

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
vs. :
WILLIAM FOREMAN, :
Respondent, :
Cross-Petitioner, :
_____ :

Case No. 66,212

FILED
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RESPONDENT/CROSS-PETITIONER'S REPLY BRIEF

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

AND SUMMARY OF ARGUMENT

Respondent/Cross-Petitioner will rely on the Statement of the Case and Facts and Summary of Argument as contained in his initial merit brief.

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)

Mr. Foreman relies on the argument contained in his initial brief for this point.

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)

Mr. Foreman relies on the argument contained in his initial brief for this point.

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)

The State argues that Mr. Foreman was not habitualized and that the record fails to support such a contention. Mr. Foreman disagrees with this conclusion. If this Honorable Court were to find that the Category 2 Sexual Offenses was the proper category (and Mr. Foreman strenuously objects to this conclusion - see his original merit brief), then one must accept the scoresheet prepared for that category (R49).

In preparing this scoresheet, the State used two different colored pens to show how Mr. Foreman should be scored with and without an enhancement of his sentence (R49,476-479). In the State's argument, Mr. Foreman could be habitualized for one in-state misdemeanor conviction and one out-of-state felony conviction (R509).¹ The State then refigured Mr. Foreman's scoresheet by increasing or upgrading the Primary and Additional Offenses by one degree. Thus, according to the State's scoresheet, with enhancement for habitualization, Mr. Foreman would receive 218 points for a life felony instead of 180 points for the first-degree felony he was convicted of and 44 points for a life felony instead of the 36 points for the first-degree felony he was convicted of. Totaling up the points, the State

¹ Mr. Foreman relies on his initial merit brief in arguing that these convictions are insufficient to justify a habitualization of Mr. Foreman.

gave Mr. Foreman 333 points with enhancement, placing Mr. Foreman in the 9-12 year range. He would only have received 287 points, which would have placed him in the 7-9 year range, had the State not scored him as if he had committed higher degrees of offenses (R49,50,479,480,501,502,505-509).

Mr. Foreman argued against increasing the degree of the felonies for enhancement purposes (R497,498). The trial court stated that it would use the enhancement procedure, admitted as proved the fact that there were two prior convictions for Mr. Foreman, and declared Mr. Foreman enhanced (R510). The trial court then sentenced Mr. Foreman to twelve years of imprisonment on both counts - the maximum under the State's figuring of the enhanced guidelines. The record more than amply shows that the trial court habitualized and enhanced Mr. Foreman on the basis of the State's upgrading of the degrees on the scoresheet.

In Mr. Foreman's initial brief, he pointed to a First District Court of Appeal case that held that enhancement does not reclassify the offenses enhanced to new, higher-degree offenses but merely allows for an increased maximum sentence.

Cuthbert v. State, Case No. AW-272 (Fla. 1st DCA November 6, 1984)[9 F.L.W. 2311]. Since then, the Fifth District Court of Appeal has also held that the enhancement statute does not allow for reclassifying the offense. Dominguez v. State, Case No. 84-506 (Fla. 5th DCA January 3, 1985)[10 F.L.W. 114]. Of course, Mr. Foreman continues to argue that the proper way of enhancing a

defendant under the guidelines is to determine the points on the scoresheet; and if the points go beyond the usual statutory maximum, the defendant can be habitualized to extend the statutory maximum. The defendant's recommended sentence on the scoresheet could then be imposed.

Mr. Foreman relies on his initial brief for further argument on this point.

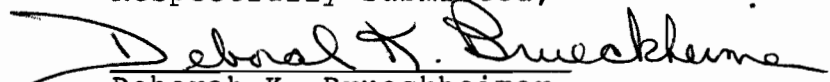
CONCLUSION

In light of the foregoing reasons, arguments and authorities, Appellant respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Davis G. Anderson, Jr., Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, February 22, 1985.

Respectfully submitted,


Deborah K. Brueckheimer
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