IN THE SUPREME COURT OF FLORIDA

CHARLES HAYWOOD,

Petitioner,

vs.

CASE NO. 66,994

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BREIF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, In and For Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. In the brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote record on appeal.

STATEMENT OF CASE AND FACTS

Petitioner was charged and convicted for second degree murder. The information alleged shooting "with a firearm or other deadly, to wit: a hand gun" (R 693). The verdict was "guilty of second degree murder with a firearm" (R 695).

Petitioner was adjudicated guilty on November 18, 1983. The judgment stated that the conviction was for a life felony (R 697). Petitioner elected a non-guidelines sentence (R 683). On December 9, 1983, Petitioner was sentenced to thirty years imprisonment with a three year mandatory minimum for possession of a firearm (R 701).

Appeal was taken to the Fourth District Court of Appeal, which on April 3, 1985, issued its decision affirming the conviction and sentence. The first issue discussed by the District Court of Appeal in its opinion was Petitioner's contention that the trial court had erred in enhancing his conviction for second degree murder, a first degree felony, to a life felony with a minimum penalty of thirty years, while also imposing the minimum mandatory sentence for possession of a firearm. The court held that the relevant statute, Section 775.087, Florida Statutes (1983), does not prohibit such double enhancement of a sentence.

Jurisdiction of this Court was invoked by way of Notice of Discretionary Review filed May 2, 1981. Briefs on jurisdiction were filed, and on August 23, 1985, this Court accepted jurisdiction and ordered briefs on the merits.

SUMMARY OF ARGUMENT

Petitioner was convicted for second degree murder, a first degree felony. He used a firearm in the crime. Because of the firearm, the trial court imposed the three-year mandatory minimum. But it also relied upon the firearm to reclassify the crime to a life felony and to impose a thirty-year (non-guideline) sentence. Since both statutory provisions will result in a longer period behind bars before Petitioner is eligible for parole, the application of both constituted improper stacking or double enhancement of the penalty. A single firearm was used once in the crime, so that only a single enhancement should be allowed.

ARGUMENT

POINT

THE DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT A SENTENCE COULD BE ENHANCED AND A THREE YEAR MANDATORY MINIMUM IMPOSED FOR THE SAME CRIME IN WHICH ONE FIREARM WAS USED.

The Fourth District Court of Appeal has held in this case that both Section 775.07(2), Florida Statutes (1983), the three year mandatory firearm minimum statute, and Section 775.087(1), which reclassifies the degree of a felony in which a firearm is used, may be applied to the same crime and to the same use of a firearm. In two other cases pending before this court, the First and Second District Courts of Appeal have ruled the same way. Brown v. State, 460 So.2d 546 (Fla. 1st DCA 1984), pending as Supreme Court case number 66,390; Carter v. State, 464 So.2d 172 (Fla. 2d DCA 1985), pending as Supreme Court case number _____. The Third District Court of Appeal, on the other hand, has held, in another case presently pending before this Court, that both statutes may not be applied together to impose double enhancement for the use of a firearm in a single crime. Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), pending as Supreme Court case number 65,492.

This Court should rule in accordance with the Third District in Whitehead. The court in Whitehead pointed out that a determination that a firearm was used is required for invocation of either subsection (1) or (2) of the statute, and concluded that application of both subsections at once was a double enhancement not statutorily warranted. This reasoning is in

keeping with that of this Court in Palmer v. State, 438 So.2d 1 (Fla. 1983). Palmer involved one of the statutory provisions involved here, section 775.087(2), the three year firearm minimum. Because Palmer had used a single firearm once in holding up thirteen people, this Court held that he could not be sentenced to thirteen consecutive three-year minimums, but that the three-year minimums would have to be imposed concurrently. In effect, this Court authorized the imposition of only a single three-year minimum for a single use of a firearm, in keeping with the obvious intent of the legislature to deter a person from picking up a firearm and going out to commit a felony with it, which Mr. Palmer in fact did only once.

The reasoning of Palmer applies to the double application of the two subsections of Section 775.087 in the instant case as well. Petitioner here committed a single felony with a single firearm. The obvious legislative intent of both subsections of the statute is to deter a person from picking up a firearm and going out to commit a crime with it. Like Mr. Palmer, Petitioner here did this once. Therefore, like Mr. Palmer, he should not be subject to "stacked" or double application of the firearms statutes.

This Court should find unconvincing the decisions of the Fourth District in the instant case, of the First and Second Districts in Brown and Carter, and the dissent of Judge Pearson in Whitehead, upon which the decision in the instant was based at least in part. All of these opinions were based upon strained distinctions between the two subsections of the statute. Brown,

and Carter which followed it, both relied upon purported "separate functions" of the two subsections. Perhaps ignored because of its very obviousness was the fact that both subsections function to increase punishment. This is especially so with a non-guidelines sentence such as that in the instant case (R 683). First, both the reclassification of Petitioner's crime from a first degree felony to a life felony and the imposition of a greater sentence than that which might have otherwise been imposed will obviously serve to extend the number of years which Appellant will serve in prison before becoming eligible for parole. Second, the three year minimum will result in denial of gain time to Petitioner which he might otherwise have received. Section 775.087(2)(b), Florida Statutes (1983). Quite clearly, the end result of the application of either or both of the statutory subsections will be more time behind bars for Petitioner. Stacking of the two provisions will thus constitute a double increase in punishment for a single criminal act.

The failing of Judge Pearson's dissent in Whitehead is that he based it upon seeing "nothing in the statute evincing an intent on the part of the legislature to make its independent provisions mutually exclusive." 450 So.2d at 546. On the other hand, however, there is also nothing in the statute indicating that the legislature did not intend to make the two provisions mutually exclusive. Judge Pearson overlooks the well-established principle that criminal statutes are to be construed strictly in favor of the person against whom a penalty is to be imposed; nothing that is not clearly and intelligently described in a

penal statute's very words, as well as manifestly intended by the legislature, is to be considered as included within its terms. Palmer v. State, supra, 438 So.2d at 3. If there is any uncertainty at all about the intended operation of the two statutory provisions in question here, then that doubt must be resolved in favor of Petitioner. This Court should accept the holding of Whitehead and require the lower court to elect whether to reclassify the crime upward or whether to impose the three year mandatory minimum.

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GREGORY C. SMITH, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 29th day of August, 1985.

Of Counsel