

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 REPLY BRIEF ON THE MERITS

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Argument

The Respondent (hereinafter "State") presents two main reasons why this Court should not declare Petitioner's (hereinafter Mr. Sims) sentence invalid. First, the State suggests this Court does not have jurisdiction over the case. Second, the State suggests that victim injury points were properly assigned in Mr. Sims' case. Mr. Sims responds to the State's arguments below.

A. This Court Has Jurisdiction

The State offers three arguments for why this Court should not have jurisdiction over this case: (1) whether Mr. Sims was timely in filing his motion to invoke discretionary jurisdiction; (2) whether there is a conflict between the district courts of appeal warranting jurisdiction; and (3) whether the issue would be moot because Mr. Sims is no longer incarcerated.

(1) Timeliness of Requesting Review

First, the State argues that this Court does not have jurisdiction because Mr. Sims filed his Petition to Invoke All Writs Jurisdiction after the expiration of the 30-day period required to invoke discretionary review. Article V, Section 3(b)(3), of the Florida Constitution provides this Court with jurisdiction to review any decision of a

district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." This Constitutional provision is incorporated in Fla. R. App. P. 9.030(a)(2)(A)(iv). While Fla. R. App. P. 9.120(b) provides that "[t]he jurisdiction of the supreme court described in rule 9.030(a)(2)(A) shall be invoked by filing two copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the district court of appeal within 30 days of rendition of the order to be reviewed," this Court retains the authority pursuant to Fla. R. App. P. 9.040(d) to "permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties." See Romero v. State, 870 So.2d 816, 818 (Fla. 2004).

Mr. Sims filed his All Writs Petition in August 2005 and the Court considered it a Notice to Invoke Discretionary Jurisdiction. This Court has already acknowledged that Mr. Sims filed his Petition outside the time period required by the rules, but granted Mr. Sims time to submit a Motion for Reinstatement explaining why his Petition should be considered timely.

In his Motion, Mr. Sims explained that he was continuing his appeal pro se because his attorney discontinued representation after the Fifth District Court of Appeals' decision in his case. Mr. Sims explained that he thought he needed the Fifth District Court of Appeals mandate, lower court transcript, and record on appeal in order to submit his request for discretionary review by this Court. Mr. Sims was not able to obtain all of these documents from his former counsel because he was told he would have to pay for the copies and he did not have the money to do so. The sincerity and degree of Mr. Sims' concern about getting the documents required to file his appeal with this Court is evidenced by his filing of a complaint with the Florida Bar attempting to obtain the documents he reasonably believed he needed to seek review in this Court.

This Court accepted Mr. Sims' arguments and granted Mr. Sims' Motion for Reinstatement in December 2005. Since that time, Mr. Sims, proceeding pro se until the undersigned counsel was appointed in May 2006, has met all of the court-ordered deadlines for pleadings in this case.

(2) There is a Conflict Between 5th DCA and 2nd DCA

Second, the State argues this Court does not have jurisdiction because there is no conflict between Sims v.

State, 869 So.2d 45 (Fla. 5th DCA 2004), in the Fifth District Court of Appeals and Geary v. Florida, 675 So.2d 625 (Fla. 2d DCA 1996), and Rodriguez v. Florida, 684 So.2d 864 (Fla. 2d DCA 1996), in the Second District Court of Appeals.

As Mr. Sims stated in his Initial Brief on the Merits, there is a conflict because in each of these cases the record does not support the conclusion that the defendant's criminal conduct in leaving the scene of the accident caused the victim's injury. The Sims court affirmed the imposition of victim injury points in the absence of the causal link between the criminal conduct and the victim injury. This is in direct conflict with the Geary and Rodriguez courts who did not impose victim injury points where there was no causal link between the criminal conduct and the victim injury.

There is uncontroverted evidence in the Sims case proving that Mr. Williams was dead before Mr. Sims committed or even began the criminal offense of leaving the scene of an accident resulting in death. The trial court accepted Dr. Steiner, the medical examiner, as an expert in the field of forensic pathology. (R. Vol. 5 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 and no finding that the death occurred *during* the criminal episode of leaving the scene, nor is there evidence that the victim's death was the *direct result* of the crime of leaving the scene of the accident. Mr. Sims was neither charged with nor convicted of any criminal conduct concerning the accident itself or Mr. Williams' death. His only criminal conduct occurred after the instantaneous death when he left the scene.

The Fifth District Court of Appeals' decision to assign victim injury points given the lack of evidence establishing a causal link between the defendant's conduct and the victim's death is in direct conflict with factually similar cases in the Second District Court of Appeals. In Geary, 675 So.2d 625, the Court held it was error to apply the victim injury points when the victim's injury occurred before the defendant committed the crime of leaving the scene of an accident and where the victim would still have been injured had the defendant remained at the scene. Id. Similarly, in Rodriguez, 684 So.2d 864, the Second Court of Appeals held that it was error to add victim injury 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.

In each case there is no basis to conclude 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). Therefore, there is a conflict between the Fifth District Court of Appeals' decision in Sims and the Second District Court of Appeals' decisions in Geary and Rodriguez.

(3) The Issues in this Appeal are not Moot

Finally, the State argues that even if this Court determines that victim injury points should not have been assessed, the Court does not have jurisdiction because Mr. Sims' claim is moot. The State argues that because Mr. Sims has already served the incarcerative portion of his sentence, any changes to his scoresheet are moot. However, the Court's jurisdiction is not destroyed by mootness. This Court can still exercise jurisdiction over the issue of the application of victim injury points because it is an issue of great public importance and is likely to recur. See Florida v. Mathews, 891 So. 2d 479 (Fla. 2004); Tormey v. Moore, 824 So. 2d 137 (Fla. 2002). In fact, if the

lower court's decision is affirmed there will be confusion and an invitation to impose victim points for death on all defendants convicted of leaving the scene of an accident resulting in death, irrespective of a causal link.

B. Victim Injury Points Should Not Have Been Assessed

As Mr. Sims explained in his Initial Brief on the Merits, victim injury points were not available for application to his case for two reasons: (1) there is no causal connection between Mr. Sims' criminal offense and the death of the victim and (2) the issue of causation and the application of victim injury points was not determined by the jury.

(1) No Causal Link Between the Crime and the Injury

The first reason victim injury points are not applicable in Mr. Sims' case is because there is no causation between the crime for which he was convicted and the death of Mr. Williams. The definition of victim injury points requires the death be "a *direct result of the primary offense...for which an offender is convicted.*" Section 921.0021(7)(a), Florida Statutes. (emphasis added). Additionally, Florida Rule of Criminal Procedure 3.701(d)(7) requires that victim injury points be scored

"for each victim physically injured *during* a criminal episode or transaction." (emphasis added).

Mr. Williams' death was not *the direct result* of Mr. Sims leaving the scene of the accident nor did the death occur *during* the criminal episode or transaction of leaving the scene. The death occurred before Mr. Sims committed the crime of leaving the scene of an accident resulting in death.

The medical examiner, Dr. Steiner, was the *only* witness qualified as an expert to testify about the time and cause of death. He testified that upon being struck by the vehicle, the victim's death was "instantaneous" meaning "within a second or two." (R. Vol. 5 at 360). The medical examiner further explained that Mr. Williams' death was "instantaneous," (Id. at 358, 360, 366), or "instant," (Id. at 358), due to the sudden, multiple fatal injuries sustained upon impact with the vehicle. (Id. at 356-58, 366). There is no competent evidence to suggest that Mr. Williams suffered any further injuries leading to his death after Mr. Sims began the conduct of leaving the scene of the accident.

The State places unwarranted importance on the medical examiner's statement that Mr. Williams was "struck and overrun" by a vehicle. There is no doubt that Mr. Williams

was struck and overrun by the vehicle. However, the relevant fact at issue in this case is that the death was "instant." There is no evidence to support the conclusion that Mr. Williams was killed as the result of being dragged. Even if there were, any dragging that occurred in this case was part of the accidental and unavoidable collision with the vehicle. This is in sharp contrast to May v. State, 747 So.2d 459 (Fla. 4th DCA 1999), where the dragging of the victim occurred *during* the crime of leaving the scene.

Mr. Sims does not contend that victim injury points for death are never applicable for the offense of leaving the scene of an accident resulting in death. He is merely arguing that they are not applicable in cases like Sims, Geary, and Rodriguez where the victim's injury was not the result of the defendant leaving the scene of the accident. Victim injury points could be applicable in a factual scenario like that in May, 747 So.2d 459, in which the medical examiner testified that the injuries that could be a cause of the victim's death were the result of the defendant's leaving the scene. Id. at 460.

(2) Causation is an Issue for the Jury

The second reason victim points are not applicable to Mr. Sims' case is because Mr. Sims' ultimate sentence of

five years in prison was not supported by the jury verdict alone as is required by the Sixth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment. See Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakeley v. Washington, 542 U.S. 296 (2004); and United States v. Booker, 543 U.S. 220 (2005).

The State incorrectly argues that applying Apprendi to the Sims case would be a retroactive application of Apprendi. Apprendi, 530 U.S. 466, was decided in 2000. Mr. Sims' case was not final until April 26, 2004, when he received a mandate from the Fifth District Court of Appeals. See Hughes v. State, 901 So. 2d 837, 839 (Fla. 2005)(stating that a conviction is final after an appellate court mandate has been issued). Accordingly, this would not be a retroactive application of the Apprendi rule.

Additionally, the State argues that the constitutional requirements articulated in Apprendi are satisfied in that the jury had to necessarily find there had been a death in order to convict Mr. Sims of leaving the scene of an accident resulting in death. This oversimplification and dilution of Apprendi's requirements would permit the application of victim injury points in all convictions for leaving the scene of an accident resulting in death. Adoption by the Court of the State's position would

establish the basis for an automatic imposition of victim injury points in all convictions for leaving the scene of an accident resulting in death, ignoring the temporal and causal requirements of the statute. Such a rule would also have supported the imposition of victim injury points in Geary and Rodriguez.

Finally, the State argues that Mr. Sims has never presented the claim of the lack of a jury finding of causation to the lower court. In fact, Mr. Sims immediately objected to and contested the imposition of victim injury points since at his trial in 2001. Throughout his appeal and his application for review by this Court, Mr. Sims has consistently argued that the application of victim injury points requires a factual determination that the death was the result of the crime of leaving the scene. Apprendi requires that the factual determination that Mr. Sims has been arguing for in this case would have had to have been made by the jury, as his was a jury trial.

This Court has held that "magic words are not needed" to make and preserve a proper objection. Williams v. State, 414 So. 2d 509, 512 (Fla. 1982). In Williams, the defendant's counsel made an objection at trial about the application of a statute stating "there is a question as to whether or not the statute was in effect" at such time that

it was applicable to defendant's case. Id. at 511. On appeal, the defendant attempted to raise an ex post facto claim. Id. at 510-11. The First District Court of Appeals refused to consider the issue concluding that the original objection at trial failed to preserve the error of ex post facto application of the statute. Id. This Court held that the articulated concern about the effective date of the statute was sufficient to inform the judge of the error and gave the trial court the opportunity to cure the error. Id. at 512.

The facts and holding in the Williams case are analogous to those in the Sims case. Mr. Sims has argued that the application of victim injury points is not available in the absence of the requisite finding of causation. Apprendi, Blakely, and Behl, 898 So.2d 217 (Fla. 2d DCA 2005), explain that the underlying factual determination must, consistent with the Sixth Amendment, be made by the jury. At sentencing and throughout his appeals process, Mr. Sims has consistently contested the lack of a finding of causation justifying the imposition of victim injury points. Apprendi and its progeny simply require that the necessary finding in this case would have had to have been made by the jury.

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.

Respectfully Submitted,

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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 _____ day of September 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).

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