IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CHRISTIAN FLEMING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D05-3411

Opinion filed April 17, 2012.

An appeal from the Circuit Court for Columbia County.
E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

This case was remanded from the Florida Supreme Court in State v. Fleming, 61 So. 3d 399 (Fla. 2011), for a determination as to whether an Apprendi violation in connection with the appellant's guidelines departure sentence was

harmless error, where those reasons were not submitted for a jury finding. A review of the record indicates that there is no reasonable doubt that the jury would have found two of the stated departure reasons: permanent physical injury to the victim and an offense committed in order to prevent or avoid arrest. Therefore the Apprendi violation is harmless as to those two stated reasons and those reasons remain as permissible bases for the guidelines departure. Section 921.001(6), Florida Statutes, (Supp. 1994) requires that the appellant's departure sentence be upheld.

Upon his conviction for aggravated battery, shooting within a building, and false imprisonment, the appellant was sentenced in 1997, well before the United States Supreme Court's rulings in Apprendi 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). The appellant was later resentenced after the Apprendi and Blakely decisions, and in State v. Fleming, supra, the Florida Supreme Court established that the Apprendi and Blakely rulings should have been applied in the resentencing proceeding. However, as the Florida Supreme Court had previously established in Galindez v. State, 955 So. 2d 517 (Fla. 2007), a violation of the Apprendi requirement that sentencing enhancement factors be determined by a jury may be harmless, if it appears beyond a reasonable doubt that a rational jury would have found the stated factors. See also Washington v.

Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed.2d 266 (2006). In State v. Fleming, supra, the Florida Supreme Court remanded the present case to this court, for application of a harmless error analysis in accordance with Galindez.

At the trial in this case it was established that the offenses were committed while the appellant was visiting at the victim's home. The appellant shot the victim and the bullet passed through the victim's ear, producing what was described as a "big gaping hole." It was further established that the appellant prevented the victim from leaving to obtain medical care until the victim agreed to a contrived explanation which would not implicate the appellant in the shooting. When the victim was finally able to leave, she went to a hospital where surgery was performed. The victim suffered permanent scarring at the site of the wound and a partial loss of hearing.

The trial court provided several reasons for its departure from the guidelines recommendation on resentencing, including the fact that the victim suffered permanent physical injury, and that the appellant committed an offense to avoid arrest or to impede or prevent prosecution. Upon consideration of the evidence presented at trial, in connection with the appellant's defense and the jury's verdict as to the charged crimes, it is clear that if those departure reasons had been submitted for a jury finding, the jury would also have found those sentencing factors. Even though the resentencing court provided further departure reasons for

which the Apprendi violation is not clearly harmless, the existence of any permissible departure reason requires that the departure sentence be upheld on appeal. See §921.001(6), Fla. Stat. (Supp. 1994).

Accordingly, the trial court's denial of the appellant's Motion under Rule 3.800, Florida Rules of Criminal Procedure, in which the appellant raised the Apprendi – Blakely issue and sought another resentencing proceeding, is affirmed.

THOMAS and CLARK, JJ., CONCUR; BENTON, C.J., DISSENTS WITH OPINION.

BENTON, C.J., dissenting.

The last time this case was before us— noting the state conceded error as to all four grounds cited for upward departure—we reversed and remanded for resentencing, without considering any question of harmless error. See Fleming v. State, 31 Fla. L. Weekly D1112 (Fla. 1st DCA Apr. 21, 2006). In his initial brief, filed with this court on October 18, 2005, Mr. Fleming argued that the failure to submit for the jury's determination any factual allegation pertinent to a sentencing factor required resentencing, and that errors of this kind were not subject to harmless error analysis. In its answer brief, filed on February 9, 2006, the state agreed that one reason the sentencing court gave for departure reflected a mistake of law and that the other three departure grounds were all based on facts found by the trial court and not the jury. The state did not argue that the failure to submit to the jury factual questions pertinent to sentencing factors was harmless error.

On June 26, 2006, the United States Supreme Court held that "[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 subject to harmless-error analysis. Washington v. Recuenco, 548 U.S. 212, 221-22 (2006). Following suit, the Florida Supreme Court likewise held, in Galindez v. State, 955 So. 2d 517, 521-22 (Fla. 2007), that harmless error analysis was appropriate in such circumstances.

Our supreme court issued an order on February 11, 2009, specifically

directing the parties in the present case not to address the issue of whether any sentencing factor allegedly found in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004), or both, was harmless beyond a reasonable doubt under Galindez. See State v. Fleming, No. SC06-1173, 2009 WL 435357 (Fla. Feb. 11, 2009).[1] The court later explained that it disallowed briefing on harmless error so that it would clearly have jurisdiction to resolve the conflict in the district courts on the question of whether Apprendi and Blakely apply to resentencing proceedings held after Apprendi issued where the resentencing was not final when Blakely issued. See State v. Fleming, 61 So. 3d 399, 408-09 (Fla. 2011).

Because the only briefs filed in this court antedate the decisions in Recuenco and Galindez, fundamental fairness and the Sixth Amendment dictate that Mr. Fleming should be afforded the opportunity to be heard through counsel on the question of whether the failure to apply Apprendi and Blakely was harmless. Accordingly, the court should issue an order granting Mr. Fleming leave to submit

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[1] The order read:

> In our order of January 9, 2008 (which the present order supersedes and replaces as to briefing), we specifically directed the parties to address the issue of whether any sentencing factor alleged to violate Apprendi and/or Blakely is harmless beyond a reasonable doubt under Galindez v. State, 955 So. 2d 517 (Fla. 2007). However, upon further consideration, the parties are specifically directed to not address this issue.

State v. Fleming, No. SC06-1173, 2009 WL 435357 (Fla. Feb. 11, 2009).

a supplemental brief addressing the question of harmless error before acting. On this procedural ground, I respectfully dissent from today's decision.