

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2008

WILLIE PERRY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-4291

[February 20, 2008]

PER CURIAM.

Appellant Willie Perry timely appeals convictions of kidnapping, carjacking with a firearm, sexual battery, and aggravated fleeing and eluding a police officer.

We are not persuaded by Perry's argument that the trial court erred in restricting defense counsel's closing argument as to whether co-defendant Johnson could have been tried as an adult. Though defense counsel was not allowed to specifically argue that Johnson could have been tried as an adult, counsel made it clear to the jury that Johnson was not prosecuted in the same way Perry was. Even if there was error, no prejudice resulted.

We remand to correct a sentencing error. The jury found that Perry actually possessed a firearm during the course of the armed kidnapping and the carjacking. For his possession of a firearm, the trial court imposed a ten-year mandatory minimum for armed kidnapping and a consecutive ten-year mandatory minimum for carjacking with a firearm. Case law interpreting section 775.087(2)(d), Florida Statutes, holds that imposition of consecutive mandatory minimum sentences of any duration is prohibited in a case involving a single criminal episode during which a firearm is used but not fired. *See Church v. State*, 967 So. 2d 1073 (Fla. 2d DCA 2007); *see also State v. Sousa*, 903 So. 2d 923 (Fla. 2005); *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2007). As the firearm in the instant case was never fired, and the kidnapping and carjacking were not separated by any temporal or spatial breaks, the trial

court erred in sentencing Perry to consecutive ten-year mandatory minimum sentences as they were part of a single criminal episode.

We therefore affirm Perry's convictions but reverse for re-sentencing as to the consecutive ten-year mandatory minimum sentences for armed kidnapping and carjacking with a firearm.

Affirmed and Remanded.

STONE, POLEN and MAY, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Peter M. Weinstein, Judge; L.T. Case No. 01-13374 CF10A.

Carey Haughwout, Public Defender, and Richard B. Greene, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Mark J. Hamel, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing