

Third District Court of Appeal

State of Florida

Opinion filed August 28, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1551
Lower Tribunal No. 18-3192

Ernesto Carballo,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Diane V. Ward,
Judge.

Carlos J. Martinez, Public Defender and Susan S. Lerner, Assistant Public
Defender, for appellant.

Ashley Moody, Attorney General and Kayla Heather McNab, Assistant
Attorney General, for appellee.

Before SALTER, LOGUE and SCALES, JJ.

PER CURIAM.

Ernesto Carballo appeals his sentences following his conviction on four charges of criminal mischief. We affirm.

As to guilt and the nature of the offenses, Carballo admitted to a detective that he threw nails all around neighborhoods in Coral Gables over a period of six weeks because he felt disrespected and bad. Some of these incidents were videotaped by residents in the affected neighborhoods.

Prior to trial, Carballo rejected two plea offers: (1) pretrial intervention with restitution of \$3,237.37 (computed based on damage to numerous tires belonging to residents' vehicles), and (2) probation with the condition of 100 hours of community service.

The jury returned guilty verdicts on a first-degree misdemeanor and three second-degree misdemeanors. The trial court sentenced Carballo to 60 days of jail time for each of the second-degree misdemeanors and 364 days of jail time for the first-degree misdemeanor, with all four sentences to be served concurrently.

Carballo's appeal contends that those sentences are vindictive. We review the issue de novo. See Williams v. State, 225 So. 3d 349, 353 (Fla. 3d DCA 2017). We apply the factors enunciated by the Florida Supreme Court in Wilson v. State, 845 So. 2d 142 (Fla. 2003), to determine whether the totality of circumstances gives rise to a presumption of vindictiveness. The record before us does not support a presumption of vindictiveness when assessed under Williams and Wilson. See also

Concepcion v. State, 188 So. 3d 5, 9 (Fla. 3d DCA 2016) (If the totality of circumstances does not give rise to a presumption of vindictiveness, the burden of proof never shifts to the State and the defendant must satisfy his or her burden to prove actual vindictiveness).

Carballo has not carried his burden to prove actual vindictiveness, and the sentences are thus affirmed.