

IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1800

WILLIE EARL LUTON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER

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ARGUMENT

A MR. LUTON'S MOTION WAS TIMELY

The state asserts on page 11 of its brief that Mr. Luton has "failed to acknowledge that his 3.800(b)(2) motion was not properly filed, as it was not served *before* Defendant served his first brief." Indeed, Mr. Luton has not acknowledged this allegation and he does not acknowledge it for one simple reason. Contrary to the state's claim, the motion was *not* untimely.

What the *state* fails to acknowledge is that Mr. Luton obtained the permission of the Third District to file the motion when he did. *Blakely v. Washington*, 542 U.S. 296 (2004), the case that formed the basis for the motion, was decided one day after Mr. Luton served his initial brief. Two days thereafter, Mr. Luton filed a motion for leave to withdraw that brief in order to file a motion to correct sentencing error based on *Blakely* and the Third District *allowed him to do so* and to file an amended initial brief which added the *Blakely* issue to those relating to the conviction. Only after the court entered its order in this regard did Mr. Luton file his motion.

The state goes on to argue on page 12 of its brief that Mr. Luton "appears to overlook the fact that 3.800(b) is a rule of *procedure*." Mr. Luton has certainly not overlooked that fact; rather, he suggests that it is the very reason why the motion was timely. Courts may extend or otherwise alter procedural

time periods and that is what occurred here. To accept the state's argument that the motion was untimely after the district court authorized it to be filed is to say that any time a brief is served after an appellate court grants a motion for extension of time, it is untimely because it is served after the time established by the appellate rules. Such a conclusion would be absurd, but so is the one urged by the state with regard to the filing of the motion to correct sentencing error in this case.¹

¹ Moreover, the state should not be heard to complain about the alleged untimeliness of the motion because *it* did not timely assert *its* claim in this respect before either the district court or the trial court. When Mr. Luton sought to withdraw his initial brief, the state objected *solely* because of its belief that the proposed motion was without merit. It in no way argued or even suggested that the procedure proposed by Mr. Luton was improper. Likewise, in the trial court, the state filed a response to the motion which was directed solely to the merits of the issue and which in no way asserted that the motion was untimely or any manner deficient (SR 5-6). After Mr. Luton raised the issue in his amended initial brief in the district court, the state, in its answer brief, again addressed only the merits of Mr. Luton's position. Moreover, it specifically rephrased the point in a manner that stated the issue solely as one dealing with the denial of the motion to correct sentencing error (State's Answer Brief, pp. i, 35). It did not in any respect raise any claim regarding preservation, nor did it argue, suggest, or even imply that Mr. Luton's motion was improper, untimely, or any way deficient. Likewise, at oral argument in the district court, the state made no assertion as to any procedural reason why the court should not reach the merits of the issue (Reply to Response to Order of March 23, 2006, p. 2). Not until after the Third District issued an opinion stating that the issue was not preserved, and after Mr. Luton filed a motion for rehearing challenging that conclusion, and after the district court *ordered* the state to file a response, did the state ever claim that the motion was untimely.

A similar situation was dealt with in *Thomas v. State*, 599 So. 2d 158 (Fla. 1st DCA 1992). There, the state argued for the

It should further be recognized that the Third District's authorizing Mr. Luton to proceed was entirely in keeping with the fact that allowing motions to correct sentencing errors while cases are pending on appeal promotes judicial economy and cuts down on the amount of litigation. To accept the state's position is to say that upon learning of a new case decided the day after a brief is served, appellate counsel should do nothing, wait until the appeal is over, raise the issue before the trial court at that time, and then take another appeal. Such an approach would disserve defendants, the state, and the courts. It would run contrary to the rationale underlying motions to correct sentencing errors. Thus, not only should the

first time in a motion for rehearing that the defendant had failed to preserve an issue. The First District rejected the state's claim on two bases, because, under the facts, the issue was preserved and "because the state improperly attempts to insert this issue for the first time on motion for rehearing." 599 So. 2d at 160-161 n. 1. Both conclusions are equally applicable here. In fact, the logic behind the state waiving the right to assert its procedural claim applies even more strongly here because had the state raised its claim when Mr. Luton sought to withdraw his brief, and had the district court found it to be meritorious, the court would have likely granted Mr. Luton's alternative request to relinquish jurisdiction to the trial court. Under such circumstances, Mr. Luton could have raised the *Blakely* issue pursuant to either Fla. R. Crim. P. 3.800(a) or 3.850, taken an appeal from the denial of his motion, and moved to consolidate his two appeals. That process would have plainly put the issue before the Third District in a proper manner.

state's position in this regard be rejected, but the procedure followed here by Mr. Luton should be encouraged.²

B THE POLICY REASONS SET FORTH BY THE STATE HAVE NO BEARING ON THE QUESTION OF WHETHER THE MOTION HERE WAS TIMELY

On page nine of its brief, the state sets forth numerous policy reasons why the state believes that *Blakely* claims should have to be raised prior to sentencing. Such factors are inappropriate considerations in determining whether Mr. Luton preserved his claim. That is because for the reasons discussed in Mr. Luton's initial brief, it is clear that under the rule as it now exists, the issue he raised is a proper subject for a motion to correct sentencing error.³ The policy reasons

² One additional comment by the state regarding this aspect of this case should also be addressed. The state on page 11 of its brief asserts that Mr. Luton's "recitation of the facts vaguely represents that he filed a motion to correct sentencing error '[w]hile his appeal was pending.'" Mr. Luton used that language because it accurately sets forth the facts *relevant* for this court's consideration of the issues raised. The facts regarding the withdrawal of the initial brief and the district court's authorization to file the motion are relevant only to demonstrate the lack of merit of the state's eleventh-hour effort to inject the timeliness issue. Clearly, the district court did not consider those facts relevant because it ignored the assertion made by the state when it was ordered to respond to Mr. Luton's motion for rehearing and instead framed the issue in terms of Mr. Luton "explain[ing] that after the appeal had been initiated, he filed a motion to correct sentencing error pending appeal under Florida Rule of Criminal Procedure 3.800(b)(2)." *Luton v. State*, 934 So. 2d 7, 10 (Fla. 3d DCA 2006). The court's description is obviously quite similar to that used by Mr. Luton in his initial brief.

³ It is extremely interesting to note that the state offers no response at all to Mr. Luton's discussion in his initial brief of the purposes of the rule as it now exists, of how it plainly

asserted by the state are proper matters for consideration by this court as possible reasons to change the rule. Thus, should this court find them worthy of such consideration,⁴ Mr. Luton

encompasses the motion at issue here, or of how the district courts of this state have consistently considered claims similar to the one raised by Mr. Luton. The state's silence speaks loudly. Mr. Luton also notes that in his initial brief he pointed out that the Third District, in reaching the question of the retroactivity of *Blakely* in appeals from denials of post-conviction motions inherently found the *Blakely* challenge to have been preserved by those motions. Subsequent to the service of that initial brief, this court, in *Galindez v. State*, 32 Fla. L. Weekly S89 (Fla. Feb. 15, 2007), also addressed the retroactivity question in a case in which the issue had been raised in a post-conviction motion, without any indication of any need to have preserved the issue either at or before sentencing.

⁴Mr. Luton asserts that they are not. Essentially, the state argues that allowing the issue to be raised on a motion to correct sentencing error would require the empanelling of a second jury when the motion is found to have merit. There is an easy way of avoiding such a process, however, and that is doing things right when sentence is imposed. The state itself on page nine of its brief appears to suggest one appropriate way of obviating the need for a second jury, having a bifurcated proceeding following the receipt of the verdict (the state's brief actually refers to such a proceeding occurring after "jury selection," a reference which Mr. Luton assumes is a typographical error). Such an approach would comply with *Blakely* and would require only one jury. Mr. Luton, notes additionally, however, that depending on this court's determination of the merits of the issue he raises, there may not even be a need for a bifurcated process. A proceeding independent from the guilt phase of a trial will only be necessary if this court accepts Mr. Luton's position that all the requirements of the statute over and above the simple fact of a prior conviction must be proven to the jury. Should this court conclude that only the fact that the offense for which sentence is being imposed occurred within the timeframe established by the statute (the factor that Mr. Luton suggests is most clearly within the scope of *Blakely*), that fact can easily be submitted to the jury at the time the question of guilt is submitted. All it would require is a check-off box or

would suggest that it refer the matter for study by the Florida Rules of Criminal Procedure Committee or, if it finds such referral unnecessary, that it consider the reasons itself and adopt whatever changes it may deem appropriate for future proceedings. Whatever is done in that regard, however, should have no impact whatsoever on the present case. Mr. Luton properly preserved this issue under the rule now in effect and any subsequent amendments to the rule cannot change that fact.

In concluding its argument as to the policy reasons, the state submits on page 10 of its brief that a request for a jury trial on sentencing or an objection to the judge determining the factors required for habitual offender sentencing must be made prior to the sentencing proceeding. It then posits that Mr. Luton "does not dispute that this was not done" here. To the contrary, however, Mr. Luton did argue on pages 18-19 of his brief that the invocation of the right to a jury trial encompasses all determinations that fall within a jury's purview under the Constitution. Because he did invoke⁵ that right, he does not accept the state's characterization of his position.

line on the verdict form, similar to what is used when the jury is asked whether a crime occurred with the use of a firearm or weapon. The check-off could either call for a finding that the offense occurred on a specific date or that it occurred before the date marking the end of the statutory timeframe. There would be no need to refer to the prior offense.

⁵Of course, the right to a jury trial is invoked unless it is voluntarily, knowingly, and intelligently waived. *Tucker v.*

C THE ERROR IS FUNDAMENTAL

The state contends that this court should not reconsider its determination in *McGregor v. State*, 789 So. 2d 976, 978 n.2 (Fla. 2001), that relief for errors under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is unwarranted under the fundamental error doctrine. The state bases this position on the assertion on page 16 of its brief that "*Blakely* merely clarified *Apprendi*."

Mr. Luton disagrees, as do the highest courts of at least two states. The Supreme Court of Vermont found *Blakely's* clarification to be sufficient to call for reversal in a case in which the appellant did not raise his *Blakely* claim until oral argument on appeal. In *State v. Yoh*, 910 A.2d 853 (Vt. 2006), the court dealt with a situation in which, at the time of the filing of the appellant's first appellate brief, *Apprendi* had been decided, but *Blakely* had not. 910 A.2d at 873. The appellant did not challenge his sentence in that brief, but he later moved for and received a stay of the proceedings so that

State, 559 So. 2d 218, 219 (Fla. 1990). Thus, even if the invocation of this right as to the trial is not deemed to carry over to sentencing, such a waiver would have to occur for the right not to apply at sentencing. See *State v. Osbourne*, 715 N.W.2d 436, 443 (Minn. 2006) (although trial court was not faulted for not making inquiry of defendant as to whether he wished to waive jury trial on sentencing factors in light of the fact that *Blakely* had not been decided at time of sentencing, "the necessary consequence is that any 'waiver' by Osbourne by his silence or his failure to object to the court acting as fact-finder on sentencing factors, was ineffective.").

he could file a motion for post-conviction relief. *Id.* at 859. When the trial court ruled against him, he appealed, the two appeals were consolidated,⁶ *id.*, and he raised for the first time at oral argument the contention that facts not proven to a jury could not be used to increase his sentences. *Id.* at 870.

The court applied a "plain-error analysis" to vacate the appellant's sentence, *id.* at 874, indicating that an intervening decision it had reached had been based on *Blakely*, *id.* at 873-874, that "[t]he *Blakely* Court stated that the jury-trial right implicated in its decision 'is no mere procedural formality, but a fundamental reservation of power in our constitutional structure,'" and that, "[t]hus, there is no doubt that a *Blakely* error affects a defendant's substantial rights." *Id.* at 873 (citation omitted). It went on to state that when the appellant's brief was filed, "*Apprendi* had recently signaled a shift in Sixth Amendment law, but it was still not obvious that there was a reasonable argument for vacating appellant's sentence," that "*Blakely* contained a clearer definition of the statutory maximum for *Apprendi* purposes, and [that] this definition led directly to" the intervening decision. *Id.* at 873. The court therefore stated, "We conclude that it would be

⁶ Mr. Luton notes that the procedure in *Yoh* was very much like the procedure he suggested above, n. 1, *supra*, might well have been followed in the present case had the state successfully presented its preservation claim at the time he moved to withdraw his brief in the Third District.

both unfair to appellant and harmful to the public reputation of Vermont's justice system to allow appellant's sentence to stand under these circumstances." *Id.*

Similarly, in *Smylie v. State*, 823 N.E.2d 679, 690 (Ind. 2005), the court stated:

We conclude that it is appropriate to be rather liberal in approaching whether an appellant and her lawyer have adequately preserved and raised a *Blakely* issue. A very tough *Blakely* preservation rule would prompt practitioners to fill trial time and appellate briefs with all imaginable contentions, contrary to the general advice that it is good practice to focus on the most viable issues. It would also drastically alter the burden imposed on counsel as to what constitutes effective assistance to their clients. As we said in *Fulmer v. State*, 523 N.E.2d 754 (Ind. 1988), "An attorney is not required to anticipate changes in the law and object accordingly" in order to be considered effective. *Id.* at 757-58. As we suggested above, a trial lawyer or an appellate lawyer would not be ineffective for proceeding without adding a *Blakely* claim before *Blakely* was decided. Consequently, we do not deem the failure to raise a Sixth Amendment objection to the trial court as it proceeded through sentencing to constitute forfeiture of a *Blakely* issue for purposes of appellate review.

This court should follow the same approach.⁷

D THE SENTENCE IS INVALID UNDER *BLAKELY*

On the merits, the state primarily relies upon cases that stand for the proposition that the date of a prior conviction or

⁷ Doing so would be in accord with the esteem this court has shown for the right to jury trial, a right it has called "indisputably one of the most basic rights guaranteed by our constitution," *State v. Griffith*, 561 So. 2d 528, 530 (Fla. 1990), and "an indispensable component of our system of justice." *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997).

of a prisoner's release need not be determined by a jury. While Mr. Luton submits that those decisions run contrary to the plain wording of *Apprendi* and *Blakely*, he notes that, even if they are accepted, they do not resolve the issue he raises.

The statute here requires *more* than just proof that a prior conviction or release occurred on some specific date. It requires a showing that the crime *for which the defendant is being sentenced* occurred within five years of the conviction or release date and thus also requires proof of the date of the subsequent crime.⁸ That showing is clearly contingent on the facts of the *new* case, not the prior one. It therefore cannot be said to be encompassed by "the fact of a prior conviction," *Blakely*, 542 U.S. at 301, quoting *Apprendi*, 530 U.S. at 490,⁹

⁸ The jury in the present case was not asked to, and did not, make any finding as to the date of the offenses. The jury instructions did not refer to the date (T 345-360, R 72-84), nor did the verdict forms (R 85-86). Moreover, the verdict forms did not even follow the findings of guilt with the words, "as charged in the information," instead merely preceding the findings with the words, "as to Count One of the Information, charging Aggravated Battery (R 85)" and "as to Count Two of the Information, charging Attempted Robbery (R 86)." Further, the information itself was not specific, charging that the offenses occurred "on or about" the date of May 27, 2002 (R 8, 9), a date just over a month away from the end of the five-year period defined by the statute, as calculated using the release date indicated on the affidavit submitted by the state at sentencing (R 94).

⁹ Contrary to the contention on page 18 of the state's brief that Mr. Luton has lost "sight of the fact that *Apprendi* does not apply to the fact of a prior conviction," Mr. Luton suggests that *Apprendi's* limitation to the *fact* of prior conviction is precisely what demonstrates his entitlement to relief.

even if such matters as the lack of a pardon or a conviction not having been set aside are deemed to fall within that ambit. It therefore must be proven to a jury.

E THE STATE'S HARMLESS ERROR CLAIM SHOULD BE REJECTED

The state's claim that the error is harmless¹⁰ is based on the simple fact that Mr. Luton did not make any specific allegation directed to the criteria for habitual violent felony offender sentencing. That fact is not relevant in a harmless error analysis, however. In *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986), this court expressed sentiments that, when applied to the present case, demonstrate that it cannot be concluded that the error was harmless.

Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt

¹⁰ In n. 2, *supra*, Mr. Luton characterized the state's initially raising its timeliness claim when it was ordered to respond to his motion for rehearing as an "eleventh-hour effort." The state's harmless error argument, which was never presented at all in the district court, is coming well after the clock struck twelve. The rationale of *Thomas*, cited in n. 1, *supra*, in support of Mr. Luton's position that the state should not be heard on timeliness, applies even more strongly here. See also *Milks v. State*, 894 So. 2d 924, 928 n. 5 (Fla. 2005) (declining to consider substantive due process and equal protection issues not addressed by the district courts). Thus, the state should be deemed to have waived the right to argue harmless error.

that the error did not affect the verdict, then the error is by definition harmful.

Under the circumstances here, *DiGuilio* makes it clear that the state must bear the burden of proving beyond a reasonable doubt that the jury would have reached the same conclusion as the judge on the question of whether the necessary factors were proven. It has not even attempted to meet this burden. What's more, it cannot be said that the evidence here demonstrates beyond a reasonable doubt that the jury would have found that the criteria of the statute were shown. Any analysis in this regard is inherently speculative because there is no way of knowing what instructions the jury would have been given regarding the elements that had to be proven. It can probably be presumed, however, that the court would have given instructions that tracked the statute. In this regard, Mr. Luton submits that the statute is written in a manner that could be interpreted either of two ways, one of which would call for the conclusion that the present crime was committed beyond the timeframe the statute defines, and that this fact demonstrates that the jury could have accepted as true all of the state's evidence and still found that the state failed to prove the elements.¹¹

¹¹ Under the facts of the present case, it seems quite possible that if the jury were uncertain as to the meaning of the statute, they might well have given the benefit of the doubt to

Mr. Luton. Those facts hardly established a strong case. While the jury's verdict demonstrates that they felt the state had supplied proof beyond a reasonable doubt, they may have felt that the evidence, which even the trial court described as "somewhat weak (T 320)," was not sufficient to make them want Mr. Luton to receive an enhanced sentence.

The state's case turned on the testimony of the victim, Daniel Hernandez. Mr. Hernandez repeatedly stated flat out that he had lost his mind (T 215, 216, 219, 220) throughout the period during which he was stabbed, made his show-up identification, and gave his deposition. He asserted that he had "cure[d] his brain" prior to trial through the use of "big medication at Mexican Soup Market (T 215)." Despite this "cure," Mr. Hernandez' identification of Mr. Luton at trial occurred only after he indicated that he did not recall the person who stabbed him too well (T 184), and only after the prosecutor had described Mr. Luton's clothing to him by asking if the person he saw on the night in question was the individual with a green shirt (T 184). Even with this clearly improper suggestion by the prosecutor, the identification was immediately followed by the admission that Mr. Hernandez only remembered "a little (T 185)," and later by an indication that he did not "recall very much (T 199)."

It should also be noted that Mr. Hernandez made inconsistent statements about whether the person who stabbed him had facial hair or not (T 205-208) and about the money taken from him (T 214-215). He admitted to difficulties seeing at night, when the stabbing occurred (T 206-207). He did not call the police the first time he saw Mr. Luton after the stabbing (T 195). He stated that the knife used in the stabbing was white (T 189), while most of the knife seized from Mr. Luton some three days after the crime was black on the outside, with the only white part being part of a black and white handle (T 318). Further, although the knife was submitted for DNA testing (T 297-298) in light of the fact that it had caked blood on it (T 298), the state quite tellingly submitted no evidence as to the results of the testing.

Although it is hard to imagine anyone who would not have some concerns over Mr. Hernandez' credibility, there are specific indications in the record of the jury's qualms in this regard. They sent out questions during their deliberations (T 362, R 71) dealing with the time of day and with whether it was raining, questions that seem to indicate that Mr. Hernandez' ability to identify the person who stabbed him was a matter of concern for them.

Specifically, the statute requires a showing that the offense for which sentence is being imposed occurred "[w]ithin 5 years of the date of the conviction of *the last enumerated felony*, or within 5 years of the defendant's release from a prison sentence ... that is imposed as a result of a *prior conviction for an enumerated felony*, whichever is later." § 775.084(1)(b)2.b, Fla. Stat. (emphasis added). Thus, the statute uses different phrases in referring to a defendant's last conviction and to his or her date of release, using "last enumerated felony" when speaking of the date of conviction, and "a prior conviction for an enumerated felony" when referring to a defendant's release. Because of this inconsistency, and the fact that the reference to the release follows the reference to the conviction, the statute allows a jury to reasonably conclude that the state must show either that the offense for which sentence is being imposed occurred (1) within five years of the date a defendant was convicted of the last enumerated felony, or (2) within five years of release for an enumerated felony for which he was convicted *prior to the conviction for the last enumerated felony*. If the jury here interpreted the statute in that manner, it would have disregarded the affidavit regarding Mr. Luton's release date because it gives the release date for the last enumerated felony and the jury would have felt that the date of conviction for that felony would have been the relevant

date. That date being December 27, 1993 (R 98-99), and the jury not being provided with any information about the release date for any enumerated felonies committed prior to the one in that case, it would have determined that the five-year period would have expired on December 27, 1998, well before the date of the crime at issue. Thus, had this issue been submitted to the jury, the result could have been very different.

CONCLUSION

Based on the foregoing, Mr. Luton respectfully submits that relief as requested in his initial brief should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded to Linda S. Katz, Asst. Attorney General, 444 Brickell Ave., Ste. 650, Miami, FL 33131 this 21st day of May, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

ANTHONY C. MUSTO