IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,492

THE STATE OF FLORIDA,

Petitioner

vs.

LEVI WHITEHEAD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON MERITS

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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 the State and the Defendant. The symbol "A" will be utilized to designate the Appendix to this Brief. The symbol "R" will be used to designate the Record on Appeal and the symbol "T" will designate the transcript of proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by indictment with the first degree premeditated murder on one Alonzo Williams, on October 3, 1981, by shooting and killing him with a pistol, in violation of sections 782.04, and 775.087, Florida Statutes. (R.5). The Defendant was tried before a jury and convicted of the lesser offense of second degree murder with a firearm. (R.283). After ordering a presentence investigation (R.286), the trial court, on August 30, 1982,

sentenced the Defendant to fifteen years in prison with a minimum mandatory sentence of three years. (R.290).

Defendant's conviction for second degree murder with a firearm was affirmed. However the State, by Cross-Appeal, 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.1-2).

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, either reclassification or the mandatory minimum sentence could properly be imposed and that "double" enhancement was not statutorily warranted. (A.2-3, 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 notice invoking the discretionary review jurisdiction of this Court was filed on June, 1984. On December 13, 1984, this Court granted review.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT, WHERE THE JURY FOUND THE DEFENDANT COMMITTED THE SECOND DEGREE MURDER WITH A FIREARM, AND THE TRIAL COURT ONLY IMPOSED A 3 YEAR MANDATORY SENTENCE AND DID NOT RECLASSIFY THE SECOND DEGREE MURDER CONVICTION FROM A FIRST DEGREE FELONY TO A LIFE FELONY, AS REQUIRED BY SECTION 778.087, FLORIDA STATUTES.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT, WHERE THE JURY FOUND THE DEFENDANT COMMITTED SECOND DEGREE MURDER WITH A FIREARM AND THE TRIAL COURT ONLY IMPOSED A 3 YEAR MANDATORY SENTENCE AND DID NOT RECLASSIFY THE SECOND DEGREE MURDER CONVICTION FROM A FIRST DEGREE FELONY TO A LIFE FELONY AS REQUIRED BY SECTION 775.087, FLORIDA STATUTES.

The Defendant was convicted of second degree murder, which under Section 782.04(2), Florida Statutes is classified as a felony of the first degree. However, the jury found and the trial court convicted Defendant of using a firearm in the commission of the second degree murder. (R.283). Under Section 775.087(1)(a), Florida Statutes, the use of a firearm during the commission of a felony, except when such use is an essential element of the crime convicted of,[1] reclassifies the charge from a felony of the first degree to a life felony. Under Section 775.082(3)(a), Florida Statutes, a person who has been convicted of a life felony, may be punished by a term of imprisonment for life

[1]Crimes which this section does not apply are those offenses which already provides an enhanced penalty for use of a firearm. Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981); i.e.: Aggravated assault is an enhancement of the crime of assault. Williams v. State, 358 So.2d 187 (Fla. 4th DCA 1978); Armed robbery is an enhancement of the crime of robbery. Perry v. State, 425 So.2d 1195 (Fla. 1st DCA 1983); Aggravated battery is an enhancment of the crime of battery, whereas there is no enhancement of the crime of murder. Pedrera v. State, 401 So.2d 823 (Fla. 3d DCA 1983).

or for a term of years not less than 30. Under section 775.087(2), Florida Statutes, a person convicted of an enumerated felony, which murder is one, while in possession of a firearm, shall be sentenced to a minimum term of imprisonment of three years. The trial court sentenced the defendant to fifteen years and imposed the three year mandatory sentence. (R.290).

By way of Cross-Appeal, the State challenged the Defendant's sentence on the ground that the jury's finding that the Defendant committed the second degree murder with a firearm obligated the trial court to reclassify Defendant's conviction of second degree murder with a firearm from a first degree felony to a life felony and thereby enhance his sentence as well as to impose the three-year mandatory sentence for the possession of the firearm during the felony. The District Court of Appeal, Third District, disagreed and held that a jury finding that a firearm was used in the commission of a felony, in which the use of the firearm was not an essential element of the offense, only permits the trial court to either reclassify defendant's sentence or impose the three mandatory sentence; and that "double enhancement" is not statutorily warranted." The Dissent on the other hand, would have found that 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. The Dissent based its view on its reading of statute, which reading found nothing in the Statute evincing an intent on the part of the legislature to make its independent provisions mutually exclusive. The dissent found the reclassification section subjects the offender to a greater punishment, while the three-year maximum mandatory provision simply insures that persons convicted of certain felonies, murder being one, in which a firearm is possessed, the offender will serve at least three years of his sentence before becoming eligible for parole, regardless if the sentence is greater due to reclassification.

The State respectfully urges this Court to adopt the dissenting opinion as its own. In support thereof, the State submits that this Court has already implicitly accepted the dissent's view and the other District Courts of Appeal have already explicitly followed the dissents' view.

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 firarm, 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. Steinhorst v. State, 412 So.2d 3332 (Fla. 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 mandating not only reclassification but also the imposition of the mandatory minimum three years being eligible for parole.

The foregoing analysis is further supported by this Court's recent decision in Miller v. State, 9 FLW 506 (Fla. Dec. 6, 1984). In Miller, the issue was whether the reclassification provisions of Section 775.087(1), Florida Statutes, applied where the defendant was convicted of a lesser included offense. After answering that question

affirmatively, this Court upheld the trial court's sentence which not only reclassified but also imposed the three year minimum mandatory sentence. Therefore, this Court, having implicitly held that jury's finding that a defendant committed a felony with a firearm obligates the trial court to effectuate both prongs of Section 775.087, Florida Statutes, should quash the Third District's opinion and remand this cause to the trial court for presentencing in accordance with Section 775.087, Florida Statutes.

The dissent's interpretation has been explicitly accepted by the other District Courts of Appeal. In Blanton v. State, 388 So.2d 1271 (Fla. 4th DCA 1980), rev. denied, 399 So.2d 1140 (Fla. 1981), the Court found that the two subsections of 775.087 serve two different functions. Subsection (1) provides for reclassification of a felony to a higher degree where a weapon or firearm is used and the use of the weapon had not already resulted in the offense being upgraded to a higher degree. Subsection (2) does not act to enhance the penalty because the purpose is to provide for mandatory minimum imprisonment for a person who has been convicted of certain crimes while possessing a firearm. The mandatory minimum sentence provision does not reclassify the offense to a higher degree nor authorize any greater maximum penalty for the crime. The foregoing distinction has been adopted by the First District in Vause v. State, 425 So.2d

52 (Fla. 1st DCA 1982) and by the Fifth District in Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983). See also Aikens v. State, 423 So.2d 593 (Fla. DCA 1982)(rejecting appellant's argument that subsections (1) and (2) are to read in pari materia).

Finally, on the same day this Court accepted jurisdiction of the case sub judice, the First District in Brown v. State, No. AZ-407 (Fla. 1st DCA Dec. 13, 1984), when faced with the exact issue as sub judice, expressly rejected the Third District's decision in Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984). The First District found that the functions of the two subsections as distinguished by Blanton v. State, supra, were valid. In addition thereto, the Court found the further distinction that the legislature did not intend the two subsections to be alternative methods of enhancement as they are not addressed to congruent sets of crimes. The Court said that subsection (1) applies to all felonies while subsection (2) applies only to certain felonies named therein and this indicated to the Court that the subsection were drafted to serve separate functions in deterring and punishing both the presence of firearms during the commission of felonies in general and the use of firearms in certain felonies.

In the case sub judice, the Defendant was convicted of

second degree murder with a firearm. Pursuant to the statutory elements of the office, the use of a firearm is not an essential element of second degree murder. Therefore, the jury's specific finding that Petitioner used a firearm in the commission of the second degree murder, is sufficient to, and obligates the trial court to effectuate both prongs of Section 775.087, and not to choose one or the other. Miller v. State, supra; Strickland v. State, supra. See also: Brown v. State, supra; Blanton v. State, supra; Perez v. State, supra and Vause v. State, supra.

CONCLUSION

Based upon the foregoing argument and citations of authority, the State respectfully requests this Court to quash the decision of the Third District Court of Appeal and directs that Court to reverse defendant's fifteen year sentence and remand 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.

Respectfully submitted,

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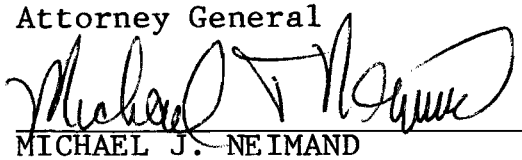

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF ON THE MERITS was furnished by mail to ARTHUR B. CALVIN, ESQ., Attorney for Respondent, 1504 N.W. 14th Street, Miami, Florida 33125, on this 31 day of December, 1984.

MICHAEL J. NEIMAND
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