IN THE SUPREME COURT OF FLORIDA

CHARLES FERGUSON, :

Petitioner, :

vs. : Case No. 85-108

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The State filed an information in the Circuit Court for Lee County, Florida, on July 13, 1984, charging Appellant CHARLES FERGUSON with grand theft of a motor vehicle in violation of Section 812.014, Florida Statutes (1983). (R106)

On the date of the offense, Mr. Ferguson, the Appellant, treated himself to an afternoon at Shorty's bar where he spent most of the ten dollars he had earned in the morning and drank ten beers before supper. (R58) Another dollar went for three chicken wings at Jack Carter's place. (R58) Then it was time for bed and Appellant headed down to the used car lot at the corner of Fowler and Anderson to find a car where he could finish his chicken wings and go to sleep. (R58) The owner of the lot had recently towed in a car,its ball joints broken and left front wheel dangling. (R16) Mistakenly believing the car was undriveable, he had left the keys in the ignition. (R16) Appellant happened to choose this car for the night and was quick to see the opportunity of an evening's ride cum chicken wings before retiring. (R60) His arrest ensued shortly thereafter. The car had been observed wobbling from curb to centerline and back. (R21-22) Two blocks later as Appellant was attempting to abandon the idea of a ride, police apprehended him and chicken wings went flying, marking a disappointing end to a promising day. (R34)

A jury trial was held before the Honorable Wallace R.

Pack, Circuit Judge, on November 17, 1984. (R11-105) The jury returned a verdict of guilty as charged (R102), and the court adjudicated Appellant guilty of grand theft. (R102)

On November 28, 1984, the State filed an habitual offender notice. (R116) A guideline scoresheet was prepared which reflected a recommended sentence of twelve to thirty month's incarceration or community control. (R118) The score included points for four prior third degree felonies, four prior misdemeanors and a prior category 6 theft offense. (R118)

Appellant was sentenced on January 3, 1985, as an habitual offender to ten years in prison. The predicate felony established by the State to trigger proceedings under the habitual offender act had already been factored into the guideline scoresheet. (R129-130) The trial court's specific findings of fact that an enhanced sentence was necessary for the protection of the public also relied upon prior convictions factored into the guideline scoresheet. (R130-140) The court additionally relied upon four prior misdemeanor convictions which had not been scored, but which were apparently cited in the pre-sentence investigation report. (R139-140)

Appellant filed a timely notice of appeal (R143), and the court appointed the Office of the Public Defender to represent him. (R108)

The District Court of Appeal, Second District, affirmed Appellant's conviction and sentence by per curiam

opinion citing specific case law for authority. Ferguson v. State, 11 F.L.W. 111 (Fla.2d DCA filed Oct. 25, 1985).

Appellant filed a motion for rehearing (Appendix A). Among the issues raised, Appellant urged the District Court of Appeal to consider the extent of the trial court's departure in light of Albritton v. State, 476 So.2d 158 (Fla. 1985). Appellant also argued that Hendrix v. State, 475 So.2d 1218 (Fla.1985) prohibits the trial court from relying on prior convictions already factored into the guidelines to justify a departure sentence as an habitual offender. Appellant raised an additional issue in his reply to the State's response to his motion for rehearing claiming that prior record alone will not satisfy the specific findings of fact required by the habitual offender act and citing Scott v. State, 446 So.2d 261 (Fla.2d DCA 1984). (Appendix B).

By per curiam opinion, the District Court of Appeal denied Appellant's motion for rehearing on the grounds that neither the legislature nor the supreme court intended the sentencing guidelines to so curtail the application of the habitual offender act. However, recognizing the issue would frequently arise, the District Court of Appeal certified the following question as a matter of great public importance: Ferguson v. State, 11 F.L.W. 111 (Fla.2d DCA Jan. 3, 1986).

> IS THE DETERMINATION OF A DEFENDANT AS AN HABITUAL OFFENDER PURSUANT TO SECTION 775.084 A SUFFICIENT REASON FOR DEPARTURE FROM THE RECOMMENDED RANGE OF THE SENTENCING GUIDELINES?

Appellant filed a timely notice to invoke the discretionary jurisdiction of this Honorable Court. (Appendix C).

SUMMARY OF ARGUMENT

There is both a yes and no answer to the question certified herein depending on how this Honorable Court chooses to reconcile the sentencing guidelines with the habitual offender.

The approach adopted by the District Court of Appeal, Second District, suffers from several disadvantages, among them the contradictions posed by the case law construing valid reasons for a guidelines departure when applied, as logically it must be, to findings supporting an enhanced sentence pursuant to the habitual offender act. Moreover, this approach undermines the express purpose of the guidelines to eliminate unwarranted variations in sentences. The District Court has answered the question affirmatively.

Appellant contends that regardless of the sentencing theory adopted, his sentence as an habitual felony offender is illegal. Nonetheless Appellant would answer no to the certified question and advocate a second means of reconciling the guidelines and habitual offender act.

The habitual offender act would not constitute a departure from the guidelines if it were triggered only when the recommended guidelines' sentence exceeds the maximum term provided by general law. This approach promotes the guidelines' goals, implements the built-in aggravating factors intended by the Sentencing Commission and shifts the focus at an habitual offender proceeding from the validity of the findings to the quality of proof of such findings.

ARGUMENT

IS THE DETERMINATION OF A DEFENDANT AS AN HABITUAL FELONY OFFENDER PURSUANT TO SECTION 775.084 A SUFFICIENT REASON FOR DEPARTURE FROM THE RECOMMENDED RANGE OF THE SENTENCING GUIDELINES?

The answer to the question certified to this Honorable Court is either yes or no, depending upon which theory is adopted to harmonize the habitual offender act with the sentencing guidelines. Section 775.084, Fla.Stat. (1983); section 921.001, Fla. Stat. (1983); Fla.R.Crim.P. 3.701. Although Appellant would urge this Honorable Court to answer the question in the negative, he contends that either theory construing the two laws together dictate the reversal of his sentence as an habitual felony offender.

The District Court of Appeal, Second District, has answered the question in the affirmative and holds that the habitual offender act constitutes a clear and convincing reason for departure. Ferguson v. State, 11 F.L.W. 111 (Fla.2d DCA Jan. 3, 1986); Fleming v. State, 11 F.L.W. 112 (Fla.2d DCA Jan. 3, 1986).

Appellant proposes a second theory, that the habitual offender act is triggered only when this recommended guideline sentence exceeds the maximum term provided by general law. This theory would implement the recommended guidelines and not require a departure. Hence, the answer to the question certified in this case would be no.

A third possibility would be to treat the habitual

offender act as an exception or alternative to a guideline sentence. However, section 921.001, Florida Statutes, appears to preclude this because it requires a guidelines sentencing for all offenses committed after October 1, 1983. See also Mc Cuiston v. State, 462 So.2d 830,831 (Fla.2d DCA 1984).

Under the first theory, that sentencing under the habitual offender act constitutes a guidelines' departure, Appellant's sentence should be reversed and remanded for resentencing within the presumptive guideline range. The trial court erred in sentencing Appellant as an habitual offender by relying on invalid reasons to support its conclusion that an enhanced sentence was necessary for the protection of the public. Hendrix v. State,475 So.2d 1218 (Fla.1985) holds that prior convictions which have been factored into the guideline score do not constitute clear and convincing reasons for departure. Fla.R.Crim.P. 3.701(d)(11). The court erred in Appellant's case by relying on four prior third degree felonies and four prior misdemeanors which had already been factored into the guideline score. (R118,139) The trial court also referred to four other prior misdemeanors which were not scored (R139); however, because it is not evident that the trial court would have determined Appellant to be an habitual felony offender on this basis alone, Appellant's sentence must be reversed and the cause remanded for resentencing. Albritton v. State, 476 So.2d 158 (Fla.1985).

Upon rehearing before the District Court of Appeal, Appellant contended that Hendrix should be applied to reasons used to support a sentence as an habitual offender. (Appendix A and B). Appellant further contended that the District Court's decision in Scott v. State, 446 So.2d 261 (Fla.2d DCA 1984) also invalidated Appellant's sentence. Scott holds that general reference to prior record alone will not satisfy the specific findings requirement of the habitual offender act.

In response to Appellant's contentions, the District Court held that Hendrix is inapplicable to the predicate felony required to be established as a threshold finding by the habitual offender act because the predicate felony merely ignites the procedural events which must precede the imposition of an habitual offender sentence. Ferguson v. State, 11 F.L.W. at 111; Fleming v. State, 11 F.L.W. at 112. However, the Fleming decision appears to hold sub silencio that Hendrix must be applied to the "critical findings forming the bases for the enhanced sentence." Unfortunately the District Court applied its analysis only to the predicate felony in Appellant's case and did not consider Appellant's contention that Hendrix invalidated the "critical findings forming the bases for the enhanced sentence," Id. (Appendix E). As a result Appellant's sentence was affirmed.

Although the Fleming analysis suceeds in reconciling the guidelines with the habitual offender act without functionally

repealing the latter, it breaks down in cases where the "critical findings forming the bases for the enhanced sentence" depend upon factors invalidated by Hendrix and Santiago v. State, 10 F.L.W. 578 (Fla. Oct. 31, 1985) (prohibits reliance on factors relating to the instant offense for departure). In such cases, the operation of the habitual offender act would be greatly curtailed, a result the District Court had hoped to avoid in Fleming.

The Fleming approach has the added disadvantage in that it fails to promote the goal of eliminating "unwarranted variation in the sentencing process by reducing subjectivity in interpreting specific offense - and offender-related criteria and in defining their relative importance in the sentencing decision." Fla.R.Crim.P. 3.701(b). Although the purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision - making process, it is clear that the guidelines offer no guidance as to when a prosecutor or judge should consider enhanced sentencing under the habitual offender act. Consequently, depending on a particular prosecutor's subjective assessment of the offender and his offenses, an habitual offender notice will or will not be filed, triggering the right of the State to seek the enhanced sentence and the right of the court to impose it. Moreover, once an habitual offender notice is filed, the same criteria which justify a departure from

the guidelines also, once a predicate felony is established, justify an enhanced sentence as an habitual offender. The filing of the habitual offender notice effectively empowers the sentencing judge to depart from the sentencing guidelines in two ways, either up to the maximum sentence permitted by law or up to the maximum sentence permitted by the habitual offender act. Thus, the same criteria may be used to justify either type of departure, but will result in widely differing sentences. Therefore, in Appellant's case, the trial judge could have sentenced Appellant to five years or ten years using the same justification. The Fleming analysis thus impedes the goals set forth in the statement of purpose in the sentencing guidelines. Fla.R.Crim.P. 3.701(b).

As proposed earlier, there is a second approach to reconciling the guidelines with the habitual offender act. This approach would limit the implementation of the habitual offender act to cases where the recommended guideline sentence exceeds the maximum sentence provided by law, hence, eliminating the subjectivity involved in the prosecutor's decision to file an habitual offender notice and the sentencing court's decision to enhance a sentence beyond the maximum provided by law.

The mechanism that would trigger a prosecutor's decision to file the notice would be a guideline score placing a defendant in a recommended range beyond the term provided by general law. The sentencing court would then be authorized

to sentence the offender up to a term within both the guidelines and maximum term provided by the habitual offender act. This triggering mechanism eliminates the subjectivity in both the prosecutor's and sentencing court's decision to seek and to impose habitual offender sentencing and, consequently, reduces unwarranted variations in the sentencing process. Reliance on the guideline score to determine when habitual offender sentencing is appropriate not only fully comports with the purpose of the guidelines, but also with the intent of the Sentencing Commission which by virtue of the guideline score-sheet has already assigned a degree of aggravation for each category of offense and entry therein. Fla.R.Crim.P. 3.988. However, when a sentencing judge departs from the guidelines pursuant to the habitual offender act, he effectively substitutes his perception of dangerousness for the Commission's.

The sentencing court would, of course, still be bound to follow the proceedings set forth in the habitual offender act before sentencing the habitual felony offender to the enhanced term of imprisonment. The focus of the proceedings, however, would be on the quality of the evidence, not the validity of the reasons justifying an enhanced sentence. With the focus being shifted to the quality of the evidence pre-sentence investigation reports will be more closely scrutinized which will insure their reliability and eliminate the danger inherent in hearsay evidence. See section 775.084(3)(a) and (c), Fla.Stat. (1983). Eutsey v. State, 383 So.2d

219,225 (Fla.1980). Because there would be no guidelines' departure, the validity of the reasons for the enhanced sentence would not be an issue and the contradictions posed by Hendrix would not exist.

Applying the second analysis to the facts in Appellant's case, the trial court erred in sentencing Appellant as an habitual offender because the guidelines recommended only a sentence of twelve to thirty months. The maximum term provided by general law is five years for Appellant's offense. Because the recommended guideline sentence does not exceed the maximum term provided by general law, the habitual offender act has not been triggered, and, thus, an enhanced sentence is not appropriate. (R118)

Appellant would have had to have scored 147 points in order to trigger the habitual offender act. He actually scored 51 points, a difference of 96 points. Ninety-six points is equal to three prior first-degree felonies or six prior second degree felonies. Fla.R.Crim.P. 3.988(f). The commission clearly intended the more serious felonies to carry the most weight; this is consistent with the fact that the more serious felonies pose the greater threat to public safety. Appellant advocates the adoption of the second method of reconciling the guidelines with the habitual offender act because it is easier to apply, eliminates the need to examine the validity of the reasons for departure and furthers, rather than impedes, the purposes and goals of the sentencing guidelines.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse his sentence and remand for resentencing within the presumptive guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 6th day of February, 1986.

for Paul C. Helm
ANN N. RADABAUGH