IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 66,212

WILLIAM FOREMAN, :

Respondent, :
Cross-Petitioner. :

:

RESPONDENT/CROSS-PETITIONER'S BRIEF ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Deborah K. Brueckheimer
Assistant Public Defender
Criminal Courts Complex
5100 - 144th Avenue North
Clearwater, Florida 33520

TOPICAL INDEX

CITATION OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 66,212
WILLIAM FOREMAN,	:	
Respondent,	:	
Cross-Petitioner,	:	
_____	:	

STATEMENT OF THE CASE

On July 29, 1983, the State Attorney in and for the Sixth Judicial Circuit, Pinellas County, Florida, filed an information which it amended on December 1, 1983, charged the Appellant William Foreman, with Sexual Battery contrary to Florida Statute 794.011(4)(b) and Burglary/Assault contrary to Florida Statute 810.02, both of which occurred on July 9, 1983 (R8,9,18,19). Mr. Foreman entered a plea of not guilty; and on December 6 and 7, 1983, he had a jury trial with the Honorable William Walker, Circuit Judge, presiding (R10,58). On December 7, 1983, the jury deliberated and found Mr. Foreman guilty as charged on both counts (R31,32).

A Motion for New Trial was filed on December 9, 1983, and denied on January 5, 1984 (R35-37,42). Mr. Foreman was sentenced on January 11, 1984, to twelve years of imprisonment with credit for one hundred eighty-seven days time served on each count, said

counts to run concurrent with each other (R44-52). The recommended guideline sentence was exceeded (R49-52). Mr. Foreman timely filed his Notice of Appeal on January 19, 1984 (R53).

On appeal Mr. Foreman attacked the giving of the instruction of stealth as being prima facie evidence of entering to commit a crime when the State had alleged that Mr. Foreman had intended to commit an assault or battery in the burglary information. Mr. Foreman also attacked his sentence under Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1983), and the trial court's deviation from the recommended guideline sentence.

The Second District Court of Appeals agreed that Wicker applied to Mr. Foreman's case, but held that the application of the guidelines dictated a different sentencing procedure. Instead of vacating the judgment and sentence for the sexual battery, the Second District Court of Appeals ordered that the sexual battery be treated as the primary offense and the burglary assault be dropped to a simple burglary and treated as an additional offense for scoresheet purposes. The Second District Court of Appeals then certified the question to this Honorable Court as to whether or not a defendant can be sentenced for both a burglary assault and sexual battery when it is the sexual battery that enhances the burglary to a first-degree felony. The Second District Court of Appeals did not address the jury

instruction issue and did not rule on whether or not the reasons given for departure were valid. The State filed a Notice to Invoke Discretionary Jurisdiction on that certified question, and Mr. Foreman filed a Cross-Notice.

STATEMENT OF THE FACTS

Patricia Jean McCormack testified that she, her husband Robert, and her severely retarded daughter, live in a house in St. Petersburg (R229,230). On the evening of July 8 and morning of July 9, Mrs. McCormack worked the three to eleven shift at the hospital, arriving home at 11:45 p.m.; and her husband worked the 11:00 p.m. to 7:00 a.m. shift at his place of employment (R236). After her husband called at 12:30 a.m., Mrs. McCormack went to sleep (R237). It was noted that on that particular night Mrs. McCormack failed to check the back door in the laundry room to make sure it was locked (R238).

At approximately three o'clock in the morning, Mrs. McCormack woke up and saw a figure of a man standing at the bottom corner of the bed (R238). The man was white with wavy hair, tall, and nude (R238,239). Realizing that the man was not her husband, Mrs. McCormack started to sit up and scream (R239). The man then stated that if she screamed he would kill her (R240). Realizing that no one would hear her screaming and that her daughter might wake up, Mrs. McCormack stopped screaming (R240,241). Mrs. McCormack tried to move him off of her, but could not do so (R241). The man then informed her that he had been watching her, that he had asked her ten times to make love with him, and that she had refused every time (R241). Mrs. McCormack stated that such a statement was not true and was unable to determine if she

had ever met this particular man before (R241). When she tried again to push the man away, the man indicated he would get violent (R242). At that point the man did stick his penis in her and kept telling her how much he was enjoying what he was doing, that he could tell her his full name that night, that she could have him arrested the next day, but that it was worth what he was doing (R242). Mrs. McCormack indicated that she was crying almost the whole time with her eyes closed and that the man kept apologizing for making her cry (R243). The man kissed her face and neck (R243).

After about twenty minutes, the man fell asleep on top of her (R244). When she tried to push him off, she acted like she was having a lot of problems breathing (R240). The man asked if she had an asthma problem, and Mrs. McCormack figured that that was as good a reason as any to get the man to leave (R244). When he asked here where her medication was, Mrs. McCormack said that she didn't have any because she had not had a problem in so many years (R245). Mrs. McCormack then asked the man to leave, and he did so (R245). Mrs. McCormack watched him run through the backyard and jump over a back wall into the alley (R245).

Mrs. McCormack noted that the man did not have a shirt on, was carrying his shoes in one hand, and was wearing some blue jeans (R246). Mrs. McCormack then telephoned the police (R246,247). When asked to give a further description of the man,

Mrs. McCormack stated that she could smell alcohol and cigarette smoke on him, knew he was white without tattoos, he did not have a moustache but had not shaved for awhile, and did not have a lot of body hair (R247). She described him as being about as tall as her husband who was 6'1" (R247,248). Mrs. McCormack then stated that although she was given the opportunity to see a picture of a man, she was unable to positively identify him as her assailant (R248). Mrs. McCormack stated that she never saw her assailant's face (R248).

Sergeant Monte Davidek, with the St. Petersburg Police Department, stated that on July 9, 1983, at about 3:38 in the morning, he received a call to respond to a burglary and a rape that had just occurred (R278-280). He met with the alleged victim, Patricia McCormack, and described her condition as being very upset and recently crying (R280). After obtaining a description of the assailant from Mrs. McCormack, Sgt. Davidek broadcast the description over the radio (R288). While he was still at Mrs. McCormack's house, Sgt. Davidek received word that a suspect had been stopped that fit the description (R282). Sergeant Davidek went to the location where he saw two police officers and Mr. Foreman (R282-284). Mr. Foreman fit Mrs. McCormack's description, and he was carrying his shoes in one hand, a shirt in the other hand, and his zipper was open so that you could see the pubic area (R284,285). Mrs. McCormack had

stated that the assailant was a white male in his twenties, about 6'2", about one hundred sixty to one hundred seventy pounds, dark hair down over the ears, three to four days growth of beard, odor of alcohol on his breath. These factors were present with Mr. Foreman (R285).

After seeing Mr. Foreman, Sergeant Davidek went back to Mrs. McCormack's home where further investigation revealed a shoeprint in the soft dirt outside Mrs. McCormack's bedroom (R286). Sergeant Davidek sent for Mr. Foreman's shoes; and upon obtaining the shoes, compared them to the print in the yard (R286). When the shoe was brought to Sergeant Davidek, he compared the shoe to the print in the dirt and found the two to have similar characteristics (R292). In Sergeant Davidek's opinion, Mr. Foreman's shoes made the print in the dirt (R292). After comparing the shoe, Sergeant Davidek broadcast to Officer Fisher that Mr. Foreman should be arrested (R293).

Officer Robert Fisher, with the St. Petersburg Police Department, stated that at approximately 3:52 a.m. he took up a position in the vicinity near the rape victim's home in response to the rape call (R299,300). At about 3:58 a.m., Officer Fisher observed Mr. Foreman walking in a westerly direction (R301,303,304). Mr. Foreman fit the description given as being about 6'2", one hundred sixty to seventy pounds, dark hair over the ears, unshaven with two or three days growth of beard, white

male, no hair on chest (R303). Mr. Foreman was also carrying his shoes in one hand, a T-shirt in the other hand, wearing blue jean cut-offs with his zipper down and no underwear on, and had an odor of alcoholic beverage on his breath (R303). After reading Mr. Foreman his Miranda rights, the officer asked Mr. Foreman where he was coming from and where he was going to (R304-306). Mr. Foreman responded he was coming from Northshore Park and was going home and gave the address (R306). Officer Fisher mentally compared the address with the Foreman's present position and where he had been coming from, and asked Mr. Foreman why he was so far north of his home (R306,307). Mr. Foreman responded that he always zigzagged when he walked (R307). Officer Fisher then asked Mr. Foreman what time it was, and Mr. Foreman indicated it was midnight (R307). The time was actually four o'clock in the morning (R307).

Shortly after stopping Mr. Foreman, a request came over the radio for Mr. Foreman's shoes in order to match them up with a print at the scene (R308,309). Officer Fisher obtained the shoes from Mr. Foreman and gave them to another officer (R309). Shortly thereafter, Officer Fisher arrested Mr. Foreman for involuntary sexual battery (R309). It was noted that Mr. Foreman made several statements to Officer Fisher at the time of stop that made no sense or bore no relationship to the questions Officer Fisher was asking him (R313,314). Mr. Foreman did deny any knowledge about breaking in and raping Mrs. McCormack (R316,317).

Officer Gary Swanhart, a K-9 officer with the St. Petersburg Police Department, stated that he was on active duty on July 9, 1983 (R318,319). Officer Swanhart reported to a rape scene with his dog Magnum (R319,325). Officer Swanhart took Magnum to the area where the assailant had last been seen and Magnum started tracking the scent (R326-328). Magnum and Officer Swanhart scaled the wall in the back of the residence and continued down an alley to a point where Magnum acted a bit confused (R329,330). After a few minutes of scenting the air and the surrounding area, Magnum continued to track the scent (R330,331). Magnum then tracked right up to Mr. Foreman and stopped (R331). In Officer Swanhart's opinion, the scent Magnum was tracking belonged to Mr. Foreman (R331,332).

When asked about Magnum, Officer Swanhart noted that Magnum had since retired due to a nervous condition (R332). When Magnum would go inside a dark building, he would vomit and develop a nervous condition (R332). Officer Swanhart never noticed that the nervous condition interfered with Magnum's ability to track, stating that Magnum had completed several tracks of people who were apprehended out on the street (R333,334). It was also noted that Magnum was not trained as an attack dog and would not eat up people he had tracked (R334,335).

Detective Robert Engelke, with the St. Petersburg Police Department, interviewed Mr. Foreman on the morning of July 9,

1983, in regards to an investigation of a sexual battery upon Patricia McCormack (R357-359). After reading Mr. Foreman his Miranda rights, Mr. Foreman informed the detective that he had purchased and drank a case and a half of beer starting in the afternoon of July 8 and finishing around one o'clock in the morning on July 9 (R359-366,374). He had spent the evening in the Northshore Park area watching softball and playing pool with a friend (R366,377). From there Mr. Foreman proceeded in a zig-zig type pattern home (R367). As he was going down an alley, he looked into the backyard of the victim's home and saw the rear door open (R370). Mr. Foreman entered the back portion of the residence, and saw Mrs. McCormack laying in bed in a nightgown (R370). At this point Mr. Foreman decided to sexually assault the victim (R370). Mr. Foreman undressed; and as he was standing over her without any clothes on, she woke up (R378). Mr. Foreman denied threatening her, but he did state that she was emotional (R370). Mr. Foreman then admitted he engaged in sexual intercourse with her (R370). Mr. Foreman then fell asleep on top of the woman. The next thing he recalled was that the woman was having trouble breathing (R371). She told him that she had asthma, and he asked where she kept her medicine (R371). She stated that she did not have any medicine available; and at that point he got up, put his clothes on, and went out the rear of the residence (R371). As Mr. Foreman started to zigzag back towards

his residence, he was stopped by uniformed officers (R371). When asked why he had gone into the residence, Mr. Foreman responded that he saw the door open (R371,372). Detective Engkle did admit smelling alcohol beverage on Mr. Foreman's breath during the interview (R373).

Crime scene technician Arthur Jakeway stated that on July 9, 1983, he did process the McCormack's residence for fingerprints and lifted several prints from the bedroom floor (R379-386). Fingerprint technician Frank Rinehart examined these lifts but only one latent print was capable of being identified (R386-389). Technician Rinehart compared this one print to Mr. Foreman's prints and noted that the one footprint did not belong to Mr. Foreman (R388-390). It was noted that the location of this particular footprint that was identifiable was in an area of Mrs. McCormack's bedroom that Mrs. McCormack had never seen the assailant walk (R391-394). Mrs. McCormack did admit, however, that she had no idea where the assailant had been walking prior to her waking up (R394,395).

SUMMARY OF ARGUMENT

The issue in this case certified by the Second District Court of Appeals and addressed in Petitioner/State's Brief as to whether or not sexual battery is a lesser included of burglary assault when the assault is the sexual battery, has been recently answered adversely to Mr. Foreman by this court in Wicker v. State, Case Nos. 64,958 and 64,985 (Fla. January 10, 1985)[10 F.L.W. 33].

Respondent/Cross-Petitioner addresses two other issues in his brief: (1) he was entitled to a new trial on the basis of erroneous jury instructions on the burglary charge; and (2) his erroneous sentence under the guidelines. In the first issue Mr. Foreman points out that inasmuch as the State charged him with burglary with the intent to commit an offense therein, to wit: assault or battery; the State was not entitled to the benefit of the "stealthily entered" instruction. Based on recent Florida Supreme Court cases interpreting the burglary charge and appropriate instructions to the jury, the State should not be entitled to the prima facie instruction of stealth unless it fails to allege a particular crime in its information. In regards to the sentencing issue, the guidelines were creatively manipulated by the Second District Court of Appeals and erroneously made the sexual battery the primary offense for conviction purposes. Mr. Foreman argues that first-degree

burglary is the primary offense, and any other resolution would be an ex post facto application of the new sentencing guidelines. Additional reasons given for departure were either already considered on the scoresheet or part of the actual crime itself and could not be considered again or resulted from an erroneous application of the habitual offender statute. Mr. Foreman argues that the habitual offender statute could not be used in his case as he did not have two in-state first-degree misdemeanor convictions or two out-of-state first-degree misdemeanor or felony convictions; and even if the statute did apply, it could not be used to upgrade his felony conviction or double his recommended sentence or justify a departure.

ISSUE I

WHETHER THE DISTRICT COURT ERRED TO THE PREJUDICE OF THE STATE IN VACATING FIRST DEGREE CONVICTION OCCASIONED BY THE RESPONDENT'S ASSAULT OR BATTERY ON THE VICTIM BECAUSE IT OCCURRED DURING THE SAME CRIMINAL EPISODE AS AN INVOLUNTARY SEXUAL BATTERY INVOLVING THE THREATENED USE OF FORCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY?
(As stated by Petitioner)

Inasmuch as this issue has been recently decided by this Honorable Court adversely to Respondent in Wicker v. State, Case Nos. 64,958 and 64,985 (Fla. January 10, 1985)[10 F.L.W. 33]; Respondent has no argument on this issue.

ISSUE II

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY ON ENTERING A STRUCTURE WITH STEALTH AS BEING PRIMA FACIE EVIDENCE OF ENTERING WITH INTENT TO COMMIT A CRIME WHEN THE STATE ALLEGED THAT APPELLANT INTENDED TO COMMIT AN ASSAULT OR BATTERY IN ITS INFORMATION? (As stated by Respondent/Cross-Petitioner)

In its amended information on the burglary charge against Mr. Foreman, the State alleged that Mr. Foreman had unlawfully entered Mrs. McCormack's home "with the intent to commit an offense therein, to with: assault or battery..." (R18). During the jury instruction conference the State asked that the trial court read Florida Statue 810.07 and argued that they need not have alleged"stealthily entered" in order to have the benefit of Florida Statute 810.07 (R411). Mr. Foreman objected to the State being able to use this particular instruction in his case, but the trial court gave the instruction over Mr. Foreman's objections (R410-412,432).

In the case of Bennett v. State, 438 So.2d 1034 at 1035 (Fla. 2d DCA 1983), the Second District Court of Appeals interpreted recent Florida Supreme Court case law as follows:

> We read Waters to stand for three separate, though interrelated, propositions. First, when the state, either by indictment or by information, charges someone with burglary, the state need not allege that the accused intended to com-

> mit a specific offense after the breaking and entering occurs. For example, the state may or may not allege in the charging document that the accused broke and entered with the intent to commit an offense therein, to wit: sexual battery. Second, if the state does not allege that the accused intended to commit a specific offense, section 810.07 may be used as an alternative method to prima facie establish that a defendant has the intent to commit an unspecified offense after the breaking and and entering occurs. Third, if the state charges that a defendant did intend to commit a specific offense after the breaking and entering occurs, then the state must prove that the defendant did in fact intend t commit this offense. Furthermore, when the state does so charge, the proof must be established without the benefit of section 810.07. (Emphasis added.)

In Bennett, the State had charged the defendant with burglary by unlawfully entering a structure "with the intent to commit an offense therein, to with: theft." The State failed to prove that the defendant had intended to commit a theft, and it could not rely on section 810.07 because it had alleged an intent to commit a theft. Therefore, the defendant was entitled to a discharge. See also T.L.J v. State, 449 So.2d 1008 (Fla. 2d DCA 1984).

In Mr. Foreman's case the State alleged in its information that Mr. Foreman had unlawfully entered a structure with the intent to commit the crime of either assault or battery. At this point the State had to prove that Mr. Foreman intended to enter Mrs. McCormack's house to commit either the crime of assault or

battery and it could not utilize section 810.07. Because 810.07 for stealthy entry being prima facie evidence of an intent to commit a crime only applies when no specific offense is alleged in an information charging burglary, the State was not entitled to the 810.07 instruction. Inasmuch as it is impossible to determine whether or not the jury relied on this instruction when convicting Mr. Foreman of burglary (there being evidence that Mr. Foreman saw the open door and entered without intending to commit a crime until after he was inside and saw Mrs. McCormack on the bed (R370-372), it cannot be said that the giving of this instruction was harmless error. The 810.07 instruction was misleading to the jury and improper as a result. See Diez v. State, 359 So.2d 55 (Fla. 3d DCA 1978). Mr. Foreman is entitled to a new trial on the burglary charge.

ISSUE III

DID THE TRIAL COURT AND SECOND DISTRICT COURT OF APPEALS ERR IN SENTENCING MR. FOREMAN UNDER THE GUIDELINES?
(As stated by Respondent/Cross-Petitioner)

According to the guideline scoresheet, Mr. Foreman should have been sentenced to three and one-half to four and one-half years of imprisonment (R496-498). The trial court declared Mr. Foreman a habitual offender and enhanced his sentence to twelve years, departing from the guidelines (R512-515). No reasons for the departure were given at the hearing, and what was to be listed on the scoresheet as reasons for departure was crossed out (R512-515,51).

The first thing to note is that the trial court failed to give its reasons for departing from the guidelines. According to F.R.Cr.P. 3.170(d)11., "Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure." The trial court never gave its reasons for going beyond the guidelines at the hearing (although the State presented many reasons for departure, the trial court never ruled on such reasons), and failed to put down its reasons in writing on the scoresheet as is required (R49,51,512-515). The sentence must be remanded so that the rule requiring written reasons be complied with.

Because the trial court failed to list its reasons for going beyond the guidelines, it is extremely difficult to argue why the trial court should not have gone beyond the guidelines and stayed with the recommended sentence. There were a few arguments presented by the State for departure purposes that will be discussed at this point.

The major argument of the State's is that the scoresheet for life first-degree burglary comes out much more lenient than if first-degree sexual battery had been scored. Since the burglary as defined under F.R.Cr.P. 3.710(d)3. is the primary offense, it is the burglary scoresheet that must be used. Had the sexual battery, however, been the primary offense, then the scoresheet recommended sentence would have been much higher coming in at the seven to nine years range (R49-52,477-481).

This particular problem was recently recognized by the Florida Supreme Court and rectified in F.R.Cr.P. 3.701(d)3. by an amendment. See The Florida Bar Amendment To Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines) 451 So.2d 824 (Fla. 1984). Mr. Foreman, however was sentenced on January 11, 1984, with the original guidelines. Mr. Foreman relied on these original guidelines as approved by the Florida Supreme Court and he had a right to have them applied as written. The amended rule cannot now be applied to Mr. Foreman's case due to the fact that it would result in an increased sentence. To do

so would be an ex post facto application of the rule on Mr. Foreman's sentence. See State v. Williams, 397 So.2d 663 (Fla. 1981); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984), at footnote 3; Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); and Hanabury v. State, Case No. 84-310 (Fla. 4th DCA November 14, 1984)[9 F.L.W. 2393].

The Second District Court of Appeals in its opinion for Mr. Foreman's case tried to get around the ex post facto application of the guidelines in justifying the use of the sexual battery as the primary offense over that of the burglary assault. The Second District Court of Appeals decided that inasmuch as the guidelines scoresheet for burglary failed to have a space for first-degree felony punishable by life, the burglary was only to be considered a first-degree felony. This reasoning then placed the burglary and sexual battery on the same level of offense and necessitated using the sexual battery as the primary offense due to its lower category number.

This reasoning is erroneous in that Mr. Foreman is still guilty convicted of a first-degree felony punishable by life for the burglary assault conviction. The fact that the scoresheet is perhaps defective and has no space for this degree of burglary does not alter Mr. Foreman's conviction for this higher degree, and a burglary assault punishable as a first-degree life felony is a higher statutory degree offense than sexual battery

punishable as a first-degree felony. See Florida Statute 775.082(3)(a)(b), 794.011(4)(b), and 810.02(2). According to the clear meaning of F.R.Cr.P. 3.701(d)3.a), the primary offense was the burglary assault; and Mr. Foreman should be scored accordingly. Any defect inherent in the rules should not be used to the detriment of the accused.

The State also argued several other items to justify a guideline departure such as the following: Mr. Foreman's prior misdemeanor conviction was for exposing himself (R499), the crime was premeditated in nature, the woman had a retarded daughter in the house (R487), and the victim was raped and traumatized by the rape (R487,488). Most of these factors were covered by the guidelines as prior offenses or as being a part of the actual crime - burglary requires intent upon entering the home and rape requires that a woman be sexually assaulted against her will. To ask that the guidelines be departed from because the victim was traumatized by the rape is redundant. The points given for the crime of sexual battery are set high to compensate for the nature of the crime. The same goes for premeditation and burglary. The issue about the mentally retarded daughter was totally immaterial inasmuch as the assailant never mentioned the daughter nor was the daughter ever approached. Thus, the miscellaneous reasons given by the State for departing from the guideline sentence cannot be used by the trial court.

See Mischler v. State, Case No. 84-151 (Fla. 4th DCA October 17, 1984)[9 F.L.W. 2205], in which the court certified the question to this Honorable Court as to whether the circumstances that comprised the crime constitute clear and convincing reasons for departure. The Fourth District Court of Appeals thought it should not, for to allow it to do so would set precedent for a departure in most instances. See also Davis v. State, Case Nos. 84-87, 84-164, and 84-383 (Fla. 4th DCA October 17, 1984)[9 F.L.W. 2221], where the Fourth District Court of Appeals certified the question to this Honorable Court as to whether prior convictions could constitute clear and convincing reasons for departure when the prior convictions had already contributed to the points on the scoresheet. The Fourth District Court of Appeals questioned this use of "double dipping" to depart from the recommended guideline range.

The trial court also declared Mr. Foreman a habitual offender under Florida Statute 775.084 (R515). For several reasons, however, the trial court erred in its enhancement of Mr. Foreman under the habitual offender section.

First of all, the habitual offender statute could not be used in Mr. Foreman's case. Section 775.084 reads in part:

> (1) As used in this act:
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
> 1. The defendant has:

> a. Previously been convicted of a felony in this state;
> b. Twice previously been convicted of a misdemeanor of the first degree in this state or of another qualified offense for which the defendant was convicted after the defendant's 18th birthday;
>
> . . . .
>
> (c) "Qualified offense" means any offense in violation of a law of another state or of the United States that was punishable under the law of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding one year or that was equivalent in penalty to a misdemeanor of the first degree. (Emphasis supplied.)

According to the Rules of Construction in Florida Statute 775.021, penal provisions shall be strictly construed; and when the language is susceptible of differing constructions, it shall be construed most favorably to the accused. Section 775.084 in this case specifically states that two in-state first-degree misdemeanors can be used or two out-of-state convictions for first-degree misdemeanors or felonies can be used to habitualize a defendant. [1] The statute does not say that one in-state first-degree misdemeanor can be used and one out-of-state first-degree misdemeanor or felony can be used, which is what was used in Mr. Foreman's case (R478,508,4509). The statute must be strictly construed and the State cannot read into it a provision that does not come within the provisions (R478,508,509). Thus, the habitual provision does not apply to Mr. Foreman's case.

1. It has already determined that the statute requires two out-of-state convictions and not just one conviction. See Miles v. State, 374 So.2d 1167 (Fla. 2d DCA 1979); and Coots v. State, 426 So.2d 1304 (Fla. 2d DCA 1983).

Should this court disagree and find the habitual provision capable of being used in Mr. Foreman's case, the trial court erred in its application of the provision. The habitual offender statute, as was argued by Mr. Foreman (R478,479), does not increase or upgrade the offense. The section merely changes the maximum sentence for the offense in question. For example, a third-degree felony does not become a second-degree felony; the third-degree felony's sentence is increased by increasing the maximum sentence from five to ten years. See Florida Statute 775.084(4) and F.R.Cr.P. 3.701(d)10. Thus, if a defendant had acquired enough points to go beyond the usual statutory maximum (five years in the case of a third-degree felony), the trial court could have used the habitual offender statute to go by the points up to the point of the new/adjusted statutory maximum (ten years in the case of a third-degree felony). See Cuthbert v. State, Case No. AW-272 (Fla. 1st DCA November 6, 1984)[9 F.L.W. 2311], which agrees with this application of the habitual offender statute. The habitual offender statute, however, in and of itself does not justify exceeding the recommended guideline sentence. Prior convictions and the frequency of some prior convictions are already built into the guideline range. Thus, the trial court erred in using the habitual offender statue to increase the recommended guideline sentence. [2]

2. In Mr. Foreman's case the trial court used the sexual battery scoresheet as a primary offense, upped the primary offense to a life felony based on the habitual offender statute, increased the points on the scoresheet by at least 38 points, and raised the recommended guideline range from seven to nine to nine to twelve. Mr. Foreman, of course, argues that the sexual battery scoresheet should not even have been used in his case; and he would appreciate a ruling by this Court on this matter to prevent the same type of thing reoccurring upon sentencing.

In addition, the trial court erred in finding that Mr. Foreman is a habitual offender because the trial court failed to follow the dictates of Florida Statute 775.084 in declaring Mr. Foreman a habitual offender. According to Florida case law, before a trial court may sentence a defendant as a habitual offender, it must find the enhanced penalty is necessary for the protection of the public and specify in the record the evidence upon which the court relied. Following these mandates affords the defendant an opportunity for meaningful appellate review. See Lee v. State, 410 So.2d 182 at 184 (Fla. 2d DCA 1982); and Ruiz v. State, 407 So.2d 1042 (Fla. 3d DCA 1981). In Thomas v. State, 414 So.2d 525 at 526 (Fla. 1st DCA 1982), the court stated:

> [W]e agree with appellant that when the trial court enhances a statement pursuant to section 775.084, Florida Statute (1979), there must be a finding that, from a preponderance of the evidence, it was necessary for the protection of the public to sentence the appellant to an extended term. (Emphasis added.)

The court in Thomas then vacated and remanded the enhanced sentence based on this failure.

Not only must the trial court state that the enhanced sentence is necessary for the protection of the public, but it must give underlying facts as the basis for the enhanced sentence. Merely, however, referring to a defendant's bad record

is insufficient as the underlying basis for imposing an enhanced sentence. See Fry v. State, 359 So.2d 584 (Fla. 2d DCA 1978).

In our case the trial court failed to specify the underlying facts for declaring Mr. Foreman a habitual offender. The trial court simply stated that Mr. Foreman had a prior sex offense and it would enhance the sentence imposed (R515). Such statements were insufficient to justify an enhancement. Based on the above, the enhanced sentences should be vacated.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, this Honorable Court should follow the logical application of State v. Waters, 436 So.2d 66 (Fla. 1983); and award Mr. Foreman a new trial for the burglary charge based on erroneous jury instructions. Upon resentencing, which will be necessitated by this Court's recent ruling in Wicker, supra, Mr. Foreman should be sentenced according to the recommended guideline sentence with the burglary assault as the primary offense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished by mail to Davis G. Anderson, Jr., Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, January 24th, 1985.

Respectfully submitted,

Deborah K. Brueckheimer

Deborah K. Brueckheimer
Assistant Public Defender