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MAR 25 1985

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66792

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIE EARL LANE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-3
QUESTION PRESENTED.....	4
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	6-9
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	10

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
Brown v. State, 9 FLW 2602 (Fla. 1st DCA December 13, 1984).....	2, 9
Carter v. State, 10 FLW 242 (Fla. 2d DCA January 23, 1985).....	2, 9
Ex parte Bosso, 41 So.2d 322 (Fla. 1949).....	7
Lewis v. State, 154 Fla. 825, 14 So.2d 149 (1944).....	7
Miller v. State, 460 So.2d 373 (Fla. 1984).....	8
Palmer v. State, 438 So.2d 1 (Fla. 1983).....	2
Pederera v. State, 401 So.2d 823 (Fla. 3d DCA 1981).....	9
Steinhorst v. State, 412 So.2d 332 (Fla. 1982).....	7
Strickland v. State, 437 So.2d 150 (Fla. 1983).....	6, 8, 9
Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984).....	2, 8, 9

OTHER AUTHORITIES

Section 775.087(1), Fla.Stat. (1979).....	1, 6, 7
Section 775.087(2), Fla.Stat. (1979).....	1, 6
Section 777.07, Fla.Stat. (1981).....	6
Section 782.04, Fla.Stat. (1981).....	6
Rule 9.140(g), Fla.R.App.P.....	1

INTRODUCTION

The Petitioner, The State of Florida, was the Appellee 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, Willie Earl Lane, was the Appellant 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 Willie Earl Lane filed an appeal pursuant to Rule 9.140(g), Florida Rules of Appellate Procedure, following the trial court's summary denial of his motion for post-conviction relief. Respondent was charged by information with two counts of attempted first degree murder with a firearm and one count of unlawful possession of a firearm while engaged in a criminal offense. A jury found respondent guilty as charged on all three counts. Respondent was sentenced, pursuant to Section 775.087(1), (2), Florida Statutes (1979), for one count of attempted first degree murder to life imprisonment with the three year mandatory

sentence before parole eligibility; he received a second, consecutive sentence of life imprisonment with the three year mandatory sentence for the second count of attempted first degree murder; sentence on count three was suspended. Respondent challenged the double enhancement of his sentence, that is, the reclassification of the penalty for attempted first degree murder from a first degree felony to a life felony, plus the imposition of the three year mandatory minimum sentence. (A. 1-2).

The Third District found Respondent's position was meritorious on the authority of Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), pet. for review granted No. 65,492 (Fla. December 13, 1984). In so holding the District Court recognized that Whitehead v. State, supra, and the instant decision are in conflict with Carter v. State, 10 FLW 242 (Fla. 2d DCA January 23, 1985) and Brown v. State, 9 FLW 2602 (Fla. 1st DCA December 13, 1984). The District Court then affirmed the consecutive life sentences imposed for both counts of attempted first degree murder, but vacated the 3 year minimum mandatory sentence.¹ (A. 2-3).

In Whitehead v. State, supra, the Court, while acknowledging that the use of a firearm is not an essential

¹The District Court vacated the other 3 year minimum mandatory sentence under authority of Palmer v. State, 438 So.2d 1 (Fla. 1983) and as such Petitioner has no quarrel with said portion of the opinion.

element of second degree murder, held that once a factual determination was made by the jury that the defendant committed the crime with a firearm; either reclassification or the minimum mandatory sentence could properly be imposed and that double enhancement was not statutorily warranted. (A. 4-5). The dissent thought otherwise. (A. 5-6).

The Petitioner has timely filed a notice invoking the discretionary review jurisdiction of this Court.

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); THE SECOND DISTRICTS DECISION IN CARTER V. STATE, 10 FLW 242 (FLA. 2D DCA JANUARY 23, 1985); AND THE FIRST DISTRICTS DECISION IN BROWN V. STATE, 460 SO.2D 546 (FLA. 1ST DCA 1984)?

SUMMARY OF THE ARGUMENT

In the instant case the Third District held that a finding by a jury that the defendant committed a crime with a firearm obligates the trial court when sentencing the defendant to either reclassify the offense or impose the three year minimum mandatory term. This holding is in direct and express conflict with decisions of this court and of other District Courts.

ARGUMENT

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); WITH THE SECOND DISTRICTS DECISION IN CARTER V. STATE, 10 FLW 242 (FLA. 2D DCA JANUARY 23, 1985); AND WITH THE FIRST DISTRICTS DECISION IN BROWN V. STATE, 460 SO.2D 546 (FLA. 1ST DCA 1984).

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

is an essential element of the offense. Since use of a weapon or firearm is not a 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 332 (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 before being eligible for parole. Accord Miller v. State, 460 So.2d 373 (Fla. 1984).

In the case sub judice the Third District reaffirmed its previous holding of Whitehead. The court then held that (1) when the use of a firearm is not an essential element of the charged crime and (2) when the jury finds that a firearm was used in the commission of the charged crime, the trial court must select one of the two enhancement penalties provided by Section 775.087, either reclassification of the felony status or imposition of the three year minimum sentence before parole eligibility. The Court then upheld the reclassification of Respondent's sentence, and reversed the imposition of the three year minimum mandatory sentence. (A. 2-3).

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 two counts of attempted first 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 attempted first degree murders 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.

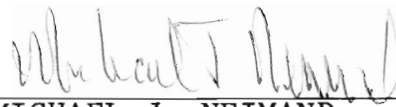
The case sub judice also expressly conflicts with Carter v. State, 10 FLW 242 (Fla. 2d DCA January 23, 1985) and Brown v. State, 460 So.2d 546 (Fla. 1st DCA 1984). In both cases the Court rejected the Third District's analysis in Whitehead v. State, supra, and held that a finding that the defendant used a firearm during the commission of the crime obligated the trial court to both reclassify the offense and to impose the three year minimum mandatory sentence.

CONCLUSION

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

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was served by mail to WILLIE EARL LANE, pro se, DC#072223, P.O. Box 1100, Avon Park, Florida 33825, on this 22 day of March, 1985.



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