

O.A. 59-91

FILED

SID J. WHITE

FEB 18 1991

CLERK, SUPREME COURT

By _____
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76, ³98

WILLIAM BERRY,
PETITIONER,

-VERSUS-

THE STATE OF FLORIDA,
RESPONDENT.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

BRIEF OF PETITIONER ON THE MERITS

ARTHUR CARTER, ESQUIRE
SPECIAL ASSISTANT PUBLIC DEFENDER
AT
SUITE 306
1399 N.W. 17TH AVENUE
MIAMI, FLORIDA 33125

LAW OFFICES OF
MARIA BREA LIPINSKI
JOHN H. LIPINSKI
OF COUNSEL
AT
Post Office Box 97-0679
MIAMI, FLORIDA 33197-0679
(305) 253-7557

TABLE OF CONTENTS

INTRODUCTION		1
STATEMENT OF THE CASE		2
STATEMENT OF THE FACTS		2-4
QUESTION PRESENTED		5
SUMMARY OF THE ARGUMENT		6
ARGUMENT	I	7-9
CONCLUSION		10
CERTIFICATE OF SERVICE		10

TABLE OF CITATIONS

<u>DAVIS V. STATE</u> 517 So.2D 670 (FLA. 1987)	8
<u>FLETCHER V. STATE</u> 16 FLW D93 (FLA. 2D DCA 1991)	9
<u>GOPAUL V. STATE</u> 536 So.2D 296 (FLA. 3D DCA 1988)	8
<u>HALL V. STATE</u> 517 So.2D 692 (FLA. 1988)	8
<u>HARRIS V. STATE</u> 15 FLW D2111 (FLA. 5TH DCA 1990)	9
<u>LONETT V. STATE</u> 15 FLW D2790 (FLA. 2D DCA 1990)	9
<u>ODOM V. STATE</u> 15 FLW D1347 (FLA. 5TH DCA 1990)	9
<u>PERKINSON V. STATE</u> 16 FLW D295 (FLA. 1ST DCA 1991)	9
<u>SANDERS V. STATE</u> 15 FLW D2709 (FLA. 3D DCA 1990)	9
<u>WILSON V. STATE</u> 15 FLW S429 (FLA. 1990)	9

INTRODUCTION

THE PETITIONER WAS THE APPELLANT IN THE DISTRICT COURT AND THE DEFENDANT IN THE TRIAL COURT. THE RESPONDENT WAS THE APPELLEE IN THE DISTRICT COURT AND THE PROSECUTION IN THE TRIAL COURT. THE PARTIES WILL BE REFERRED TO AS THEY STAND IN THIS COURT. RECORD REFERENCES WILL BE BY THE LETTER "R". REFERENCES TO THE TRIAL TRANSCRIPTS WILL BE BY THE LETTER "T". REFERENCES TO THE DISTRICT COURT'S OPINION (INCLUDED IN PETITIONER'S APPENDIX) WILL BE BY THE LETTER "A". ALL EMPHASIS IS ADDED UNLESS OTHERWISE INDICATED.

STATEMENT OF THE CASE

THE DEFENDANT WAS CHARGED BY INFORMATION WITH THE CRIMES OF SEXUAL BATTERY (3 COUNTS) AND POSSESSION OF A CONTROLLED SUBSTANCES (R. 7).

THE DEFENDANT FILED MOTIONS TO SUPPRESS PHYSICAL EVIDENCE (R. 25) AND STATEMENTS (R. 26).

THE DEFENDANT MOVED TO STRIKE OTHER CRIMES EVIDENCE (R. 28).

THE DEFENDANT, AT TRIAL, WAS CONVICTED OF SEXUAL BATTERY (1 COUNT) AND POSSESSION OF A CONTROLLED SUBSTANCE.

THE DEFENDANT WAS SENTENCED OUTSIDE THE SENTENCING GUIDELINES TO 15 YEARS IMPRISONMENT ON THE BASIS THAT HE ABUSED HIS FAMILIAL AUTHORITY AND TRUST (R. 64).

THIS APPEAL FOLLOWS.

STATEMENT OF THE FACTS

AT THE TRIAL THE FOLLOWING FACTS WERE ELICITED:

BRIDGETTE BERRY, THE DEFENDANT'S DAUGHTER (T. 337) WAS 19, ALMOST 20, AT THE TIME OF THE OFFENSE (T. 336-337).

SHE LIVED WITH HER MOTHER (T. 336) AND HARDLY EVER SAW THE DEFENDANT AFTER THE DEFENDANT SEPERATED FROM HER MOTHER (T. 339).

ON THE DATE OF THE INCIDENT, SHE WENT, WITH HER BOYFRIEND AND SON, TO THE DEFENDANT'S APARTMENT TO VISIT THE DEFENDANT (T. 347). DURING THE VISIT, THEY LOOKED AT FAMILY PICTURE ALBUMS (T. 352), RAN AN ERRAND WITH THE DEFENDANT (T. 354), WENT SWIMMING (T. 358), AND WAS GIVEN CLOTHES BY CLESTE, THE DEFENDANT'S GIRLFRIENT (T. 361).

DURING THE EVENING, THE DEFENDANT USED COCAINE (T. 349).

LATER, IN THE EVENING, THE DEFENDANT INVITED HER AND HER BOYFRIEND TO STAY THE NIGHT, BUT HER BOYFRIEND REFUSED. BRIDGETTE ACCEPTED THE DEFEND-

ANT'S OFFER (T. 363).

WHILE BRIDGETTE WAS IN THE BATHROOM PUTTING ON HER NIGHTGOWN, SHE TESTIFIED THAT THE DEFENDANT ENTERED AND TRIED TO LIFE IT, WHICH SHE RESISTED (T. 371).

THE DEFENDANT THEN TOOK BRIDGETTE INTO THE BEDROOM WHERE HE HIT HER ON THE BUTTOCKS WITH A CLOTHES HANGER (T. 381), THEN COMMITTED SEX ACTS ON HER (T. 389-395).

SHE CONSIDERED RUNNING AWAY, BUT COULDN'T BECAUSE HER SON WAS THERE AND SHE DIDN'T WANT TO LEAVE HIM (T. 383).

LATER, THE DEFENDANT TOOK BRIDGETTE BACK TO HER MOTHER'S HOUSE (T. 399). HER BOYFRIEND AND SISTER TOOK HER TO THE RAPE TREATMENT CENTER (T. 401) WHERE SHE WAS EXAMINED (T. 403) AND TOLD BOTH THE DOCTOR (T. 404) AND DETECTIVE TABER (T. 405) WHAT HAD HAPPENED.

CELESTE HOLMES LIVED WITH THE DEFENDANT AT THE TIME OF THE INCIDENT (T. 452). THAT EVENING, SHE SAW BRIDGETTE EXIT THE BATHROOM, THE DEFENDANT BEHIND HER (T. 461). CELESTE WENT INTO THE LIVING ROOM, WHILE THEY WENT TO THE BEDROOM (T. 463). SHE LATER WENT TO THE BEDROOM AND SAW BRIDGETTE ON THE BED, NAKED AND CRYING (T. 467). THE DEFENDANT ASKED HER IF SHE WANTED TO SUCH BRIDGETTE'S NIPPLES WHICH SHE REFUSED (T. 468). SHE THEN LEFT. WHEN THE POLICE CAME TO ARREST THE DEFENDANT, THE DEFENDANT ASKED CELESTE TO "STICK BY HIM" (T. 477).

TEJUANA BERRY, 24 AT TIME OF TRIAL (T. 536), TOOK BRIDGETTE TO THE RAPE TREATMENT CENTER. YEARS BEFORE WHEN THE DEFENDANT LIVED AT HOME WITH THE FAMILY, THE DEFENDANT HAD PERFORMED SEX ACTS WITH HER (T. 543, 545, 547, 549).

LILI MAY BERRY HAD BEEN MARRIED TO THE DEFENDANT (T. 560). SHE SAW MARKS ON BRIDGETTE'S BUTTOCKS AT THE RAPE TREATMENT CENTER (T. 563). HER DAUGHTER, TEJUANA, HAD, YEARS BEFORE RUN AWAY AFTER SHE SAID THAT THE DEFENDANT ATTEMPTED TO HAVE SEX WITH HER (T. 568).

DETECTIVE THOMAS TABER OBTAINED SPECIMEN SAMPLES TAKEN FROM BRIDGETTE

AT THE RAPE TREATMENT CENTER (T. 582), INTERVIEWED BRIDGETTE (T. 583), SAW MARKS ON HER BUTTOCKS (T. 592) AND OBTAINED A FORMAL STATEMENT FROM BRIDGETTE (T. 587).

HE THEN OBTAINED A SEARCH WARRANT FOR THE DEFENDANT'S APARTMENT (T. 593) WHICH HE SERVED (T. 596) SEIZING SEVERAL ITEMS (T. 605) INCLUDING WHITE POWDER (T. 607).

HE OBTAINED A FORMAL STATEMENT FROM CELESTE HOLMES (T. 618). HE ADVISED THE DEFENDANT OF HIS "RIGHTS" (T. 621, 622) AND WAS PRESENT DURING DETECTIVE SIMMONS INTERVIEW OF THE DEFENDANT (T. 624).

LEONARDO BLACKAR EXAMINED BRIDGETTE AT THE RAPE TREATMENT CENTER (T. 630). HE INTERVIEWED HER (T. 633) AND SAW MARKS ON HER BUTTOCKS (T. 635).

CRIME LAB TECHNICIAN WALTER BADIE FOUND THE PRESENCE OF COCAINE ON ITEMS TAKEN FROM THE DEFENDANT'S APARTMENT (T. 671).

SEROLOGY CRIME LAB TECHNICIAN TERESA MERIT TESTIFIED THAT NO SPERM WAS FOUND ON THE SWABS/SPECIMENS TAKEN FROM BRIDGETTE (T. 690).

DETECTIVE DAVID SIMMONS TESTIFIED THAT HE INTERVIEWED THE DEFENDANT (T. 714) AND THAT THE DEFENDANT WAS ADVISED OF HIS "RIGHTS" (T. 718) AND SIGNED A WRITTEN FORM STATING SO (T. 722).

THE DEFENDANT THEN GAVE A STATEMENT ADMITTING THE ACTS (T. 726).
THIS APPEAL FOLLOWS.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN
DEPARTING FROM THE SENTENCING GUIDE-
LINES ON THE SOLE BASIS OF ABUSE
OF FAMILIAL AUTHORITY AND TRUST WHEN
THE VICTIM WAS 19, DID NOT LIVE WITH
THE DEFENDANT AND WAS NOT IN HIS
CUSTODY

SUMMARY OF THE ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT OUTSIDE (ABOVE) THE SENTENCING GUIDELINES SOLELY ON THE BASIS OF A VIOLATION OF FAMILIAL TRUST. THE VICTIM WAS THE DEFENDANT'S EMANCIPATED 19 YEAR-OLD DAUGHTER WHO DID NOT LIVE WITH THE DEFENDANT. THE CRIME WAS NOT MADE POSSIBLE DUE TO A BREACH OF TRUST, BUT BECAUSE OF THE VICTIM'S FEAR OF PHYSICAL VIOLENCE.

ARGUMENT

I

THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES ON THE SOLE BASIS OF ABUSE OF FAMILIAL AUTHORITY AND TRUST WHEN THE VICTIM WAS 19, DID NOT LIVE WITH THE DEFENDANT AND WAS NOT IN HIS CUSTODY

CHARGED WITH THREE COUNTS OF SEXUAL BATTERY, THE DEFENDANT WAS CONVICTED OF ONLY 1 (IN ADDITION TO POSSESSION OF COCAINE). THE DEFENDANT'S GUIDELINES WAS 4 1/2 TO 5 1/2 YEARS (T. 874).

THE DEFENDANT WAS SENTENCED TO 15 YEARS AND 5 YEARS CONSECUTIVELY, TOTALLING 20 YEARS (T. 385). THE DEFENDANT'S SENTENCE WAS, THEREFORE, QUADRUPLED.

THE SOLE REASON GIVEN FOR GUIDELINES DEVIATION (R. 64) WAS THAT THE DEFENDANT ABUSED HIS FAMILIAL AUTHORITY AND TRUST WITH HIS DAUGHTER.

THE SENTENCING TRANSCRIPT INDICATES THE TRIAL COURT WANTED TO SENTENCE THE DEFENDANT HARSHLY (T. 877) EVEN THOUGH HE STATED HE DID NOT SEE ANY LEGAL GROUNDS (T. 878), DID NOT FEEL HE WAS "CONFINED" TO THE EVIDENCE HE HEARD AT TRIAL (T. 881) AND EVIDENTLY BASED PART OF HIS DEVIATION REASONING UPON THE DEFENDANT'S "PATTERN" OF OFFENSE (T. 883).

THE DEFENDANT WAS CHARGED WITH AND CONVICTED OF SEXUAL BATTERY BY MEANS OF PHYSICAL FORCE NOT LIKELY TO CAUSE SERIOUS INJURY (R. 7).

BRIDGETTE WAS 19 AT THE TIME. SHE DID NOT LIVE WITH THE DEFENDANT. SHE HAD NOT SEEN THE DEFENDANT FOR SOME TIME. SHE WAS NOT IN THE DEFENDANT'S CUSTODY. SHE DID NOT SUBMIT TO THE DEFENDANT BECAUSE HE WAS HER FATHER, BUT BECAUSE SHE DIDN'T WANT TO GET HIT ANYMORE (VIOLENCE) AND WANTED TO RUN BUT COULD NOT LEAVE HER SON (T. 383). UNTIL SHE WAS HIT, SHE REFUSED TO SUBMIT (T. 373).

IN CONTRAST TO THE CASES CITED IN THE COURT'S ORDER, BRIDGETTE WAS NOT A MINOR (19), WAS NOT RETARDED, WAS EMANCIPATED WITH A CHILD OF HER OWN, DID NOT LIVE WITH THE DEFENDANT AND WAS NOT IN HIS CUSTODY. SHE DID

NOT SUBMIT DUE TO MENTAL INCAPACITY OR TENDER AGE OR BECAUSE SHE DEPENDED ON THE DEFENDANT. SHE SUBMITTED BECAUSE SHE HAD REFUSED HIS ADVANCES AND HE HIT HER. THE DEFENDANT'S "FAMILIAL AUTHORITY" DID NOT CAUSE HER TO SUBMIT. VIOLENCE AND THE THREAT OF FUTURE VIOLENCE DID.

THE DEFENDANT SUBMITS THAT HIS SENTENCE WAS AGGRAVATED/GUIDELINES EXCEEDED SOLELY BECAUSE THE VICTIM WAS A RELATIVE. HE SUBMITS THAT THAT IS NOT A CLEAR AND CONVINCING REASON FOR GUIDELINES DEPARTURE. IF IT WERE, ANY WORTHLESS CHECK BETWEEN COUSINS WOULD BE A BASIS FOR DEPARTURE AND A JAIL SENTENCE. A CHILD (OF 18-50) STEALING FROM HIS PARENT COULD BE SENTENCED TO THE STATUTORY MAXIMUM. HOW MANY TEENAGE CHILDREN WHO STEAL FROM THEIR PARENTS (TO SUPPORT A DRUG HABIT OR OTHERWISE) WOULD FACE THE PROSPECT OF PRISON FOR THEIR FIRST CONVICTION, LIKE THIS DEFENDANT (HE HAD NEVER PREVIOUSLY BEEN ADJUDICATED FOR A CRIME).

IN ITS OPINION, THE DISTRICT COURT STATED, IN PERTINENT PART:

IN OUR VIEW THE SAME RULE (AS TO FAMILIAL AUTHORITY) APPLIES NOT WITHSTANDING THAT THE RAPE VICTIM IS THE DEFENDANT'S EMANCIPATED TEEN-AGED DAUGHTER. IT WAS FAMILIAL RELATIONSHIP WHICH BROUGHT THE GIRL, ALONG WITH HER INFANT CHILD, BACK TO HER FATHER'S HOME FOR A VISIT WHERE SHE WAS FORCED TO SUBMIT TO HER FATHER'S ADVANCES UNDER THE THREAT OF VIOLENCE

(A. 1-2)

THE SOLE AUTHORITY CITED IN THE DISTRICT COURT OPINION WAS GOPAUL V. STATE, 536 So.2d 296 (FLA. 3d DCA 1988), A CASE IN WHICH A 19 YEAR-OLD ASSAULTED A NINETEEN-MONTH-OLD BABY COUSIN WHILE BABYSITTING.

THIS COURT IN DAVIS V. STATE, 517 So.2d 670 (FLA. 1987), FOUND GUIDELINES DEVIATION FOR ABUSE OF AMILIAL TRUST IMPROPER IN A CASE WHERE A WIFE KILLED HER HUSBAND WHILE HE WAS SLEEPING IN THE MARTIAL BED FINDING THAT:

IN THE INSTANT CASE, NO PARTICULAR TRUST BESTOWED ON DAVIS BY THE VICTIM FORMED THE DOUNDATION OF THE CRIME; THE CRIME WAS NOT DIRECTLY RELATED TO A SPECIFIC TRUST AS IN THE ABOVE CASES (P. 674).

DAVIS, IN CONTRAST DID NOT TAKE ADVANTAGE OF A POSITION OF AUTHORITY OVER A VICTIM WHO WAS A YOUNG CHILD (P. 674).

LIKewise, IN HALL V. STATE, 517 So.2d 692 (FLA. 1988), THIS COURT FOUND GUIDELINES DEVIATION FOR BREACH OF FAMILIAL TRUST IMPROPER IN A CASE WHERE PARENTS COMMITTED CHILD ABUSE ON THEIR TWO YOUNG CHILDREN.

/IH
ALSO, ODOM V. STATE, 15 FLW D1347 (FLA. 5TH DCA 1990), THE COURT FOUND GUIDELINES DEVIATION FOR BREACH OF FAMILIAL TRUST IMPROPER IN A CASE WHERE THE DEFENDANT WAS THE VICTIM'S STEPDAUGHTER AND VICTIM LIVED WITH THE DEFENDANT.

SINCE THE DISTRICT COURT'S DECISION, THIS COURT HAS RULED IN WILSON V. STATE, 15 FLW S429 (FLA. 1990) THAT AN ABUSE OF A POSITION OF FAMILIAL AUTHORITY IS NOT A CLEAR AND CONVINCING REASON TO DEPART FROM THE SENTENCING GUIDELINES. THIS COURT'S HOLDING ON THE PRECISE QUESTION INVOLVED HERE HAVE BEEN FOLLOWED (IN PETITIONER'S FAVOR) IN THE DISTRICT COURT OPINIONS OF PERKINSON V. STATE, 16 FLW D295 (FLA. 1ST DCA 1991); LONETT V. STATE, 15 FLW D2790 (FLA. 2D DCA 1990); FLETCHER V. STATE, 16 FLW D93 (FLA. 2D DCA 1991); SANDERS V. STATE, 15 FLW D2709 (FLA. 3D DCA 1990); HARRIS V. STATE, 15 FLW D2111 (FLA. 5TH DCA 1990).

THE POSITION ADVANCED BY PETITIONER AND APPROVED BY THIS COURT IN WILSON V. STATE, SUPRA, IS NOW THE LAW (AS SEEN BY THE ABOVE CITATIONS) IN THE STATE OF FLORIDA.

THIS CAUSE MUST BE REMANDED WITH DIRECTIONS TO RESENTENCE THE PETITIONER/DEFENDANT WITHIN THE SENTENCING GUIDELINES.