such force that the bone was showing through the wound. A large splinter of wood was imbedded in the victim's forehead.

Id. The victim died a lingering death. See also Hines v. State, 586 So. 2d 620 (Fla. 2d DCA 1991) (multiple sexual batteries resulted in severe permanent physical and mental injury far exceeding those generally seen); Hall v. State, 517 So. 2d 629 (Fla. 1988) (cannot use scarring and disfigurement of children because scored as victim injury, but can consider the severity and repeated nature of beatings which occurred over several years time.) Compare Gortman v. State, 547 So. 2d 285 (Fla. 2d DCA 1989) (departure for egregious crime and emotional trauma not shown to be beyond the norm for offense; reason just disagreement with guideline range.)

Although Petitioner denied it, the evidence presented by the state showed that Petitioner called and threatened to kill his estranged wife if she did not return to him. He then confronted her as she arrived for work, hitting her with what a witness described as "full swing" blows to the head with a hammer. The district court's opinion states:

> The victim testified that while trying to protect her head she was hit on both hands, and one of her thumbs was crushed.[3] Defendant held her by the hair and struck her in the eye with the hammer. She felt her skull crack.[4] She suffered fractures to her cheekbones, eyesocket and an eye injury. Although she could not remember how many times she was struck she had six round spots on her head where her hair had not grown back.

Harris v. State, 650 So. 2d at 640. From that description one would expect that Mrs. Harris suffered near fatal injuries with long lasting and severe results. Compare Law v. State, 639 So. 2d 1102 (Fla. 5th DCA 1994)(victim shot three times in head left in permanent vegetative state with no chance of recovery); Brown v. State, 611 So. 2d 540 (Fla. 3d DCA 1992)(victim beaten beyond recognition, officer of 20 years testified he had never seen a person so severely beaten survive); Williams v. State, 531 So. 2d 212 (Fla. 1st DCA 1988)(victim rendered unconscious, i.e. helpless, after first blow beaten with crowbar 5-7 more times causing multiple scalp lacerations, extensive fracturing of the head and face plus permanent memory loss;

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[3] Mrs. Harris testified her thumb was "crunched," not "crushed." She did later say a bone was broken in the thumb, though the doctor described the hand merely as "injured."

[4] Medical testimony revealed no skull fractures but a broken facial bone.

massive blood clot would have caused death but for immediate treatment.) While the district court's description was generally consistent with Mrs. Harris's testimony attempting to describe her injuries in lay terms, in this case two doctors testified describing their medical findings. That testimony revealed that while a blow to the head always has the potential of being lethal, Mrs. Harris did not in fact sustain any life threatening injuries (T 237-238). She suffered a cut through her eyebrow that required stitches, a cut on the back of her head, and a fracture of the right cheekbone and eyesocket, (T 234-235), which one doctor further described as a maxillary sinus fracture (T 243). She did not need surgical intervention to repair the damage, nor was intensive hospitalization required (T 234-236, 237, 247-248). Immediately after the attack Mrs. Harris got up and ran into Publix. In the emergency room right after the attack Mrs. Harris was able to speak coherently and give a medical history (T 232). When seen by the doctor in his office two weeks after the attack the cut above her eye was healing and she was progressing toward full recovery (T 235). At about that time she was able to begin reattending her church services as often as five nights a week from 8:00 p.m. - 11:00 or 12:00 p.m. (T 206).

Though the jury was well within its right to convict Petitioner of attempted second degree murder for this senseless act, and though Petitioner's acts were certainly sufficient to demonstrate the ill-will, hatred or evil intent, indifference to human life and depravity necessary to support an attempted murder conviction, the offense was not the type of egregious conduct described by the Court in McCall or Hall necessary to support a guideline departure. The "excessive brutality" described by the district court in its opinion was essentially the injuries to Mrs. Harris. Those injuries were already accounted for by the guidelines. There was nothing else to show that this crime was a highly extraordinary example of attempted second degree murder. This Court should reverse the decision of the district court and remand for resentencing within the guidelines.

ARGUMENT

POINT II

THE DISTRICT COURT ERRED IN ORDERING PETITIONER'S 1966 SECOND DEGREE MURDER CONVICTION TO BE SCORED AS A FIRST DEGREE FELONY.

Petitioner was convicted in 1967 of a 1966 second degree murder. At the time of the offense, felonies in Florida were not divided into degrees. Second degree murder was a felony, punishable by an indeterminate sentence of twenty years to life. § 782.04, Fla. Stat. (1967). The first classification of felonies into degrees became effective January 1, 1972. Laws of Florida § 2, ch. 71-136. Second degree murder was then classified as a first degree felony. § 782.04(2), Fla. Stat. (1971). Currently second degree murder is a first degree felony punishable by life. § 782.04(2), Fla. Stat. (1993). As with any felony, use of a weapon or firearm may currently result in reclassification pursuant to 775.087(1), Fla. Stat. (1993). No similar reclassification provision exited in 1967 nor in 1971 when felonies were first assigned degrees, though 790.07, Fla. Stat. (1967), made the use of a weapon a separate felony offense.

Over Petitioner's objection, his 1966 crime was classified on the guideline scoresheet as a life felony on the theory that it could be reclassified because a firearm was used (R 86-91, 63). Scoring the prior conviction as a life felony raised the recommended guideline range by one cell. The district court disapproved scoring the offense as a life felony. Initially the court agreed with Petitioner that the degree of offense was incapable of determination and ordered it scored as a third degree felony. Harris v. State, 19 Fla. L. Weekly D2139 (Fla. 4th DCA October 5, 1994). Later the court modified its decision finding the offense could be scored as a first degree felony. Harris v. State, 650 So. 2d at 641.

The district courts are split on how to score such convictions. Then Florida Rule of Criminal Procedure 3.701(d)(5)(a)(3) stated when "the degree of the felony is ambiguous or

impossible to determine, score the offense as a third-degree felony."[5] This is the rule that should control Petitioner's 1967 conviction. That rule was correctly applied in Johnson v. State, 525 So. 2d 964 (Fla. 1st DCA 1988). In dispute in Johnson was the scoring of a 1970 robbery conviction as a first degree felony punishable by life. The court held:

> Where, as here, the felony has no degree at the time of the defendant's conviction, we conclude that degree is "impossible to determine" in the language of Rule 3.701 d.5.(a)(3).

525 So. 2d at 966. The court ordered the conviction scored as a third degree felony. Id. Specifically rejected was the state's argument that the court look to punishment to determine the degree. Id. See also Forehand v. State, 524 So. 2d 1054 (Fla. 1st DCA 1988), approv. 537 So. 2d 103 (1989); Huffman v. State, 611 So. 2d 2 (Fla. 2d DCA 1992). Johnson was followed by the courts in Williams v. State, 562 So. 2d 844 (Fla. 1st DCA 1990), (wherein the question was certified, review dismissed 570 So. 2d 1307 (1990),) and in Wilcoxson v. State, 577 So. 2d 1388 (Fla. 1st DCA 1991). The district court initially agreed with Johnson. Harris v. State, 19 Fla. L. Weekly D at 2140. The various courts' rulings in these cases cited above are consistent with rules of statutory construction that statutes are to be strictly construed and/or are limited to their plain language. § 775.021(1), Fla. Stat. (1993).

The fifth district in Jenkins v. State, 556 So. 2d 1239 (Fla. 5th DCA 1990), reached the opposite conclusion however. To arrive at its conclusion the Jenkins court looked to Rule 3.701(d)(5)(a)(2)[6]. That provision stated:

> When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida Statute.

556 So. 2d at 1240. With no citation of authority, the court declared "(W)e believe the same standard should apply to in-state convictions." Id. But the courts are not free to disregard what the legislature has actually said in favor of what the court believes should have been

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[5] This rule has been renumbered and now appears as rule 3.702(d)8E.

[6] Now renumbered as 3.702(d)(8).

said. See Perkins v. State, 576 So. 2d 1310 (Fla. 1991), Lamont v. State, 610 So. 2d 435 (Fla. 1992). Florida convictions predating January 1, 1972, are neither federal, foreign, military, nor out-of-state convictions and thus cannot be governed by Rule (d)(5)(a)(2).

Here the district court ordered Petitioner's offense scored as a first degree felony despite the fact that there was no such offense in 1966 or 1967. To make the offense a first degree felony the court necessarily applied the 1971 statute. Such application violated the express provisions of Rule 3.701, the rule that offenses be classified as they were at the time of the offense and the constitutional prohibition on the ex post facto application of after enacted statutes. Petitioner's guideline scoresheet must therefore be recalculated reducing the points for the prior offense.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to quash the decision of the district court and remand for sentencing within the guidelines after properly rescoring the prior offense.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan L. Greenberg, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 24 day of July, 1995.

Cherry Grant

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