

IN THE SUPREME COURT OF FLORIDA

GENE ROBERT SIMS,

Petitioner,

v.

CASE NO. SC05-400

5th DCA CASE NO. 5D02-2401

STATE OF FLORIDA,

5D02-2448

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Gene Robert Sims, a defendant and appellant below and Petitioner here, will be referred to as Mr. Sims or the Petitioner. The State of Florida, the appellee below and Respondent here, will be referred to as the State.

Citations to the transcript from the trial court will be referred to as "R." with the appropriate volume number(s) and page(s). Citations to the direct record on appeal will be indicated parenthetically as "ROA." with the appropriate page(s).

STATEMENT OF THE CASE AND FACTS

In the early morning hours of May 13, 2001, Bernell Williams was accidentally hit by a small truck and killed. Mr. Williams had been lying in the middle of the road. (R. Vol. 5, 324). At the time of the accident, Mr. Williams was wearing dark clothing and apparently did not carry a light with him. (Id. at 350). At the time of his autopsy, Mr. Williams' blood alcohol level was .196; more than twice the legal limit to drive a vehicle. (Id. at 348).

On May 30, 2001, Petitioner Gene Sims was charged by information for "Failure to Stop at an Accident Scene Resulting in Death" in violation of Florida Statute section 316.027(1)(b)(2001). (R. Vol. 1, 4). A jury trial was held before the Honorable John Alexander, Judge for the Circuit Court for St. Johns County. (R. Vol. 4, 21).

At the trial, Ms. Sheila Manucy Asbury testified that Mr. Sims was driving the vehicle that struck Mr. Williams. (R. Vol. 4, 62). She said that after Mr. Sims struck Mr. Williams, Mr. Sims exclaimed "Oh my God. I didn't mean to hit him. I wouldn't have hit anybody." (Id. at 68). Ms. Asbury testified that if Mr. Sims had not hit Mr. Williams, he would have killed the passengers in the truck because "if [Mr. Sims] had to swerve to the left, he would have hit the guardrail; if he had swerved to the right, he would have hit the guardrail." (Id. at 66, 69).

Sergeant Anthony Sapp, a traffic homicide investigator for the Florida Highway Patrol, testified as a lay witness about his impressions of what he found when he arrived at the scene of the accident. (R. Vol. 5, 218). He testified that he found a body that had been "run over by a vehicle." (Id.). He also testified that it looked like the victim was "drug down the road for a bit and was dead." (Id. at 229-30).

The medical examiner, Dr. Terrance Steiner, was the only witness offered as or accepted by the trial court as an expert. He was accepted as an expert in the field of forensic pathology. (Id. at 342). Dr. Steiner testified about how and when the victim died. (Id. at 357-58). He testified that Mr. Williams died "instantaneously, meaning sudden to, you know, a second or two." (Id. at 358). Mr. Williams immediately "lost his heart", lost his lungs so he could not breathe, severed his spinal cord breaking his

neck, and had a crushing injury to his brain. (Id.). Dr. Steiner stated Mr. Williams' multiple serious injuries led to "instant death." (Id.). Dr. Steiner also stated "his death was instantaneous from these injuries" which were consistent with being "struck and overrun" by a car. (Id. at 357). His was the only expert testimony or evidence about the time and cause of death.

Mr. Sims was convicted of violating Florida Statute section 316.027(1)(b) (2001). (R. Vol. 7, 693; R. Vol. 8, 379). There were no findings of fact by the jury indicating the victim's injury was a result of the conviction, (Id.), nor were there any instructions from the court requiring them to do so. (R. Vol. 7, 667-83).

At sentencing, the State argued that victim injury points should be applied to Mr. Sims' sentence. (R. Vol. 3, 335). Mr. Sims objected because no injury was inflicted to Mr. Williams as a result of the Mr. Sims leaving the scene rather than remaining at the scene of the accident. (Id.). Although the uncontroverted testimony supports that the victim died instantaneously and the trial court found the accident to be "nearly unavoidable", the trial court still applied victim injury points in Mr. Sims' case. (Id. at 360, 363).

Using the Rule 3.992(a) Criminal Punishment Code scoresheet, Mr. Sims' original score was 36 points. (R. Vol. 8, 377). Using the sentence computation from the scoresheet, Mr.

Sims' original sentence would have been six months.¹ (See R. Vol. 8, 378). This is a non-state prison sanction. (Id.). Instead, the trial court added 120 victim injury points to the scoresheet, thus increasing Mr. Sims' score from 36 points to 156 points. (Id. at 377). This dramatically increased Mr. Sims' sentence from six months² to 96 months, or eight years, with a maximum sentence of 15 years. (Id. at 378). The trial court departed downward from an eight year prison sentence to five years in prison with five years of probation noting that the accident was "nearly unavoidable." (Id.; Vol. 3, 360-61).

On appeal to the Fifth District Court of Appeals, Mr. Sims argued that the trial court improperly applied victim injury points to his case. (ROA, A). He argued that such points are improperly applied when there is no evidence the victim's death was caused by or was a direct result of his leaving the scene of an accident. (Id.). Although Mr. Sims argued there was clear and uncontroverted testimony that the victim died instantaneously from the initial impact of the vehicle, the Fifth District Court of Appeals rejected Mr. Sims' arguments. (ROA, 20).

¹Notably, the trial court granted Mr. Sims 295 days credit for time incarcerated prior to the imposition of the sentence. (R. Vol. 3, 361). Thus, Mr. Sims would have received time served if the trial court had not assessed the 120 victim injury points.

²The Fifth Circuit Court of Appeals noted in its opinion that the pre-sentence investigation reflected a minimum sentence of eight months incarceration. (ROA, 15).

The Fifth District Court of Appeals delivered its opinion on March 5, 2005. (ROA, 13). The majority held that the imposition of victim injury points was within the discretion of the trial court, that there was substantial competent evidence that the victim was dragged, and, relying on May v. State, 747 So.2d 459 (Fla. 4th DCA 1999), that such evidence created a sufficient causal connection between the leaving of the accident scene and the death to justify imposing victim injury points. (ROA, 17-18).

The dissent wrote that the trial judge improperly assessed victim injury points. (ROA, 21). The dissent stated that the applicable statutory scheme required a "cause and effect relationship" between the crime for which Mr. Sims was sentenced and the injuries or death for which the points were being assessed. (ROA, 23-24). Since the testimony indicated the victim died on impact, there was no "nexus or connection" between Mr. Sims leaving the scene and the victim's death. (ROA, 23).

Mr. Sims timely filed a Motion for Rehearing on March 17, 2004. (ROA, 26-28). The motion was denied on April 7, 2004. (ROA, 29). The Fifth District Court of Appeals issued a Mandate on April 26, 2004. (ROA, 30).

Mr. Sims filed a *pro se* Petition to Invoke All Writs Jurisdiction on March 1, 2005, requesting this Court review the Fifth District Court of Appeals' ruling in his case. (ROA, 31-72). This Court treated Mr. Sims' Petition as a notice to invoke

discretionary jurisdiction and denied it as untimely filed. Mr. Sims filed a Motion for Reinstatement on August 29, 2005. This Court granted Mr. Sims' Motion for Reinstatement on December 19, 2005, and ordered initial and answer briefs on jurisdiction. This Court accepted jurisdiction on May 10, 2006. (ROA, 73-74). The Petitioner's Brief on the Merits follows.

STANDARD OF REVIEW

The issue of whether victim injury points were available for application to this case is a pure question of law. Therefore, the standard of review is *de novo*. Moore v. State, 882 So.2d 977, 980 (Fla. 2004).

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeals opinion in Sims v. State, 869 So.2d 45 (Fla. 5th DCA 2004), is in conflict with the Second District Court of Appeals decisions in Geary v. Florida, 675 So.2d 625 (Fla. 2d DCA 1996) and Rodriguez v. Florida, 684 So.2d 1275 (Fla. 2d DCA 1996). There is no evidence to support the trial court's holding that the victim died as a result of Petitioner's leaving the scene of the accident and subsequent assessment of victim injury points. The Fifth District Court of Appeals used the wrong standard of review and, in so doing, affirmed the assessment of victim injury points where there is no evidence that the victim died as a result of the Petitioner's leaving the scene of the accident. This result is in conflict with the Second District

Court of Appeals' decisions in which the court declines to assess victim injury points where there is no evidence that the victim's death was the direct result of the defendant's leaving the scene of the accident.

The conflict between the Fifth District Court of Appeals is further compounded by the Fifth District Court of Appeals misplaced reliance on and application of May v. State, 747 So.2d 977. The Fifth District Court of Appeals relied on May to support its holding that victim injury points should be assessed in the instant case. However, the May case is factually distinguishable from the instant case.

Finally, the trial court violated Petitioner's Sixth Amendment rights, as articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Booker, 543 U.S. 220 (2005); and Blakely v. Washington, 542 US 296 (2004), by adding victim injury points in the absence of a jury finding that Mr. Sims had, in fact, caused the victim's death during the commission of the crime for which he was convicted.

ARGUMENT

The Fifth DCA opinion in Sims v. State, 869 So.2d 45, is in direct conflict with the Second DCA opinions in Geary v. Florida, 675 So.2d 625, and Rodriguez v. Florida, 684 So.2d 864. Therefore, this Court has jurisdiction to hear the instant case.

In Sims, Mr. Sims was convicted of leaving the scene of an accident resulting in death. (R. Vol. 7, 693). Florida Statute section 316.027(1)(b)(2001) provided:

The driver of any vehicle involved in a crash resulting in the death of any person must immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and must remain at the scene of the crash until he or she has fulfilled the requirements of s. 316.062.³

At sentencing, the trial court assessed victim injury points for the offense of leaving the scene of an accident resulting in death. (R. Vol. 8, 360, 363). The applicable victim injury statute, Florida Statute section 921.0021(7)(a)(2001) defined "victim injury" as:

[T]he physical injury or death suffered by a person as a *direct result* of the primary offense...which is pending before the court for sentencing at the time of the primary offense. (emphasis added).

The Florida Rules of Criminal Procedure also provided guidance on how to assess victim injury points. Rule 3.701(d)(7)(2001), Florida Rules of Criminal Procedure, provided that:

Victim injury shall be scored for each victim physically injured *during a criminal episode or transaction*, and for

³ Florida Statute section 316.062(2001) provided, in pertinent part, that the driver of any vehicle involved in a crash resulting in death of any person shall give his name, address, and the registration number of the vehicle he is driving to any person injured in the crash and shall give such information to any police officer at the scene of the crash or who is investigating the crash and shall render to any person injured in the crash reasonable assistance.

each count resulting in such injury whether there are one or more victims. (emphasis added).

Additionally, when this rule was adopted, this 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 the criminal episode*, regardless of whether the injury is an element of the crime. (emphasis added).

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

On appeal, Mr. Sims argued the trial court improperly applied victim injury points because the victim's death was not the "direct result" of Mr. Sims' leaving the scene of the accident. (ROA, A). The Fifth District Court of Appeals, in a 2-1 decision, affirmed the application of victim injury points to Mr. Sims' case, stating that "there was a sufficient causal connection between the leaving of the accident scene and the death to justify the imposition of victim injury points." (ROA, 18). Judge Sharp's dissent noted that there was no testimony in the case suggesting that the victim's death was the direct result of Mr. Sims leaving the scene. (ROA, 23). In fact, the undisputed expert testimony and evidence support the conclusions that the victim died instantly upon impact and Mr. Sims' unlawful departure from the scene of the accident had no connection with the death. (Id.; R. Vol. 5, 357-

58). The dissent also noted the trial court's comment that the Sims case was the "flip side of a DUI/manslaughter" even though there is no evidence in the record to support such a comment. (ROA, 24).

A. The Fifth District Court of Appeals Decision in "Sims" Conflicts with Second District Court of Appeals' Decisions in "Geary" and "Rodriguez".

The standard of review utilized by the Fifth District Court of Appeals should have been *de novo* review. The trial court applied victim injury points in the absence of proof of causation between the death and the conviction which is a legal error, not a factual determination. Instead, the district court applied abuse of discretion review. (ROA, 15). Although the trial court has the discretion to assess victim injury points when applicable, this is a case in which victim injury points should not have even been available to the trial court judge for assessment. Had there been evidence or a jury finding that the victim's death was the direct result of Mr. Sims leaving the scene, then the trial court might have had the discretion to determine whether it should assess zero to 120 victim injury points.⁴ However, as in the instant case, where there is uncontroverted evidence that the victim's death was "instantaneous" (R. Vol. 5, 357-58), victim injury points are not

⁴Petitioner does not concede that evidence alone, without a jury finding, would support the imposition of victim injury points. See *infra*, Section C.

even applicable. In such circumstances, a trial court does not have the discretion to assess *any* points, whether it is zero points or 120 points.

The Fifth District Court of Appeals should have applied a *de novo* standard of review rather than the abuse of discretion standard of review. Had it done so, it would have determined that there was no evidence in the Sims case to support the application of victim injury points and, thus, the trial court's assessment of 120 victim injury points pursuant to Florida Statute section 3.701(d)(7)(2001) was a legal error.

In making its decision, the Fifth District Court of Appeals decision relied upon testimony from a homicide investigator that the victim looked like he was "hit by some type of vehicle and drug down the road a bit" (R. Vol. 5, 229-30). This testimony is irrelevant to the question of whether the victim died on impact with Mr. Sims' vehicle and did not constitute a factual finding by the court.

However, what is relevant and what should be controlling is the undisputed testimony of the medical examiner. The trial court accepted Dr. Steiner as an expert in the field of forensic pathology. (Id. at 342). Dr. Steiner offered expert testimony regarding the victim's autopsy, including how the victim died. (Id. at 357-58). The medical examiner gave uncontroverted testimony that the death was "instantaneous." (Id.). There is no evidence that

the death occurred *during* the criminal episode of leaving the scene as required by Florida Rule of Criminal Procedure 3.701(d)(7)(2001), nor is there evidence that the victim's death was the *direct result* of the crime of leaving the scene of the accident as required by Florida Statute section 921.0021(7)(a)(2001).

The Second District Court of Appeals has decided factually similar cases where there is no evidence that the victim's death was the direct result of the defendants' leaving the scene of the accident. The Second District Court of Appeals came to a completely different conclusion than the majority in the Sims case and has held that victim injury points should not be applied where there is no evidence that the victim's death is the result of the defendant's leaving the scene of an accident.

In Geary, 675 So.2d 625, the defendant was convicted of second degree grand theft and leaving the scene of an accident with injury. Id. at 625. The trial court assessed victim injury points for the offense of leaving the scene of an accident with injury. Id. at 626. On appeal, the defendant argued that the trial court improperly applied victim injury points because the victim injury was not the result of leaving the scene of an accident with injury. Id. The defendant argued that there was no nexus between the crimes he was convicted of and the victim's injury. Id. The

Second Court of Appeals reversed the trial court's application of victim injury points.

The court held that victim injury points could only be applied if the victim's injury was the direct result of the crime. Id. The fact that the victim's injury occurred before the defendant committed the crime of leaving the scene of an accident with injury, and had the defendant remained at the scene the victim would still have been injured, meant it was error to apply the victim injury points in that case. Id.

Similarly, in Rodriguez, 684 So.2d 864, the defendant was sentenced for leaving the scene of accident resulting in the death of a person. Id. at 865. The trial court applied victim injury points for leaving the scene of an accident resulting in the death of a person. Id. On appeal, the defendant argued that the trial court improperly applied victim injury points because the victim's death was not the result of defendant's leaving the scene of the accident. Id. The Second Court of Appeals held that it was error to score points for death where there was no evidence that the victim's death was caused by or was a direct result of the defendant's leaving the scene of the accident. Id.

The Sims decision in the Fifth District Court of Appeals is in conflict with the Geary and Rodriguez decisions in the Second District Court of Appeals because in each case there is no evidence that the victim's injury was the direct result of the defendant's

leaving the scene, yet the Sims court still applied victim injury points. In the Sims case, there is uncontroverted testimony from the medical examiner that the victim died "instantaneously", that the victim's multiple serious injuries led to "instant death", and that "his death was instantaneous from these injuries." (R. Vol. 5, 357-58).

The Second District Court of Appeals' holdings in Geary and Rodriguez correctly determine when courts should apply victim injury points. The Second District Court of Appeals requires that the victim's injury be the direct result of the defendant's crimes. If there is no evidence supporting the conclusion that the victim's injury or death was the direct result of the defendant's leaving the scene, then victim injury points are not applicable. The Second District Court of Appeals' analysis is the basic legal principle of causation as explained in Schuette v. Florida, 822 So.2d 1275 (Fla. 2002) and Triplet v. State, 709 So.2d 107 (Fla. 5th DCA 1998).

The Fifth District Court of Appeals incorrectly distinguishes the Sims case from these analogous restitution cases. (ROA, 18). The Schuette and Triplet cases are both restitution cases, and are support for the requirement of a causal connection between the victim's injury and the defendant's conviction.

In Schuette v. Florida, 822 So.2d 1275, the defendant had been charged with and convicted of driving with a suspended license

and leaving the scene of an accident involving injury. Id. at 1277. The State requested the trial court order restitution for the victim's injuries. Id. The record indicated only that the defendant's license suspension resulted from her failure to provide proof of insurance and failure to appear at two traffic court hearings. Id. The trial court denied the request to order restitution, holding that the fact that defendant did not have a valid driver's license did not create the victim's injuries and, thus, "there was no nexus between the criminal act and the injury suffered." Id.

On appeal, the Fourth District Court of Appeals had overruled the trial court's decision. Id. The court held that restitution was required because the defendant's driving without a legal right began the criminal episode during which the accident occurred, and but for her driving with a suspended license, the victim would not have incurred damages." Id. This decision was in conflict with the Fifth District Court of Appeals decision in Cheek v. State holding that restitution could not be imposed for damage arising from an accident in which the defendant was driving with a suspended license at the time of the accident. Id. at 1278. This Court accepted jurisdiction because the Fourth District Court of Appeals certified a conflict. Id.

This Court held that restitution should not be imposed for damage resulting from an accident in which the defendant was

driving with a suspended license because there is an insufficient relationship between the act of driving with a suspended license and damage or loss resulting from the accident to allow for restitution. Id. at 1283. In so holding, this Court stated that there must be both "but for" causation and proximate causation between the criminal act and the resulting damage in order to impose restitution. Id. at 1282. Thus, there must be a causal relationship between the criminal act and the accident that resulted in damages. Id. at 1283.

Similarly, in Triplett v. State, 709 So.2d 107, the defendant pled *nolo contendere* to the charge of leaving the scene of an accident involving personal injury. Id. at 107. At sentencing for leaving the scene, the trial judge imposed restitution for personal injury and property damages. Id. The defendant appealed to the Fifth District Court of Appeals. Id. The Fifth District Court of Appeals reversed the trial court's imposition of restitution. Id. at 108. The court held that the correct test for restitution is whether "but for" the criminal episode, the damages would have been incurred by the victim. Id. In this case, there was no evidence in the record that the victim's injuries or damages were exacerbated by the lack of immediate assistance due to the defendant's criminal violation of leaving the scene of the accident. Id. Therefore, restitution could not be imposed. Id.

Thus, in order to impose additional criminal sanctions such as restitution or victim injury points, there must be a legally sufficient causal connection demonstrating that "but for" the conviction the injury would not have occurred. This is the case in Geary and Rodriguez, but not the case in Sims. Therefore, to comport with the basic principles of causation and the case law established in the Second District Court of Appeals, victim injury points should not have been assessed in Mr. Sims' case. This is clear legal error and, as such, requires *de novo* review. Moore, 882 So.2d 977.

In the alternative, if the Court determines this case should be reviewed under the abuse of discretion standard of review, this Court should hold that there is not substantial competent evidence to support the conclusion that the victim's death was a direct result of Mr. Sims leaving the scene of the accident.

According to the Fifth District Court of Appeals, there was "substantial competent evidence" that the victim was dragged after being hit by Mr. Sims' vehicle and that there was a "sufficient causal connection" between the leaving of the accident scene and the death. (ROA, 17-18). In making this factually and legally inaccurate determination, the Fifth District Court of Appeals did not have for review any specific factual finding of the trial court or the jury regarding the cause or causes of the

victim's death. Instead, the Fifth District Court of Appeals apparently searched the lower court record for any evidence that could be construed to support the conclusion that there was a "nexus" or "causal connection" between the death of the victim and the crime. (ROA, 18). That evidence does not come close to establishing a causal relationship necessary to support the decision to apply victim injury points.

The Fifth District Court of Appeals placed undue significance and reliance on the testimony of Sergeant Sapp, the traffic homicide investigator, and his statement to the effect that the injuries looked to him to be consistent with having been "hit by some type of vehicle and drug down the road for a bit and was dead." (Id.). This statement, on its face, reflected a lay impression of how the victim looked, not what caused his injuries. Accordingly, it does not establish or even tend to establish a causal connection.

The testimony of the medical examiner, Dr. Steiner, is, in contrast to Sergeant Sapp's testimony, highly relevant to the time, nature and cause of death. In fact, as a highly experienced expert qualified without defense objection by the court as an expert (R. Vol. 5, 338-42, 347), Dr. Steiner was the only source of competent evidence on the subject of the victim's cause of death. Dr. Steiner testified that upon being struck by the vehicle, the victim's death was instantaneous. Repeatedly, both on direct and

cross examination he described the death as "instantaneous", (R. Vol. 5, 358, 360, 366), or "instant", (Id. at 358), due to the sudden, multiple fatal injuries he sustained upon impact. (Id. at 356-58, 366). In Dr. Steiner's uncontroverted expert opinion, the impact of the vehicle on the victim caused his instantaneous death. (Id.). There is absolutely no evidentiary basis to conclude that he suffered any subsequent injuries after Mr. Sims began the criminal conduct of leaving the scene of the accident that contributed to his death.

The Fifth District Court of Appeals incorrectly relied on Dr. Steiner's use of the phrase "struck and overrun", (R. Vol. 5, 357; ROA, 14), to support its conclusion that the victim's death was the result of Mr. Sims leaving the scene of the accident. In Sims, Dr. Steiner's use of the word "overrun" refers to the accident itself, not any subsequent attempt to leave the scene. Mr. Sims was neither charged with nor convicted of any criminal wrongdoing related to the accident; he was solely charged with and convicted of leaving the scene of the accident. The collision and overrunning of the victim was not criminal. In sum, it was only by mischaracterizing Dr. Steiner's testimony and ascribing unfounded significance to descriptions used by a traffic investigator that the Fifth District Court of Appeals found substantial competent evidence to support the trial court's conclusion that there was a causal relationship between the accident and the victim's injury.

Accordingly, even if this Court accepts the Fifth District Court of Appeals' decision to review the trial court's decision as one of fact, rather than law, this Court should find that the decision was not supported by competent substantial evidence.

Additionally, the trial court was not entitled to deference by the Fifth District Court of Appeals because neither the judge nor the jury made any factual findings on the record to support the conclusion that the victim's death was the direct result of Mr. Sims' leaving the scene of the accident. In the exercise of discretionary decisions, trial courts usually receive great deference for their factual findings. "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

However, even when entitled to broad discretion, a trial court should articulate its factual findings. In re E.B.L., 544 So.2d 333 (Fla. 2d DCA 1989). In In re E.B.L., the court explained:

It is our obligation to review the actions of trial courts to assure their compliance with the requirements of the law. Even when the trial judge is an experienced and able jurist, as in this case, we cannot affirm legal decisions which lack factual findings expressly required by the rules of procedure to allow for meaningful review.

Id. at 336.

In Sims, neither the jury nor the trial court made any findings to support the trial court's decision to impose victim injury points. The Fifth District Court of Appeals should not have substituted its own fact finding under the auspices of an abuse of discretion review. The Fifth District Court of Appeals should not have affirmed the trial court's imposition of victim injury points.

B. The Fifth District Court of Appeals Erred in its Application of "May"

The conflict between the Second District Court of Appeals and the Fifth District Court of Appeals is further compounded by the Fifth District Court of Appeals misplaced application and reliance on May v. State, 747 So.2d 459, in its determination of whether victim injury points were applicable in the Sims case.

In May, the defendant pled no contest to leaving the scene of an accident involving death. Id. at 460. The trial court assessed 120 victim injury points for the death of the victim. Id. The defendant appealed to the Fourth District Court of Appeals. Id. at 459. The Fourth District Court of Appeals affirmed the assessment of the victim injury points holding that the defendant's actions of leaving the scene of the accident were a direct cause of the death. Id. at 460.

Although the procedural history of the case is similar to that of Sims, the facts are drastically different. In May, the victim was struck by the defendant, dragged 500 feet while the

defendant was trying to dislodge the victim from his vehicle and leave the scene of the accident, and was then run over by another vehicle. Id. The medical examiner in May opined that the combination of all the injuries resulting from the first collision, being dragged 500 feet, and the second collision caused the victim's death. However, the medical examiner could not specifically say whether the victim's death was the direct result of the first collision or being dragged 500 feet. Id. The court interpreted this to mean that the death could not have resulted from either event alone. Id. Instead, the dragging was a direct cause of death along with the collision. Id. Since the dragging was part of the defendant's leaving the scene, accordingly it could be a cause of death and the assessment of victim injury points was appropriate. Id.

The May case is one of the unique and limited factual scenarios in which the act of leaving the scene of the accident actually causes the resulting death. First, the defendant dragged the victim 500 feet and "swerved from side to side in order to dislodge the victim's body in the course of fleeing the scene." Id. at n.1. Second, after leaving the scene, the defendant left the victim's body in the roadway and it was run over by a second vehicle. Id. The medical examiner testified that these events, both resulting from the defendant's leaving the scene, could be a cause of the victim's death. Id. at 460. The court held that the

trial court manifestly had evidence to support its finding that the commission of the crime at issue - leaving the scene of an accident - resulted in "death suffered by a person as a *direct result of the primary offense.*" (emphasis added). Id. The court held that the crime needs to be "a cause of death, not necessarily *the* cause of death." (emphasis added). Id. In a case with these specific findings of fact, victim injury points are properly assessed.⁵

The Fifth District Court of Appeals' misplaced reliance on the May case compounds the conflict with the Second District Court of Appeals.⁶ The Sims case is factually distinguishable from the May case because the Petitioner's crime was neither a cause of death nor *the* cause of death. In Sims, there is uncontroverted expert testimony from the medical examiner that the victim died "instantaneously." The fact of Mr. Sims leaving the scene of the accident after the incident did not cause or contribute to any injury or death as the victim was already dead. The victim died as a direct result of the "nearly unavoidable" accident for which Mr. Sims was never charged with any misconduct. The victim would be in

⁵As Petitioner explains *infra*, such findings of fact should be submitted to and found by the jury pursuant to the Sixth Amendment rights recognized by the United States Supreme Court. See infra, Section C.

⁶ This statement should not be read to imply that the May case is in conflict with the Geary and Rodriguez cases from the Second District Court of Appeals. These cases are consistent with each other as they apply consistent legal analyses to two distinct factual scenarios and evidentiary records.

no different condition had Mr. Sims remained at the scene of the accident rather than left.

The Second District Court of Appeals correctly decided Geary and Rodriguez in holding that when the victim's death was not the direct result of the defendant leaving the scene of the accident, then victim injury points should not be applied. In those cases, there was no connection between the criminal conviction - leaving the scene of an accident resulting in death - and the injuries sustained by the victim. The Fourth District Court of Appeals correctly decided May in holding that for victim injury points to be assigned the accident must be a cause of the victim's injury. In that case, there was a connection between the criminal conviction and the injuries sustained by the victim. These decisions are rooted in the understanding that the crime of leaving the scene of an accident begins after the accident has occurred. When the death of the accident victim occurs instantaneously as a result of injuries sustained in the accident, there is no causal connection between the subsequent criminal conduct and the victim's injury.

Where, as in Sims, the criminal act of leaving the scene is neither a cause nor *the* cause of death, Geary, Rodriguez, and May require the Fifth District Court of Appeals to reverse the application of the victim injury points. The Fifth District Court of Appeals committed a legal error when it affirmed the application

of victim injury points in the Sims case, where there is no evidence that defendants leaving the scene of the accident directly resulted in the victim's death and, in fact, there is uncontroverted expert testimony suggesting that the victim's death was "instantaneous."

C. Whether the Victim's Death Was the Direct Result of The Petitioner's Leaving the Scene of the Accident Is An Issue For The Jury

The trial court violated Mr. Sims' Sixth Amendment right to a jury trial by adding victim injury points in the absence of a jury finding that Mr. Sims had, in fact, caused the victim's death during the commission of the crime for which he was convicted. The offense for which Mr. Sims was convicted occurred on May 13, 2001. Upon his conviction for leaving the scene of an accident involving death, (R. Vol. 8, 379), he was sentenced pursuant to the Criminal Punishment Code, Florida Statute section 921.0024 (2001).

In the instant case, the jury returned a verdict of guilty as charged with no additional specific factual findings. (R. Vol. 8, 379). At sentencing, the trial court added 120 victim injury points over Mr. Sims' objection. As a result, his sentence was increased from the six months in state custody that the jury verdict alone justified on his scoresheet to five years in prison and five years of probation. (Id. at 377-78).

As the decisions in May, Geary, and Rodriguez demonstrate, victim injury points may or may not properly apply to convictions for leaving the scene of an accident involving death. Conviction by the jury for violating Florida Statute section 316.027(1)(b) without any further factual finding does not automatically support the imposition of victim injury points. An additional factual determination must be made regarding the causal relationship between the crime and the victim's death. See May, 747 So.2d at 460-61; Rodriguez, 684 So.2d at 865; and Geary, 675 So.2d at 626.

Because the decision to impose victim injury points increased Mr. Sims' punishment from a non-state prison sanction to five years in prison, and because his ultimate sentence was not supported by the jury verdict alone, the imposition of the points violated Mr. Sims' right to a jury as guaranteed by the Sixth Amendment to United States Constitution as applied to the states by the Due Process Clause of the Fourteenth Amendment. See Apprendi, 530 U.S. 466; Booker, 543 U.S. 220; and Blakely, 542 U.S. 296.

In Apprendi, 530 U.S. at 490, the Supreme Court held that the Sixth Amendment right to trial by jury requires compliance with the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Apprendi court held unconstitutional "the

novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 482-83.

In Blakely, 542 U.S. at 330-34, the Supreme Court explained that for Sixth Amendment purposes the "relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' (citations omitted) and the judge exceeds his proper authority." Id.

In Blakely, the petitioner had pleaded guilty to kidnapping. Id. at 298. Without any additional factual findings, the facts admitted in his plea permitted a maximum sentence of 53 months under the applicable Washington sentencing guidelines, but the trial judge imposed a 90-month sentence after finding that petitioner had acted with "deliberate cruelty," a statutorily specified basis for departing from the standard range. Id. at 303. On appeal, the State of Washington contended that there had been no Apprendi violation because the relevant statutory maximum was not the number of months established by the sentencing guideline, but

the 10-year maximum for class B felonies in set forth in Washington's general sentencing statute. Id. The Supreme Court rejected this argument and held that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* Id. at 303 (citing Ring v. Arizona, 536 U.S. 584 (2002)).

In Mr. Sims' case, the State may contend that his sentence does not implicate the Apprendi rule as it was within the fifteen year maximum imposed by Florida Statute section 775.082 (2001) on second degree felonies. As Blakely makes clear, however, the relevant statutory maximum is not a general or overall limit set by the state's statutes, but the maximum sentence that the applicable guidelines permitted based on the facts found by the jury. Id.

The application of Sixth Amendment protections articulated in Apprendi to sentencing guidelines was reaffirmed by the U. S. Supreme Court in United States v. Booker, 543 U.S. 220. In Booker, the Court held that the petitioner's sentence under the federal sentencing guidelines violated the Sixth Amendment as it had been based on "additional facts that the sentencing judge found by a preponderance of the evidence." Id. at 226. The Court explained that pursuant to the federal guidelines "the relevant

sentencing rules are mandatory and impose binding requirements on all sentencing judges." Id. at 233.

In the instant case, the sentencing court first imposed 120 victim injury points and then departed downward from the resulting eight year sentence, sentencing Mr. Sims to five years in prison and five years of probation. (R. Vol. 8, 377-78). The trial court's downward departure does not cure or avoid the Sixth Amendment issue. As the U.S. Supreme Court explained in Booker, "the availability of a departure in specified circumstances does not avoid the constitutional issue." Id. at 234.

The principles articulated in Apprendi, Blakely and Booker have been applied by Florida courts reviewing Florida sentences in which the imposition of victim injury or similar points by the trial court have been challenged on appeal. See Behl v. State, 898 So.2d 217 (Fla. 2d DCA 2005); Coggins v. State, 921 So.2d 758 (Fla. 1st DCA 2006); Donohue v. State, 925 So.2d 1163 (Fla. 4th DCA 2006); and Leveille v. State, 927 So.2d 1008 (Fla. 4th DCA 2006). In Behl, 898 So.2d 217, the petitioner was sentenced for two first-degree felony sexual batteries by a person in familial or custodial authority. The petitioner appealed on the basis that the sentences for the offenses exceeded the relevant maximum sentence under the Florida Rule of Criminal Procedure 3.991(a) sentencing guidelines scoresheet because points for penetration had been added to his score by the trial court at sentencing. He argued that the trial

court's enhancement of his sentence violated his Sixth Amendment rights as explained and protected in the Apprendi case. The State contended that in determining that the defendant was guilty, the jury had implicitly but necessarily concluded that penetration had occurred. On appeal, the Second District Court of Appeals held that, for the second count, the jury's verdict finding defendant guilty of sexual battery by a person in familial or custodial authority offense did not constitute a factual determination by the jury that the offense involved sexual penetration. Accordingly, the court held that the sentences imposed violated the petitioner's Sixth amendment right to trial by jury.

The principles articulated in Apprendi, Blakely and Booker apply to Mr. Sims' sentence and compel the same conclusion reached by the Second District Court of Appeals in Behl, 898 So.2d 217.⁷ In Behl, as a result of the trial court's actions, the defendant's sentencing score was increased by 80 points for penetration on each of two counts resulting in a total of 298 points. Id. at 219. The Second District Court of Appeals held

⁷As in Behl, the fact that Booker and Blakely were decided after Mr. Sims was sentenced does not preclude this Court's application of those decisions to his case. As Mr. Sims case is still under direct review, the current law articulated by Blakely and Booker should be applied to his claims. Griffith v. Kentucky, 479 U.S. 314, 328 (1987). As this Court has held "[t]he decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial." Wheeler v. State, 344 So.2d 244, 245 (Fla. 1977).

that the jury's verdict did not support the application of 80 points for one of the counts, but would have supported 40 points for "contact," which would have resulted in a correct overall score of 258 points. Id. at 222. Accordingly, the maximum months in prison should have been 322.5, or 26.875 years, as opposed to the 337.5 months, or 28.125 years to which the defendant had been sentenced. Id. at 223. As a result of the Behl trial court's error, the sentence imposed on Mr. Behl exceeded the maximum guidelines sentence under a corrected scoresheet by fifteen months. Id. The fifteen month difference in Behl did not implicate the statutory maximum set forth in 775.082. Id. at 221. The Second District Court of Appeals correctly interpreted the "statutory maximum" for purposes of the Sixth Amendment and the Apprendi rule to be the maximum guidelines sentence supported by the jury's factual findings. As the Second District Court of Appeals held:

Under the Supreme Court's interpretation of the Sixth Amendment, victim injury thus can be used as a sentencing factor only if its existence is determined by the jury or admitted by the defendant. Accordingly, a guidelines sentence imposed at a level that is only permissible because victim injury points were assessed will exceed the "statutory maximum" for Apprendi purposes if the victim injury points were not based on a determination made by the jury or on an admission of the defendant.

Id. at 221.

The jury in Mr. Sims' case made no specific findings about victim injury and none are logically or legally implied in the jury's verdict, as Florida courts have held that in some instances

convictions for leaving the scene of an accident justify victim injury points, while others do not.

The Sixth Amendment right to a jury trial requires that the imposition of victim injury points in Mr. Sims' case be based on the jury's determination that the injury was causally related to his criminal conviction. Because the 120 victim injury points assigned by the trial court increased Mr. Sims' sentence beyond that which the jury's verdict permitted, his sentence violated his Sixth Amendment rights as articulated in Apprendi, Booker, and Blakely.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to declare improper the application of victim injury points to Petitioner's sentence, and that Petitioner's sentence should be reversed and remanded to the trial court for resentencing on a corrected scoresheet which excludes victim injury points.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Initial Brief on the Merits has been furnished by U.S. mail to Wesley Heidt, Esq., and Kellie A. Nielan, Esq., Office of the Attorney General, 444 Seabreeze Blvd., 5th floor, Daytona Beach, FL 32118, this 26th day of July 2006.

CERTIFICATE OF COMPLIANCE

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

s/ Christopher M. Jones
CHRISTOPHER M. JONES
COUNSEL FOR PETITIONER