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AUG 22 1991

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ANTHONY ODELL McLENDON,

PETITIONER,

v.

CASE NO. 78,320

STATE OF FLORIDA,

RESPONDENT.

_____ /

PETITIONER'S INITIAL BRIEF

✓
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PRELIMINARY STATEMENT

Petitioner was the Defendant in the trial court and will be referred to as "Petitioner" or "Mr. McLendon." Respondent was the State of Florida in the trial court and will be referred to as "the State." The record is contained in eight volumes and references to the record will be designated by an "R" followed by the appropriate page number. The Court's Order postpones its decision on jurisdiction. Petitioner requests this Court to accept jurisdiction as this case was certified to be of great public importance.

STATEMENT OF THE CASE AND FACTS

On July 20, 1988, Petitioner was indicted for one count each of first degree murder, burglary with an assault and grand theft in the third degree. (R. 1017-1019). The trial of the case began on December 6, 1988. (R. 31).

On December 9, 1988, the jury returned a verdict of guilty as to all three charges. (R. 1102). An advisory sentence was returned on December 13, 1988 recommending life imprisonment without the possibility of parole for twenty-five years. (R. 1110).

A guidelines scoresheet was filed on the burglary with an assault and the grand theft. (R. 1118). Fifteen points were added for death or severe victim injury. (R. 1118). The guidelines called for 3-1/2 - 4-1/2 years Florida State Prison, but the trial court sentenced Petitioner on the burglary with an assault to life imprisonment and on the grand theft to five years. All terms of imprisonment were to run consecutively. (R. 1118).

The trial court's written reason for the upward departure was, "Defendant's scoresheet does not take into consideration that Defendant also stands convicted for murder in the first degree." (R. 1118).

On January 10, 1989, a timely notice of appeal was filed. (R. 1123).

On June 28, 1991, the Second District Court of Appeal certified to this Court as a question of great public importance whether it was proper to exceed the guidelines based upon the unscored capital felony.

SUMMARY OF THE ARGUMENT

Petitioner was convicted of first degree murder, burglary with an assault and grand theft. Petitioner was sentenced on the murder to life imprisonment without the possibility of parole for twenty-five years.

A guidelines scoresheet was drawn up on the burglary and grand theft. The trial court departed upward from the sentencing guidelines based upon the contemporaneous murder conviction.

The upward departure was for an invalid reason. Victim injury is scoreable, and was scored on the guidelines scoresheet, and the trial court departed for a reason already taken into consideration by the guidelines.

Therefore, this Court should reverse and remand with instructions to resentence Petitioner on the burglary with an assault within the applicable guidelines.

ARGUMENT

IN SENTENCING FOR A FELONY WHERE THERE IS
A CONTEMPORANEOUS CONVICTION OF AN UNSCORED
CAPITAL FELONY, IS IT PROPER TO DEPART
BASED ON THE DEFENDANT'S CAPITAL CONVICTION
WHEN THE APPLICABLE GUIDELINES PROVIDE THAT
VICTIM INJURY IS SCOREABLE

The trial court erred when it departed upward from the sentencing guidelines. This Court should reverse and remand with instructions to impose a guideline sentence on the burglary with an assault.

On July 20, 1988, Petitioner was indicted for one count each of first degree murder, burglary with an assault and grand theft in the third degree. (R. 1017-1019). The trial of the case began on December 6, 1988. (R. 31).

On December 9, 1988, the jury returned a verdict of guilty as to all three charges. (R. 1102). An advisory sentence was returned on December 13, 1988 recommending life imprisonment without the possibility of parole for twenty-five years. (R. 1110).

A guidelines scoresheet was filed on the burglary with an assault and the grand theft. (R. 1118). Fifteen points were added for death or severe victim injury. (R. 1118). The guidelines called for 3-1/2 - 4-1/2 years Florida State Prison, but the trial court sentenced Petitioner on the burglary with an assault to life imprisonment and on the grand theft. All terms of imprisonment were to run consecutively. (R. 1118).

The trial court's written reason for the upward departure was, "Defendant's scoresheet does not take into consideration

that Defendant also stands convicted for murder in the first degree." (R. 1118).

Rule 3.701(d)(7), Florida Rules of Criminal Procedure, states that "[v]ictim injury shall be scored for each victim physically injured during a criminal episode or transaction." The only victim injury in Petitioner's case was the murder, and fifteen points, representing death or sever victim injury, were added to Petitioner's guideline scoresheet. (R. 1118).

Although this Court has held that a contemporaneous unscored capital felony conviction is a valid reason for an upward departure from the sentencing guidelines, Hansbrough v. State, 509 So.2d 1081 (1987) and Livingston v. State, 565 So.2d 1288 (1988), the cases predate the amendment to Rule 3.701(d)(7) allowing victim injury to be scored for the contemporaneous capital felony conviction.

In Petitioner's case, not only was the victim injury scoreable, but it was, in fact, scored on the guidelines scoresheet. Then, the trial court departed upward from the guidelines for the identical murder that already was scored on the guidelines.

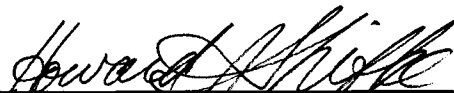
This Court has held that "[f]actors already taken into account in calculating the guidelines score can never support departure." State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). Since the murder was taken into account in calculating the guidelines, it cannot support the departure sentence in this case.

Therefore, the trial court erred when it departed upwards from the sentencing guidelines based upon the contemporaneous murder conviction. This Court should reverse and remand with instructions to resentence Petitioner to a guideline sentence on the charge of burglary with an assault.

CONCLUSION

Based upon the foregoing arguments and authorities, this Court should reverse and remand with instructions to resentence Petitioner to a guideline sentence on the charge of burglary with an assault.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Initial Brief has been furnished to Stephen A. Baker, Esquire, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, by United States Mail, this 19th day of August, 1991.



HOWARD J. SHIFKE