

IN THE FLORIDA SUPREME COURT

LARRY DONNELL BROWN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 66,390

FILED

SID J. WHITE

JAN 21 1985

CLERK, SUPREME COURT

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Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

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IN THE FLORIDA SUPREME COURT

LARRY DONNELL BROWN, :
 Petitioner, :
v. :
STATE OF FLORIDA, :
 Respondent. :
_____:

CASE NO. 66,390

BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the appellant in the first district and the defendant in the trial court, but he will be referred to as petitioner in this brief. The state will be referred to as respondent. Citations to the record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. Citations to the transcripts will be referred to as "T". Attached hereto is an appendix, which contains the opinion of the First District.

II STATEMENT OF THE CASE AND FACTS

By information filed February 24, 1984, petitioner was charged with second degree murder with a firearm (R 5). On May 21, 1984, petitioner appeared with court appointed counsel before Circuit Judge Sam Goodfriend and entered a plea of guilty to the charge. Petitioner's counsel stated his position that the crime was a first degree felony punishable by life, and could not be enhanced to a life felony because of the firearm element. If classified as a first degree felony, the crime would carry a 7-12 year sentence under the sentencing guidelines. The prosecutor argued that the crime could be reclassified to a life felony and would then be subject to a 12-17 year sentence under the guidelines. Petitioner understood the options available to the court and his plea was accepted (T 5-25).

On May 29, petitioner appeared for sentencing. The court determined that the crime was a life felony (T 28). After presentation of mitigation (T 32-71) the court imposed a 17 year sentence in accordance with the guidelines, as calculated for a life felony, and also imposed a three year mandatory minimum for the firearm (R 12-17; T 81-82).

On appeal, petitioner argued, on authority of Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), discretionary review pending, No. 65,492, that the court could not reclassify the crime when it also imposed the three year mandatory minimum. The First District recognized it was creating conflict with Whitehead in holding that the crime could be both reclassified, and a three year minimum mandatory imposed.

On January 11, 1985, a timely notice of discretionary review was filed.

III ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT BETWEEN THE INSTANT DECISION AND THAT OF THE THIRD DISTRICT IN WHITEHEAD.

Whitehead held that both subsections of Section 775.087, Florida Statutes could not be imposed for the same crime. That statute provides:

775.087 Possession or use of a weapon; aggravated battery; felony reclassification; minimum sentence. -

- (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:
 - (a) In the case of a felony of the first degree, to a life felony.
 - (b) In the case of a felony of the second degree, to a felony of the first degree.
 - (c) In the case of a felony of the third degree, to a felony of the second degree.
- (2) Any person who is convicted of:
 - (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes of; or
 - (b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful

performance of his duties and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.275, prior to serving such minimum sentence.

In the instant case, petitioner argued at sentencing and on appeal that Whitehead controlled the disposition of petitioner's crime. The First District disagreed with Whitehead and held that the subsections of the statute addressed two different functions, and thus could both operate to petitioner's detriment. Since Whitehead is currently pending before this Court, the instant case should be accepted for review and considered on the merits along with Whitehead.

The statute acted to petitioner's detriment because reclassifying the crime caused his presumptive guidelines sentence to become 12-17 years, instead of 7-12 years. He was sentenced to 15 years, and also given a three year mandatory minimum. The imposition of the three year mandatory minimum has caused the Department of Corrections to determine that petitioner is not eligible for any gain time on the three year mandatory minimum portion of his 15 year sentence. This Court should accept review because of the effect of the statute on petitioner's guidelines scoresheet and resulting presumptive sentence, as well as the effect in denying him gain time on the three year mandatory minimum portion of his sentence. This Court should also accept review because of the effect that the decision will have on other defendants in similar situation,


whose guidelines sentence is calculated based upon a score-sheet where the primary offense has been enhanced. Cf. Brown v. State, 458 So.2d 313 (Fla. 5th DCA 1984).

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests this Court to grant discretionary review and consider the instant case along with Whitehead.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

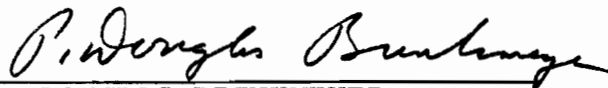


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on Jurisdiction has been furnished by hand delivery to Mr. Gregory Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and to petitioner, Larry Donnell Brown, #094073, Post Office Box 500, Olustee, Florida 32054 on this 21 day of January, 1985.



P. DOUGLAS BRINKMEYER