

IN THE SUPREME COURT OF FLORIDA

LUIS AYALA,

Petitioner,

v.

SC08-0725

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the District Court. Respondent, therefore, offers the following as a statement of the case and facts.

Luis Ayala appeals his convictions of three counts of attempted first-degree murder with a firearm, two counts of aggravated battery with great bodily harm with a firearm, and shooting from a vehicle following an incident that occurred in July 1995. Because he fled to Mexico, Mr. Ayala was not arrested until April 2004 and not tried until November 2004. On appeal, he contends that the trial court erred by permitting the State to introduce testimony from his wife in violation of the marital privilege and by imposing an upward departure sentence without proper findings of fact by the jury. We affirm the evidentiary ruling without comment. We also affirm Mr. Ayala's sentences, but write to explain why his sentences are constitutionally permissible. (footnotes omitted).

In the early morning hours of July 2, 1995, several people were drinking at the Blue Jeans bar in Apopka. One person testified that while he was sitting at the bar, Mr. Ayala came up and spoke to him. When he asked Mr. Ayala to leave him alone, Mr. Ayala poked him in the chest and yelled at him. As a result, Mr. Ayala and his friends were escorted from the bar. Later in the evening, the man who had the confrontation with Mr. Ayala, walked out to the parking lot with some friends. While they stood outside talking, a small blue car drove through the parking lot several times. Suddenly, gunfire erupted from the car's open passenger window. Mr. Ayala was identified by witnesses as the driver and

only person in the car. Three people were hit by the shots, two of whom were seriously injured.

Vickie Salazar, who was married to Mr. Ayala at the time of the shootings, testified that at that time, Mr. Ayala drove a blue two-door car. Ms. Salazar testified that Mr. Ayala was not in Mexico in June 1995 for his nephew's first communion as he claimed, but was in Apopka on July 1 and 2, 1995. On the morning of July 2, 1995, Ms. Salazar noticed that there was a hole in the passenger door of Mr. Ayala's car and that the passenger window was broken. After making these observations, Ms. Salazar spoke with Mr. Ayala. Following their conversation, Ms. Salazar and Mr. Ayala took the car to a friend's house and covered it with a tarp. Ms. Salazar then retrieved a gun from Mr. Ayala and turned it over to the Orange County Sheriff's Department. An FDLE lab analyst testified that several bullet casings found in Mr. Ayala's car, a bullet found at the scene, and a bullet extracted from one of the victims were fired from the gun that Ms. Salazar turned over to the sheriff's department.

In contrast, Mr. Ayala, a native of Mexico and an illegal immigrant, testified that he was in Mexico in June 1995 to attend his nephew's first communion. Mr. Ayala said that he did not return to the United States until June 1997, and was not at Blue Jeans on the night of the shooting. He also testified that the gun was not his.

The jury found Mr. Ayala guilty on all counts. The jury also found that Mr. Ayala possessed and used a firearm during the commission of the crimes. A sentencing hearing was held before the Honorable Richard Conrad in December 2004. Judge Conrad found four reasons for an upward sentence departure: (1) the offenses were violent and committed in an especially cruel

manner, (2) the offenses created a substantial risk of death or great bodily harm to many people, (3) the victims sustained extraordinary physical and mental injury, and (4) there were multiple victims. Judge Conrad departed from the 1994 sentencing guidelines and imposed departure sentences of concurrent terms of life in prison on counts one, two, and three; thirty years in prison on counts four and five; and fifteen years in prison on count six. Three-year minimum mandatory sentences for counts one through five were also imposed for the use of a firearm.

Mr. Ayala filed a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b), arguing that one of the trial court's reasons for an upward departure, that there were multiple victims, was not a valid basis to depart under section 921.0016, Florida Statutes (1994). Mr. Ayala also contended that the trial court's findings regarding sentence aggravators violated his right to trial by jury as explained in Appendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Judge Conrad granted Mr. Ayala's motion, struck the "multiple victims" aggravator, and ordered a new sentencing hearing.

When Judge Conrad became unavailable to conduct the resentencing, the case was transferred to the Honorable C. Alan Lawson. Over the objection of defense counsel, a new sentencing hearing was held before a newly impaneled jury that heard both arguments from counsel and witnesses' testimony. The jury found evidence beyond a reasonable doubt to support two aggravating factors: (1) that Mr. Ayala created a substantial risk of death or great bodily harm to many persons, and (2) that his acts caused extraordinary physical or emotional trauma or permanent physical injury. Based on these

findings, Judge Lawson resentenced Mr. Ayala to the same upward departure sentences as had originally been imposed.

Following resentencing, Mr. Ayala filed a second rule 3.800(b) motion to correct sentence. Mr. Ayala argued that under Shull v. Dugger, 515 So. 2d 748 (Fla. 1987), the trial court was required to resentence him to a guidelines sentence and was not authorized to impanel a new jury and conduct a new sentencing hearing. The trial court denied Mr. Ayala's motion, concluding:

In Shull, the court held that when all of the reasons stated by the trial court in support of a departure sentence are reversed by an appellate court, resentencing following remand must be within the presumptive guidelines sentence and the trial court may not enunciate new reasons for a departure sentence. Shull, 515 So. 2d 748. The purpose of the holding in Shull is to prevent an after-the-fact justification for a previously imposed departure sentence. Jones v. State, 559 So. 2d 204, 206 (Fla. 1990). However, the holding in Shull is not applicable in the instant case for several reasons. First, this Court did not impose the new departure sentences based on new reasons. The reasons for the new departure sentences were the same as two of the aggravating circumstances used as grounds for the initial departure sentence. Second, this Court did not find all the reasons for the initial departure sentences invalid. See Bell v. State, 522 So. 2d 989, 991 (Fla. 1st DCA 1988). Only one reason (multiple victims) was determined to be invalid as a justification

for a departure sentence and was stricken. Third, this Court did not rule on the merits of the remaining reasons for the initial departure sentences. See Viera v. State, 532 So. 2d 743, 744 (Fla. 3d DCA 1988). It merely found that the method of imposing the departure sentences without a jury verdict was improper. Finally, Shull is not controlling because the trial court, not the appellate court, reviewed the grounds for the initial departure sentences in a Rule 3.800(b) motion. For the reasons stated, the Court correctly imposed upward departure sentences based on the findings of a jury.

This appeal followed.

Ayala v. State, 976 So. 2d 43, 44-46 (Fla. 5th DCA 2008).

In ruling on Ayala's sentencing claim, the Fifth DCA held:

Because we conclude the error here is harmless, we need not decide if the remedy utilized was authorized. As the Supreme Court has recognized, while an Apprendi/Blakely error is one of constitutional significance, the commission of a constitutional error at trial alone does not entitle a defendant to an automatic reversal. Indeed, "most constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). The Supreme Court has concluded that the "[f]ailure to submit a sentencing factor

to the jury, like failure to submit an element to the jury, is not structural error" and is therefore subject to harmless error analysis. Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006). Under a harmless error analysis, we must determine if the record "demonstrates beyond a reasonable doubt that a rational jury" would have found the existence of the sentencing enhancement factor(s). Galindez, 955 So. 2d at 523.

On the record before us, we conclude that any error in not having the original jury make the findings needed to determine the sentence enhancements was harmless. The undisputed evidence at trial conclusively demonstrated that "[t]he offense created a substantial risk of death or great bodily harm to many persons" and one or more of the victims "suffered extraordinary physical or emotional trauma or permanent physical injury" as a result of the crime. See § 921.0016(3)(i) & (l), Fla. Stat. (1995). In fact, in his opening statement, Mr. Ayala's counsel conceded that the victims were gravely injured and that shots were fired into a crowd of people. Mr. Ayala's defense was based solely on identity and alibi. He claimed that he was in Mexico at the time of the crime and that he was misidentified as the shooter. (footnote omitted)

Because we conclude that the Apprendi/Blakely error was harmless, we need not consider whether the remedy utilized, the impaneling of a new sentencing jury, is authorized under Florida law or not. For these reasons, we affirm Mr. Ayala's convictions and sentences.

Id. at 47-48.

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. Respondent files the

instant jurisdictional brief in response to Petitioner's brief on jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. The decision under review does not expressly affect a class of constitutional or state officers.

ARGUMENT

THIS COURT SHOULD DECLINE TO
ACCEPT JURISDICTION IN THIS
MATTER.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iii). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly affects a class of constitutional or state officers."

Petitioner claims that the decision below affects circuit judges, state's attorneys, and public defenders because the district court below found that the trial court's impaneling of a new jury was harmless error. However, in its opinion, the Fifth DCA found that it did not need to reach the question regarding whether impaneling a new sentencing jury is authorized under Florida law because any error in doing so was harmless based upon the facts of the case. Ayala v. State, 976 So. 2d at 47-48. The holding in Ayala addresses neither the necessity nor the propriety of impaneling a new jury. Thus, the District Court's decision in this case fails to "expressly affect" a class of constitutional or state officers. Cf. School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985) (the term "expressly" within the context of constitutional provision allowing the Supreme Court to take

jurisdiction of a cause in which the district court opinion "expressly affects a class of constitutional officers" means within the district court opinion). The Fifth DCA's opinion instead addressed whether the particular facts of the case made the alleged error harmless. The district court below addressed Ayala's claim in a context which does not compromise any class of constitutional or state officers. The district court's factual determination below is not one which affects other circuit judges, state attorneys, or public defenders.

Accordingly, this Court should decline to accept jurisdiction in this matter as Petitioner has not demonstrated the opinion below expressly affects a class of constitutional or state officers.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been furnished by delivery to counsel for Petitioner Meghan A. Collins, at 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this 12th day of May, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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