

**IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA**

CASE No.: 1D13-3731

FREDRICK VERNEL JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Fredrick Jennings, (“Mr. Jennings”) by and through the undersigned counsel and pursuant to Rule 9.140(b)(D) Florida Rules of Appellate Procedure, hereby appeals the judgment and sentence in case number 2011-CF-12678. This Court has jurisdiction over the instant appeal pursuant to Rule 9.110(b), Florida Rules of Appellate Procedure. Venue is proper in this Court pursuant to Section 35.043, Florida Statutes. Finally, the Notice of Appeal in this case was timely filed, as it was within thirty (30) days of July 23, 2013. *See Fla. R. App. P. 9.110(b).*

The Appellee, the State of Florida, will be referred to as the “State.” The trial court which rendered the judgment and sentence against Mr. Jennings will be referred to as the “trial court.” Citations to the record on appeal will be made by the letter “R.” followed by the appropriate volume and page number.

QUESTIONS PRESENTED

(1) Did the trial court illegally sentence the Appellant where the trial court failed to review the required criteria when considering sentencing the Appellant as a youthful offender?

(2) Did the trial court violate the Appellant’s Eighth Amendment right against cruel and unusual punishment where its sentence of thirty-five (35) years in prison is grossly disproportionate?

STATEMENT OF CASE

On November 21, 2011, Mr. Jennings was arrested and charged via information. (R. 1. at 1). On December 5, 2011, Mr. Jennings was charged by Amended Information with Armed Robbery in violation of Florida Statute 812.13(2)(A). (R. 1. at 19). On January 29, 2013, Mr. Jennings entered a plea of guilty. (R. 1. at 84). On February 20, 2013, Mr. Jennings, *pro se*, filed a notice of revocation and withdrawal of plea. (R. 1. at 87). On March 18, 2013, Mr. Jennings retained counsel and filed an amended motion to withdraw his plea of guilty. (R. 1. at 150). On March 21, 2013, the trial court entered an order granting the amended motion to withdraw plea of guilty.

On June 18, 2013, Mr. Jennings entered a new plea of guilty. (R. 1. at 160). On July 23, 2013, the trial court conducted a sentencing hearing in which Mr. Jennings was sentenced to thirty-five (35) years in state prison. (R. 1. at 162).

STATEMENT OF FACTS

Mr. Jennings was seventeen years old on the date of the robbery for which he ultimately entered a plea of guilty. (R. 2 at 248). Mr. Jennings committed the robbery with Edward Littleton (“Mr. Littleton”), who was twenty-two years old at the time of the robbery. (R. 2. at 256). While he was not charged, an employee of

the store, Lavontat Anderson (“Mr. Anderson”), who was working at the Family Dollar store during the robbery, was an integral part of the robbery. (R. 2 at 251).

During the commission of the armed robbery, Mr. Jennings carried a firearm. (R. 2 at 249). However, at no point during the robbery did Mr. Jennings have any ammunition in his gun or on his person. (R. 2. at 248). Mr. Jennings failed to bring any ammunition to the robbery because the robbery was staged and therefore there was no need to have any ammunition. (R. 2. at 250). Mr. Jennings did not have any intention or concerns about anyone getting hurt. (R. 2. at 251).

Mr. Littleton carried a loaded firearm. (R. 2. at 256). During the commission of the crime, Mr. Littleton forced an employee, Willie Johnson, to open the safe at the front of the store. (R. 2. at 256). Once the money was retrieved, Mr. Johnson and Mr. Littleton attempted to leave the store only to be stopped by the police (R. 2. at 257). During an attempt to flee, Mr. Littleton was shot by police but survived. (R. 2. at 259).

On August 8, 2013, Mr. Littleton entered a plea of guilty to armed robbery and was sentenced to twenty-five years in state prison. On June 18, 2013, Mr. Jennings entered a plea of guilty. (R. 1. at 160). Mr. Jennings was eligible for a youthful offender sentence. (R. 2. At 285). On July 23, 2013, just a few weeks before Mr. Littleton was sentenced, the trial court conducted a sentencing hearing

for Mr. Jennings. During this sentencing hearing, the judge ultimately failed to consider the youthful offender factors in making his determination:

Trial court: Having considered very carefully your full admission here in Court today, having considered very carefully the testimony of the witnesses, as well as the statement or the letter of the victim . . . juvenile sanctions and a youthful offender sentence is wholly inappropriate.

R. 2. at 289.

At no point during the sentencing hearing did the judge review the common law criteria in determining whether Mr. Jennings should be sentenced as a youthful offender. Based upon the pre-sentence investigation report, Mr. Jennings minimum permissible sentence was 37.7 months. (R. 1. at 171). Further, Mr. Jennings had never been convicted, or even charged, with a felony before this instant case. (R. 1. at 171). Ultimately, Mr. Jennings was denied a youthful offender sentence and was sentenced to thirty-five (35) years in state prison. (R. 1. at 162).

SUMMARY OF THE ARGUMENT

In this instant case, the trial court declined to sentence Mr. Jennings as a youthful offender. While the determination of sentencing a youthful offender is at the discretion of the trial court, it is mandatory the trial court consider certain criteria to aid in its determination of whether to classify a defendant as a youthful

offender. In this instant case, the trial court wholly failed to consider any of the criteria in its determination. Therefore, the sentence was illegal.

Further, the sentence imposed by the trial court is a direct violation of the Appellant's Eighth Amendment right against cruel and unusual punishment where the sentence was grossly disproportionate based upon the excessive harshness of the penalty imposed in comparison to Mr. Jennings co-defendant's sentence and other jurisdiction's sentences based on the same crime.

ARGUMENT

- I. MR. JENNINGS WAS DENIED HIS EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WHERE MR. JENNINGS' SENTENCE WAS GROSSLY DISPROPORTIONATE BASED UPON THE EXCESSIVE HARSHNESS OF THE PENALTY IMPOSED IN COMPARISON TO MR. JENNINGS CO-DEFENDANT'S SENTENCE AND OTHER JURISDICTION'S SENTENCES BASED ON THE SAME CRIME.**

A. Standard of Review

A sentence imposed by a district court is reviewed by applying a deferential abuse of discretion standard. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Mixed questions of fact and law that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of fact but conducting a de novo review of the constitutional

issue. *Walker v. State*, 957 So. 2d 560 (Fla. 2007); *Buenoano v. Singletary*, 74 F.3d 1078, 1083 (11th Cir. 1996).

B. Argument on the Merits

The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments. *Solem v. Helm*, 463 U.S. 277, 285-286 (1983). The prohibition against cruel and unusual punishment also recognizes the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Ford v. Wainwright*, 477 U.S. 399 (1986). In discerning those “evolving standards,” the court looks to objective evidence of how our society views a particular punishment today. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982).

Both the Florida and United States Supreme Courts recognize that a criminal sentence must be proportionate to the crime for which the defendant is being sentenced, lest it violates the Eighth Amendment of the United States Constitution. *Solem v. Helm*, 463 U.S. 277, 290 (1983). Here, Mr. Jennings’ Eighth Amendment right was violated when he was disproportionately sentenced to thirty-five (35) years in prison.

The Eighth Amendment “prohibits not only barbaric punishments” but also extreme sentences that are grossly disproportionate to the crime. *Ewing v.*

California, 538 U.S. 11 (2003). It is well established that this narrow proportionality principle applies to noncapital sentences. *Id.*

Cases addressing the proportionality of sentences fall within two general classifications. *Graham v. Florida*, 560 U.S. 48 (2011). The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case; the second has used categorical rules to define Eighth Amendment standards. *Id.*

A court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277 (1983).

A court must begin by comparing the gravity of the offense and the severity of the sentence “[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality” the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions If this comparative analysis “validates an initial judgment that [the] sentence is grossly disproportionate,” the sentence is cruel and unusual. *Graham*, 560 at 48.

A. Gravity of the offense and the harshness of the penalty

In this instant case, Mr. Jennings does not argue that the offense is a serious one. However, the harshness of the penalty of thirty-five years in prison is overwhelmingly excessive. While Mr. Jennings was convicted of armed robbery, Mr. Jennings at no time posed a physical threat during the commission of the robbery due to the fact that his gun was never loaded, and he had no ammunition on his person at any time during the commission of the robbery.

The mandatory minimum, if Mr. Jennings was not designated as a youthful offender, is ten years in prison. However, it is important to note that Mr. Jennings' pre-sentence investigation report calculated Mr. Jennings recommended sentence to be slightly higher than three years (R. 2. at 171). This was Mr. Jennings' first time ever being charged with a felony. Further, Mr. Jennings was the youngest of the perpetrators. This information was not considered when the trial court sentenced Mr. Jennings to an excessive thirty-five year prison sentence.

B. The sentences imposed on other criminals in the same jurisdiction.

When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. *Downs v. State*, 572 So.2d 895 (Fla.1990), *cert. denied*, 502 U.S. 829, (1991); *Slater v. State*, 316 So.2d 539 (Fla.1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis. *Cardona v. State*, 641 So.2d 361 (Fla.1994), *cert.*

denied, 513 U.S. 1160 (1995). Disparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime. *Hayes v. State*, 581 So.2d 121 (Fla.1991).

The most unsettling fact about Mr. Jennings' sentence is that his fellow perpetrator, Mr. Littleton, received only a twenty-five year prison sentence while Mr. Jennings received a thirty-five year prison sentence. Comparing the two, Mr. Littleton was twenty-two years old and carried a loaded AK-47 assault rifle during the commission of this crime. In comparison, Mr. Jennings was a seventeen year old child at the time and did not possess any ammunition in his gun or have any ammunition on his person throughout the entirety of the crime.

Mr. Littleton and Mr. Jennings both pled guilty, yet received substantially different punishments. Applying the above facts Mr. Littleton, undoubtedly, was more culpable than Mr. Jennings. However, Mr. Littleton received a less sentence by ten years. Even if the Court were to find that Mr. Littleton was equally as culpable as Mr. Jennings, this disparate sentencing is relevant to a proportionality argument and such disparate sentencing is unjustified. *Id.*

Based upon this comparison between co-defendants, Mr. Jennings' sentence is extremely excessive and is grossly disproportionate. Further, Mr. Jennings has a disparate sentence compared to his co-defendant's sentence even though Mr.

Jennings is less culpable. Thus, Mr. Jennings' sentence is cruel and unusual in violation of his Eighth Amendment right.

C. Sentences imposed for commission of the same crime in other jurisdictions.

Further, comparing armed robbery sentences in Duval County to Orange County shows a significant difference in the harshness of the penalty imposed in Mr. Jennings' case. An identical case to Mr. Jennings' case was the case of Gary Mixon. In Orange County case number 2008-CF-000674-A-O, Mr. Mixon was charged and convicted of armed robbery, which occurred when he was seventeen years old. Mr. Mixon was sentenced to five years in prison.

In comparison, Mr. Jennings' sentence is seven times the length of Gary Mixon's sentence despite both being seventeen years old and convicted of the same crime. Therefore, Mr. Jennings' sentence is facially excessive in comparison to similar cases in neighboring jurisdictions. In totality, Mr. Jennings' sentence was excessively harsh, also, sentences imposed in Duval county for the same crime are much less harsh than Mr. Jennings sentence (specifically his adult co-defendant, Mr. Littleton, who received ten fewer years than Mr. Jennings), and comparing other jurisdiction's sentences for the same crime are much less harsh than Mr. Jennings' sentence.

Based upon the foregoing, Mr. Jennings' sentence was grossly disproportionate and in violation of his Eighth Amendment right against cruel and unusual punishment.

II. MR. JENNINGS' SENTENCE WAS ILLEGAL WHERE THE TRIAL COURT FAILED TO REVIEW THE REQUIRED CRITERIA IN DETERMINING WHETHER OR NOT MR. JENNINGS SHOULD BE SENTENCED AS A YOUTHFUL OFFENDER UNDER FLORIDA STATUTE 958.04.

A. Standard of Review

This Court reviews a claim that a conviction was entered in violation of due process for fundamental error. *Jaimes v. State*, 51 So. 3d 445, 451 (Fla. 2010).

B. Argument on the Merits

Section 958.021 of Florida Statutes provides the legislative intent of the Youthful Offender Act:

The purpose of this chapter is to improve the chances of correction and successful return to the community of youthful offenders sentenced to imprisonment by providing them with enhanced vocational, educational, counseling, or public service opportunities and by preventing their association with older and more experienced criminals during the terms of their confinement. It is the further purpose of this chapter to encourage citizen volunteers from the community to contribute time, skills, and maturity toward helping youthful offenders successfully reintegrate into the community and to require youthful offenders to participate in substance abuse and other types of counseling and programs at each youthful offender institution. It is the further intent of the Legislature to provide an additional sentencing alternative to be used in the discretion of the court when dealing with offenders who have demonstrated that they can no longer be handled safely as juveniles and who require more substantial limitations upon their liberty to ensure the protection of society.

Florida Statute 958.021.

The court may sentence as a youthful offender any person:

- 1) Who is at least 18 years of age . . .
- 2) Who is found guilty or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the law of this state, a felony if the offender is younger than 21 years of age at the time sentence is imposed; and
- 3) Who has not previously been classified as a youthful offender under the provisions of this act; however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act.

Florida Statute 958.04.

Application of the Youthful Offender Act to any particular defendant is within the discretion of the trial judge because the trial judge “is in the best position to determine whether sentencing under the act is the most desirable treatment for that defendant. *Ellis v. State*, 475 So.2d 1021, 1023 (Fla. 2d DCA 1985). However, the trial court’s sentencing discretion under the Youthful Offender Act is not unbridled. *McKinney v. State*, 27 So.3d 160, 161 (Fla. 1st DCA 2010).

The trial court may, **after reviewing the criteria**, decline to sentence a statutorily qualified person as a youthful offender. *Nolte v. State*, 726 So.2d 307, 309 (Fla. 2d DCA 1998) (emphasis added). But, like any other exercise of judicial discretion, the trial court’s sentencing decision must be supported by logic and reason and must not be based upon the whim or caprice of the judge. *McKinney*, 27 So.3d at 161.

The criteria the *Nolte* court is referencing is found under former Florida Statute 958.04(2) (Supp.1980), which provided in pertinent part:

(2) The following criteria shall be considered in determining whether to classify as a youthful offender a person who meets the requirement of subsection (1):

- (A) The seriousness of the offense to the community and the protection of the community
- (B) Whether the offense was committed in an aggressive, violent, premeditated, or willful manner
- (C) Whether the offense was against

persons or property (D) the sophistication and maturity of the defendant, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living (E) The record and previous history of the defendant.

Florida Statute 958.04(2) (Supp.1980).

While Florida Statute 958.04(2) (Supp.1980) has since been replaced with Florida Statute 958.04 (2009), the criteria from the previous Florida Statute is still in effect. That is, a judge is mandated to review the criteria when making its determination on whether to sentence a defendant as a youthful offender.

In *Pressley v. State*, 73 So.3d 834 (Fla. 1st DCA 2011), the appellate court held that the trial court's refusal to consider sentencing the defendant as a Youthful Offender violated the defendant's due process rights and was fundamental error. *Id.* The appellate court specified that while the trial court has discretion in whether or not to sentence a defendant under the Youthful Offender Act, review of "the criteria" is mandatory before this decision is made. *Id.* "The trial court may, **after reviewing the criteria**, decline to sentence a statutorily qualified person as a youthful offender. *Id.* (emphasis added).

In *Postell v. State*, 971 So.2d 986 (Fla. 5th DCA 2008) the trial court judge failed to consider a Youthful Offender sentence. *Id.* The appellate court reversed and remanded for resentencing after it referenced the *Nolte* case, which requires a

judge to review the criteria. *Id.* It can be inferred that when the appellate court stated “that the youthful offender sentence was never considered by the trial court, therefore we reverse”, that the appellate court is requiring the trial court to review the criteria in consideration of application of a Youthful Offender sentence. *Id.*

Important to note, the *Pressley* case is one of many cases that was disposed under the updated Florida Statute 958.04(2009), yet, the appellate court still required the trial court to consider the criteria from Florida Statute 958.04(2)(Supp. 1980). *See Salter v. State*, 77 So.3d 760 (Fla. 4th DCA 2012).

In this instant case, the trial court refused to sentence Mr. Jennings as a Youthful Offender. (R. 2. at 291). While the trial court is given discretion on whether or not to sentence a defendant as a Youthful Offender, this discretion is not unfettered and must be supported by logic. The trial judge here failed to review the criteria as required under *Pressley* and *Nolte*. As stated above, the trial judge only took into consideration the plea admission of Mr. Jennings, testimony of his family, and the statement of the victim before deciding that a Youthful Offender sentence was “wholly inappropriate.” (R. 2. at 289).

Under *Pressley* and *Nolte*, the trial court was mandated to review the criteria set out in 958.04(2) (Supp. 1980) when considering sentencing Mr. Jennings as a Youthful Offender. In applying the criteria to Mr. Jennings, it would have been illogical not to sentence Mr. Jennings as a Youthful Offender. For example, the

criteria requires a consideration of the sophistication and maturity of the defendant. Mr. Jennings was seventeen years old at the time of the robbery. Mr. Jennings was still in high school, and the fellow perpetrators were both much older and sophisticated. This factor would weigh in favor of Mr. Jennings being sentenced as a Youthful Offender.

Another factor to consider is the lack of any previous criminal history. Mr. Jennings had never been charged or convicted with any felony whatsoever. Further, based upon the lack of criminal history of Mr. Jennings, the pre-sentence investigation report recommended a sentence of only 37.7 months in prison. (R. 2. at 171). This factor weighs in favor of the judge sentencing Mr. Jennings as a youthful offender.

Based upon the aforementioned case law, specifically *Pressley* and *Nolte*, Mr. Jennings was entitled to a trial court judge to review the criteria on the record at sentencing under Florida Statute 958.04(2) (Supp. 1980) in making the determination of whether or not Mr. Jennings is entitled to be sentenced as a Youthful Offender. “We do not suggest that Appellant is necessarily entitled to resentencing as a youthful offender, but rather, Appellant is entitled to be sentenced at a proceeding at which the trial court takes into consideration an option of a youthful offender sentence.” *Pressley*, 73 So.2d at 162. Therefore, this Court

should reverse and remand back to the trial court for resentencing applying the proper criteria.

CONCLUSION

In summary, Mr. Jennings' sentence is in violation of his constitutional rights. First, Mr. Jennings' Eighth Amendment right against cruel and unusual punishment was violated where his sentence was grossly disproportionate to the crime based upon the extreme harshness of the penalty imposed in comparison to Mr. Jennings co-defendant's sentence and other jurisdictions' sentences based on the same crime.

Second, Mr. Jennings' sentence was illegal where the trial court failed to review the required criteria in determining whether or not Mr. Jennings should be sentenced as a youthful offender under Florida statute 958.04.

In light of the foregoing, Mr. Jennings' sentence violates (1) Florida Statute 958.04; and (2) the Eighth Amendment to the United States Constitution and corresponding Art. I, § 17 of the Florida Constitution.

Mr. Jennings respectfully requests that this Honorable Court reverse the Sentence entered in this cause, remand this case for resentencing and grant any such other and further relief as this Honorable Court deems just and proper.

DATED this 3rd day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail, this 3rd day of December 2013, to:

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/s/ Benjamin C. Haynes
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CERTIFICATE OF COMPLIANCE

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

/s/ Benjamin C. Haynes
Benjamin C. Haynes, Esquire