IN THE SUPREME COURT OF FLORIDA

GENE ROBERT SIMS,

Petitioner,

v. CASE NO.: SC05-400

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

STATEMENT OF CASE AND FACTS

In addition to the facts given by Petitioner, the State offers the following relevant facts, some of which have been repeated for the sake of continuity:

FACTS:

On May 17, 2001, Petitioner was arrested for leaving the scene of an accident involving death in violation of Florida Statute 316.027(1)(b). (R 2). Petitioner's arrest was based on a sworn statement from Sheila Asbury who, while a passenger in a vehicle being driven by Petitioner, witnessed Petitioner run over someone and fail to stop. (R 2).

At trial, Asbury testified that, after smoking crack cocaine with Petitioner on the night in question, Petitioner drove her and another passenger to find more drugs. (R 57, 61). They were traveling at approximately 45-55 miles per hour when, Asbury testified, she saw a man lying down on top of a bike in the middle of the road. (T 63, 110). Asbury knew they were going to hit the man so she quickly turned and covered her face and then heard "a loud dragging like metal...it was dragging bad." (T 67). Asbury described the accident as "real noisy." (T 109). Asbury also testified that Petitioner never braked after the initial impact. (T 67).

Sergeant Anthony Sapp (Sgt. Sapp), a traffic homicide

investigator for the Florida Highway Patrol with seven years experience, then testified. (T 218). Sgt. Sapp stated that upon arriving at the scene he found a body that "had obviously been run over by a vehicle." (T 228). From his investigation, Sgt. Sapp determined that the victim had been hit by a vehicle and "drug down the road for a bit and was dead." (T 229-230). Sgt. Sapp determined that the victim was dragged by Petitioner's truck for over 140 feet after the initial impact. (T 242). The victim's shoes came off while he was rolling underneath Petitioner's truck. (T 251-252). Sgt. Sapp testified that the victim's injuries were "standard with basically being drug underneath a vehicle or sliding on some asphalt." (T 253).

Richard Earl Davis, Jr. (Trooper Davis), a state trooper with the traffic homicide division of the Florida Highway Patrol, then testified. (T 376). During his investigation, Trooper Davis was given permission by Petitioner to inspect his truck. (T 386). Trooper Davis was told by his superiors that there would not be any damage to the front of the truck involved in the accident (headlights, grill); the evidence, if any, would be underneath the truck. (T 387). When Trooper Davis looked under Petitioner's truck, he found a piece of blue jean fabric and a billfold wallet stuck in the truck's frame. (T 387-388). Sgt. Sapp had earlier testified that the victim had been wearing

denim and that the denim recovered from Petitioner's truck matched the denim missing from the victim's pants. (T 254-255). The wallet belonged to the victim and identified him as 52 year-old Bernell Williams. (T 392).

Dr. Terrance Steiner (Dr. Steiner), a board certified pathologist appointed by the governor to serve as the medical examiner for St. Johns, Putnam and Flagler counties, was the State's expert witness. (T 338-340, 342). Dr. Steiner testified that the victim had lacerations of the head, neck and face, bruises and abrasions on the lower chest, skin rubbed off from large areas of his arms and from his lower back to the top of his shoulders, torn scalp, crushing injuries to his entire chest and right side of his abdomen, a broken right pelvis, every rib broken in multiple places and on both sides, a crushed and torn liver, a crushed and torn heart, extensive lung injuries, a broken back, a broken neck, and a crushed skull with extensive injuries to the brain. (T 354-358).

Dr. Steiner testified that the victim was not standing when he was struck and that his injuries were consistent with being struck and overrun with a vehicle based on the extensive tearing of the victim's clothes, the rolling of the body underneath Petitioner's truck and the tire markings on the victim's body. (T 262-263). When asked within a reasonable degree of medical

certainty how the victim died, Dr. Steiner stated that the victim died because he was "struck and overrun by a vehicle." (T 357). When asked if a second vehicle might have caused the victim's injuries, Dr. Steiner replied in the negative and stated that the victim's death was instantaneous. (T 360). Dr. Steiner defined instantaneous as meaning "a second or two." (T 358).

The jury found Petitioner guilty of failure to stop at an accident scene resulting in death as charged in the information. (T 693). At the sentencing hearing on July 26, 2002, the State added 120 victim injury points to Petitioner's scoresheet. (Supp. Vol. I, 335-337). The State argued that the case of May v. State, which authorized the assessment of victim injury points for the crime of leaving the scene of an accident involving death, was controlling in Petitioner's case. May v. State, 747 So. 2d 459 (Fla. 4th DCA 1999). (Supp. Vol. I, 335). Petitioner argued that May was factually distinguishable because the medical examiner testified that the victim's death was caused by a combination of the impact and the dragging. (Supp. Vol. I, 339). The trial court agreed with the State's position that the victim's death was the result of Petitioner's leaving the scene and added the 120 victim injury points to Petitioner's scoresheet. (Supp. Vol. I, 346, 360). The trial court then

held:

> I am departing the guidelines downward. I'm not giving him eight years. I find that the accident was nearly unavoidable, but I do think though that this accident, while merely unavoidable, was the flip side of a DUI manslaughter. Mr. Sims had to leave the scene because he knew he would be charged with another second-degree felony, and that being DUI manslaughter.

(Supp. Vol. I, 361). The trial court sentenced Petitioner to five years in the Department of Corrections to be followed by five years of probation. (Supp. Vol. I, 361).

CASE

Petitioner appealed, and his judgment and sentence were affirmed by the Fifth District Court of Appeal. The opinion of the Fifth District Court of Appeal was issued on March 5, 2004. Sims v. State, 869 So. 2d 45 (Fla. 5th DCA 2004). Mandate issued on April 26, 2004, after the appellate court denied the defense's motion for rehearing or clarification or certification. Almost a year later, on February 25, 2005, Petitioner filed a *pro se* pleading he entitled "Petition to Invoke All Writs Jurisdiction." (Petition). This Court entered an order *sua sponte* treating the Petition as a notice to invoke discretionary jurisdiction and dismissing the notice as being untimely filed.

Petitioner filed a motion for reinstatement, and on September 29, 2005, this Court ordered appellate counsel for Petitioner and counsel for the State to file responses, and both sides complied. Additionally, Petitioner filed a reply to those responses. (Reply).

In Petitioner's Reply, he included a letter (he refers to letter as Exhibit A) he received from counsel which stated that Petitioner already had the opinion from the appellate court and that counsel now had the mandate from the appellate court. This letter was dated May 4, 2004, which was only a few days after mandate was issued. Exhibit B attached to Petitioner's Reply was the mail log from prison which showed Petitioner receiving mail on May 7, 2004, from counsel. Petitioner waited until February 25, 2005, to file the notice to invoke jurisdiction.

On December 19, 2005, this Court granted Petitioner's Motion for Reinstatement ordering each side to file jurisdictional briefs. On May 10, 2006, this Court entered an order accepting jurisdiction and appointing counsel to represent Petitioner for preparation of the merits briefs.

SUMMARY OF ARGUMENT

The issue before this Court is whether victim injury points may be assessed for the offense of leaving the scene of an accident. Given the language of the applicable statute and rule of criminal procedure, it is the position of the State when a proper causal connection is shown factually such points may be assessed.

ARGUMENT

POINT OF LAW

WHETHER VICTIM INJURY POINTS MAY BE ASSESSED FOR THE OFFENSE OF LEAVING THE SCENE OF AN ACCIDENT.

Before addressing the merits of Petitioner's argument, the State respectfully will assert that this Court does not have jurisdiction. The opinion of the Fifth District Court of Appeal was issued on March 5, 2004. Sims v. State, 869 So. 2d 45 (Fla. 5th DCA 2004). Mandate issued on April 26, 2004, after the appellate court denied the defense's motion for rehearing or clarification or certification. Attached to one of Petitioner's pleadings filed with this Court was a letter from the attorney who represented Petitioner in the Fifth District Court of Appeal (Fifth District) – Thomas E. Cushman. The letter was sent to Petitioner on May 4, 2004, and begins with "I know that you have received the Opinion of the 5th DCA." Cushman continued by informing Petitioner that he did not believe there was express and direct conflict and that he would be filing a motion to mitigate with the trial court. (Exhibit B attached to Petitioner's Reply was the mail log from prison which showed Petitioner received mail on May 7, 2004, from counsel.)

So, despite this notice, Petitioner waited almost 10 months later until February 25, 2005, to file a *pro se* pleading

entitled Petition to Invoke All Writs Jurisdiction. Florida Rule of Appellate Procedure 9.120 requires a Notice to Invoke Discretionary Jurisdiction to be filed within 30 days of rendition of the order to be reviewed.

Obviously, Petitioner failed timely to file any type of petition, and it is the position of the State that he has failed to meet his burden of showing entitlement to any equitable tolling. His stated reason presented to this Court for the delay was that he did not have the opinion of the Fifth District and that he did not have his transcripts. Attorney Cushman filed a response in which he detailed that he had forwarded the record on appeal to Petitioner in prison and that such was received by the prison on June 12, 2004. As to the court opinion, the letter provided by Petitioner himself shows that at the very least he was aware of its existence on May 7, 2004, even if he wants to claim he never got the copy referenced by counsel. Again, it is the position of the State that this Court should find that such facts should be found to fail to satisfy the requirements to invoke jurisdiction.

Turning to the merits of Petitioner's claim, Petitioner submits the trial court improperly assessed 120 victim injury points to Petitioner's sentencing guidelines scoresheet. Section 921.0021(7)(a), Florida Statutes, defines victim injury

as:

> The physical injury or death suffered by a person as a direct result of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

Additionally, Florida Rule of Criminal Procedure 3.701(d)(7), provides that:

> Victim injury shall be scored for each victim physically injured during a criminal episode or transaction, and for each count resulting in such injury whether there are one or more victims.

Furthermore, the opinion of the Fifth District Court of Appeal referenced the points made in the committee comments following the Rule:

> The committee's comments following the rule reflect the intention of the committee that points for victim injury be added for each victim injured during a criminal transaction or episode. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical injury. When the rule was adopted, the Supreme Court reiterated that:
>
> **The commission recommends that victim injury be scored whether or not it is an element of the crime, if, in fact, injury occurred during the offense which led to the conviction**. We see merit in scoring physical injury if a defendant physically injures the victim of the offense during the course of a criminal episode, regardless of whether the injury is an element of the crime, but do not believe it wise to extend the definition of injury to include psychic injury.

> Florida Rules of Criminal Procedure Re Sentencing Guidelines (Rules 3.701 and 3.988), 509 So. 2d 1088, 1089 (Fla. 1987).

Sims, at 46; (emphasis added).

As review of Rule 3.701 shows, victim injury points for each victim injury occurring during the "criminal episode or transaction" should be assessed. Although not an element of the convicted offense, the injury in this case – death – occurred during the criminal episode or transaction of Petitioner leaving the scene of the accident. Therefore, victim injury points were properly assessed.

Petitioner submits that the instant case is in conflict with the decisions of Geary v. State, 675 So. 2d 625 (Fla. 2d DCA 1996) and Rodriguez v. State, 684 So. 2d 864 (Fla. 2d DCA 1996). Review of those cases shows no conflict with the instant case.[1] Rodriguez contains no reasoning and simply notes that in Geary, it had held that it was error to assess death points in a case where there was no evidence of the defendant's leaving the scene of the accident. In Geary, the district court found that

[1] Interestingly, Petitioner appears to concede that victim injury points can be assessed for the offense of leaving the scene of an accident (other than the Apprendi claim which the State will address below), and with the concession, the argument by Petitioner is that of disputing whether the facts support the trial court's determination. Petitioner submits that the instant case is more similar to Geary and Rodriguez than it is to

there were no facts showing that leaving the scene caused the victim's injury. Id. at 626.

The State agrees there has to be some connection between the offense and the injury; however, it is the position of the State that such was shown in the instant case. Much like in this Court's case of Schuette v. State, 822 So. 2d 1275 (Fla. 2002), which dealt with causation and the proper imposition of restitution, there must be a nexus between the offense and the injury, and there was in this case. The Fifth District was aware of the decisions in Geary and Rodriguez, but it found them to be distinguishable. In those cases there were no facts showing a causal connection; whereas, in the instant case there was evidence supporting the imposition of the victim injury points.

Assuming that points can be assessed, the proper standard of review is whether Petitioner has shown an abuse of discretion. Jones v. State, 826 So. 2d 1100 (Fla. 5th DCA 2002) (citing Ely v. State, 719 So. 2d 11 (Fla. 2nd DCA 1998). An abuse of discretion occurs "only where no reasonable man would take the view adopted by the trial court." Nolte v. State, 726 So. 2d 307, 309 (Fla. 2nd DCA 1998).

May v. State, 747 So. 2d 459 (Fla. 4th DCA 1999), is a

Mays. However, the State would assert that such a claim

case which helps highlight why victim injury points can be properly assessed when the facts support such imposition. In May, the Fourth District Court of Appeal upheld the assessment of victim injury points for the failure to stop at an accident scene involving death. The May court held that section 921.0011(7)(a), Florida Statutues, the statute defining victim injury points, "requires that the crime be *a* cause of death, not necessarily *the* cause of death." Id. at 461. The trial court in the instant case reviewed May prior to determining that it was controlling in Petitioner's case. (Supp. Vol. I, 330).

In May, the medical examiner testified that the victim's death was the result of "the initial impact and those [injuries] resulting from dragging the victim 500 feet..." Id. at 460. The May court went on to hold that the dragging was "*a* direct cause of death – combined, of course, with the impact." Id. at 461.

In this case, the medical examiner testified that the victim's death was a result of being "struck and overrun by a vehicle." (T 357). The overrunning by Petitioner's truck caused the victim to be dragged for over 140 feet.

Similarly, the injuries to the victim in the May case are almost identical to the victim's injuries in the case at bar.

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precisely illustrates why this is simply a factual dispute.

In May, the victim had:

> hemorrhaging from his chest cavity from both sides. He had a fracture of his right collar bone. His lungs were injured internally. He had a laceration of the left lung. He had a fracture of the sternum... He had fractures of the ribs on the left. He had blood in his abdomen. He had a laceration of his diaphragm. His stomach was lacerated. His mesentery, his pancreas, his intestines were also injured and [were] practically hanging out of [his body]. His liver was lacerated on the right. His spleen was lacerated. The left kidney was lacerated. His pelvic organs, his prostrate and his bladder were injured.

May, supra at 460.

In the case sub judice, the victim suffered:

> lacerations of the head, neck and face, bruises and abrasions on the lower chest, skin rubbed off from large areas of his arms and from his lower back to the top of his shoulders, torn scalp, crushing injuries to his entire chest and right side of his abdomen, a broken right pelvis, every rib broken in multiple places and on both sides, a crushed and torn liver, a crushed and torn heart, extensive lung injuries, a broken back, a broken neck, and a crushed skull with extensive injuries to the brain.

(T 354-358).

Additional support for the medical examiner's conclusion that the impact **and** overrun killed the victim was the fact that the victim was laying down in the middle of the road when he was hit and dragged by Petitioner's truck. This fact was testified to by Sheila Asbury, Sgt. Sapp and Dr. Steiner. If, as the

medical examiner testified, the victim died within one to two seconds after the initial impact, it is easy to see that he was alive as he tumbled underneath and was dragged by Petitioner's truck traveling at approximately 45-55 miles per hour. This was further buttressed by Sgt. Sapp's testimony that, after seven years of traffic homicide investigation, the victim's injuries appeared to be "standard with basically being drug underneath a vehicle or sliding on some asphalt." (T 253).

All that Geary and Rodriguez stand for is the proposition that victim injury points should not be assessed if there are no facts to support their imposition. In those two cases, there was no evidence showing a nexus; in the instant case, as in Mays, the evidence did show such a connection. If this Court should find that Geary and Rodriguez essentially eliminate as a matter of law the imposition of injury points for the offense of leaving the scene of an accident, then there is conflict. It is the State's position that such a holding is contrary to the intent of the Legislature as set out in its definition of the statute and contrary to the definition of victim injury provided in the rules of procedure. In fact, the language of the applicable rule provides as noted above, that victim injury points should be assessed when an "injury occurred during the offense which led to the conviction" regardless of whether an

element of the offense. Such is what the trial court properly did in the instant case, and there has been no showing of abuse of discretion.

The last argument presented by Petitioner is that imposition of victim injury points in the instant case violates Petitioner's Sixth Amendment rights as recognized in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005). First, the State would note that Apprendi was decided in 2000, and Petitioner has never presented this claim to either the trial court or to the Fifth District. This Court has clearly held that Apprendi does not apply retroactively, and it is the position of the State that such a claim can not be presented for the first time to this Court. See Hughes v. State, 901 So. 2d 837 (Fla. 2005) (This Court does a detailed analysis of Apprendi finding that it should not be applied retroactively and notes that all States and all federal circuit courts but one have so found.)

As to the related claim that his sentence violates Blakely, this argument, too, was never presented to either of the lower courts and should be found to be waived. Luton v. State, 2000 Fla. App. Lexis 13291 (Fla. 3d DCA Aug. 9, 2006) (The Third District held that even when case was decided after the

sentencing hearing the defendant needed to request a jury trial on sentencing or object to the trial judge sitting as the trier of fact prior to the sentencing hearing in order to preserve the issue for appeal).

Additionally, in this instant case the jury did find Petitioner guilty of committing a crash involving death. To be guilty of this offense, the jury had to find there was a death; therefore, there has been the necessary jury determination. See Plummer v. State, 31 Fla. L. Weekly D 1807 (Fla. 1st DCA July 3, 2006); Fleming v. State, 31 Fla. L. Weekly D 1112 (Fla. 1st DCA April 26, 2006).

Lastly, the State would submit that if this Court finds the scoresheet was improperly calculated that such error is now moot given that Petitioner has already served the incarceration portion of his sentence. He was given a downward departure sentence of five years state prison by the trial court and had served that time already. He is currently serving the consecutive probation which is unaffected by any scoresheet error.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by United States mail to Christopher M. Jones and Kristen Cooley Lentz, attorneys for Petitioner, 1010-B NW 8th Ave., Gainesville, FL 32601, this _____ day of August 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

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