

65,492

IN THE SUPREME COURT OF FLORIDA

CASE NO.

FILED

SID J. WHITE

JUN 21 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

LEVI WHITEHEAD,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF CITATIONS.....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-3
QUESTION PRESENTED.....	4
ARGUMENT.....	5-8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
Ex Parte Bosso, 41 So.2d 322 (Fla. 1949).....	6
Lewis v. State, 154 Fla. 825, 14 So.2d 149 (1944).....	6
Pederera v. State, 401 So.2d 823 (Fla. 3d DCA 1981).....	7
Robbins v. State, 413 So.2d 84 (Fla. 3d DCA 1982).....	6
Strickland v. State, 437 So.2d 150 (Fla. 1983).....	5, 6, 7, 8

OTHER AUTHORITIES

Section 782.04(2), Fla.Stat. (1981).....	1, 5
Section 775.082(3)(a), Fla.Stat (1981).....	1, 5
Section 775.087.....	6, 8
Section 775.087(1)(a).....	1
Section 775.087(2), Fla.Stat. (1981).....	1, 5

INTRODUCTION

The Petitioner, The State of Florida, was the Appellee/ Cross Appellant in the District Court of Appeal of Florida, Third District and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, Levi Whitehead, was the Appellant/Cross Appellee in the District Court and the Defendant in the trial court. The parties will be referred to in this brief as they stand before this Court. The symbol "A" will be utilized to designate the Appendix to this Brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent's conviction for second degree murder with a firearm was affirmed. Pursuant to said conviction the defendant was sentenced to a three year mandatory minimum term, pursuant to §775.087(2), Fla.Stat. (1981) (A1-2).

By cross appeal, Petitioner contended that, since a firearm was involved, the second degree murder conviction is reclassified by Section 775.087(1) (a), Section 782.04 (2), Fla.Stat. (1981), to a life felony, punishable by no less than thirty years. Section 775.082(3) (a), Fla.Stat. (1981) (A. 2).

The District Court, while acknowledging that the use of a firearm is not an essential element of second degree murder, held that in order for reclassification to be properly imposed, a factual determination is required to be made by the jury to ascertain whether the use of the firearm was an essential element of the crime convicted of. The District Court then found that since the jury verdict found that the firearm was an essential element of the crime convicted of, only the mandatory minimum sentence could properly be imposed and that "double" ^hentrenchment was not statutorily warranted. (A2-3,5).

In the dissent's view, the jury's finding that the defendant committed the crime of second-degree murder with a firearm obligated the trial court to effectuate both prongs of Section 775.087, not, as the majority suggests, choose one or the other. Under subsection (1) of Section 775.087, the jury's finding required that the felony be reclassified from a felony of the first degree to a life felony and that the defendant be sentenced to no less than thirty years in prison; under subsection (2) of Section 775.087, the jury's finding required that the defendant be made ineligible for parole for three years of the sentence imposed. The dissent saw nothing in this statute evincing an intent on the part of the Legislature to make its independent provisions mutually exclusive. The reclassification provision makes every felony in which a weapon

or firearm is used (except those in which such use is an essential element) a one-step higher crime, subject to greater punishment; the three-year minimum mandatory provision simply insures that in the case of certain described felonies--murder being one--in which a firearm is possessed, the person convicted shall serve at least three years of his sentence before becoming eligible for parole, even if the overall sentence is greater because of the reclassification of the crime.

Accordingly, the dissent would have reversed the fifteen-year sentence and remanded this cause to the trial court for the imposition of a sentence of either life imprisonment or a term of years not less than thirty, with the additional requirement that the defendant must serve three years of whichever sentence is imposed before becoming eligible for parole. (A 4).

The Petitioner timely filed a Motion for Rehearing and Rehearing En Banc which was denied, with two dissents, on June 8, 1984. (A 6). A notice invoking the ^{dis}cretionary review jurisdiction of this Court was filed on June, 1984.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN STRICKLAND v. STATE, 437 So. 2d 150 (Fla. 1983)?

ARGUMENT

THE DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT
IN THE PRESENT CASE EXPRESSLY AND
DIRECTLY CONFLICTS WITH THIS COURT
DECISION IN STRICKLAND v. STATE, 437
So.2d 150 (Fla. 1983).

In Strickland v. State, 437 So.2d 150 (Fla. 1983) an information was filed against the Defendant charging him with first degree murder with a firearm, contrary to Sections 775.087(2), 777.04 and 782.04 Florida Statutes (1981). After a jury trial, Defendant was convicted of attempted first degree murder with a firearm. He was then sentenced to life imprisonment, with the requirement that he serve the mandatory minimum three years before being considered for parole.

On appeal to the district court, he contended that his life sentence was illegal since the maximum sentence for the offense of attempted first degree murder was thirty years. Defendant's sentence was affirmed on the ground that Section 775.087 Florida Statutes (1979) provided that any first degree felony when committed with a weapon or firearm is reclassified as a life felony unless the use of a weapon or firearm is an essential element of the offense. Since use of a weapon or firearm is not an essential element of attempted first degree murder, the District Court reasoned, the reclassification to a life felony was proper.

This Court affirmed the District Court's holding that pursuant to 775.087, a first degree felony shall be reclassified to a life felony if a weapon or firearm is used so long as the use of the weapon or firearm is not an essential element of the charged crime. This Court then looked at the statutory elements of the offense and found the use of a firearm not to be an essential element of the crime of attempted first degree murder thereby affirming the sentence.

Although the opinion does not state whether the mandatory minimum sentence was challenged by Defendant, it is clear under prevailing case law that by this Court not addressing the issue the sentence was legal. This is clear since if the total sentence imposed was illegal because an excess of the maximum allowed, there exists fundamental error, Ex Parte Bosso 41 So.2d 322 (Fla. 1949), which is subject to court review ex mero muto. Lewis v. State, 154 Fla. 825, 14 So.2d 149 (1944), and which if patent on the record before the Court can be corrected on appeal despite the failure of Appellant to raise the issue. Robbins v. State, 413 So.2d 84 (Fla. 3d DCA 1982).

Therefore, Strickland v. State, supra, holds that a jury's finding that a defendant committed a reclassifiable crime with a firearm, where the firearm was not an essential

element of the charged crime, obligates the trial court to effectuate both prongs of Section 775.087 thereby mandatory not only reclassification but also the imposition of the mandatory minimum three years before being eligible for parole.

In the case sub judice, the Third District, in order to avoid "double enhancement" (A. 3) did not follow the proper test to determine whether the use of a firearm is an essential element of the crime charged. The District Court, instead of looking at the statutory elements of the offense second degree murder to determine if the use of the firearm was an essential element of the crime charged, looked at the particular facts of the case. By so doing, the District Court found that use of a firearm was an essential element in the case sub judice of the crime charged. Therefore the District Court found reclassification improper.

The State submits that the District Court's analysis expressly and directly conflicts with Strickland v. State, supra. In the case sub judice Respondent was convicted of second degree murder. Pursuant to the statutory elements of said offense, the use of a firearm is not an essential elements of the offense. See Pederera v. State, 401 So.2d 823 (Fla. 3d DCA 1981). Therefore, the jury's specific finding that Respondent used a firearm in the commission of

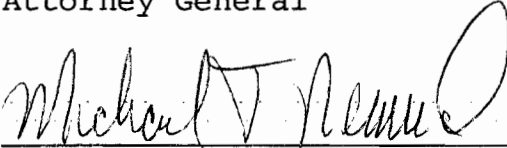
the second degree murder (A. 5), is sufficient to, and obligates the trial court to effectuate both prongs of Section 775.087, not to choose one or the other. Strickland v. State, supra.

CONCLUSION

Based upon the foregoing, Petitioner requests this Court to grant discretionary review in this cause.

Respectfully submitted,

JIM SMITH
Attorney General

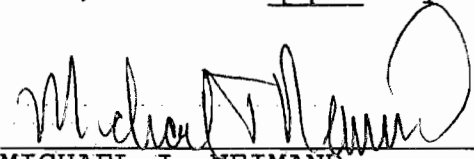


MICHAEL J. NEIMAND
Assistant Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128

(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Jurisdiction was served by mail to Arthur B. Calvin, Esq., Attorney for Respondent, 1504 N.W. 14th Street, Miami, Florida 33125, on this 19 day of June, 1984.



MICHAEL J. NEIMAND
Assistant Attorney General

dw/