O/A 9-22-86

IN THE SUPREME COURT OF FLORIDA

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RICKY JARADE PAYNE,	)	
Petitioner,	)	
vs.	)	CASE NO.: 68,180
STATE OF FLORIDA,	)	Oral Argument set for September 22, 1986.
Respondent.	)	

RESPONDENT'S BRIEF ON THE MERIT

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PRELIMINARY STATEMENT

The State accepts the Preliminary Statement set forth in the initial brief and will use the designations set out therein. References to Petitioner's merit brief will be by the symbol "PMB" followed by the appropriate page number(s).

The opinion of the Court of Appeal First District is now reported as Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985).

STATEMENT OF CASE AND FACTS

The State accepts the statement of fact and of the case as set forth in the opinion and in the initial brief as a substantially accurate recitation of the events of this case. However the State does stress the factual discrepancy set forth in footnote 2, infra at p. 3.

In addition, the State notes that Petitioner did not stay proceedings in the trial court while pursuing this Court's discretionary review. Jurisdiction was accepted by this Court on April 29, 1986. Petitioner was resentenced on April 25, 1986. The trial court imposed the same sentence of 21 years and declared the defendant to be an habitual felony offender pursuant to the procedural requirements of Section 775.084, Florida Statutes. The trial court stated its intent was for the defendant to serve the 21 year sentence. That appeal is pending in the Court of Appeal, First District. Payne v. State, No. BN-8.

SUMMARY OF ARGUMENT

Reasonable suspicion to suspect criminal activity is dependent upon facts adduced in each case which are observed and interpretated by the detaining officer in light of that officer's knowledge. The legal concept cannot be reduced to an abbreviated formula comprised of a few relevant facts such as those set forth by the Petitioner.[1] The trial court denied the motion to suppress, and the First District affirmed, on the basis of the following: (1) the car [with lights off] was parked to the side of the building, rather than someplace where it could be seen, even though no cars were parked in front of the convenience store; (2) the all white make-up of the neighborhood; [Petitioner and the co-perpetrators are black] (3) when the marked cruiser pulled up, the two black men turned around, walked back to the car and drove away without turning on the driving lights[2] and (4) because a convenience store was involved. Payne at 203.

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1 A black male leaving an open convenience store in an all white neighborhood. PMB at p. 5.

2 This statement is incorrect. One of the two men ran away and did not re-enter the vehicle. T 26, A third black male presumably had remained in the vehicle when the other two exited. The officer observed the brake (or parking) lights flash when the vehicle was parked. This contributed to the officer's suspicion and caused him to turn around to investigate further. T 24-25.

As to the second point, it is the State's position that where the sentencing judge follows procedures to declare a defendant to be a habitual offender, but elects to use the finding as aggravation for a departure sentence of 21 years rather than to impose the mandatory habitual offender sentence of life imprisonment, the finding cannot be challenged as an impermissible reweighing of prior convictions already factored into the guidelines recommendation. The procedures necessary to declare a defendant to be a habitual offender consist of separate and distinct requirements from a mere counting of prior convictions.

POINT I

THE MOTION TO SUPPRESS WAS PROPERLY DENIED AS THE STOP OF THE VEHICLE WAS PREMISED UPON REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

ARGUMENT

The issue presented herein is whether there was sufficient probable cause to believe that Appellant was involved in criminal activity to warrant the stop of the vehicle in which he was a passenger. In denying the motion to suppress pre-trial and in-court identification, the trial court set forth certain factual findings, "obvious on their face", which are pertinent here:

> . . . the officer testified that this was at a shopping center, that he was passing by, of all the stores, and apparently there was a number in the shopping center, only one was open at 11:00 at night when this occurred. He saw the car from which two black males were walking towards the only Minit Market or something of that sort, a convenience store, which only -- probably only a newly arrived Martian would not know are subject to probably more robberies than any other one type of institution in the city.
>
> And that being armed with that knowledge and most everyone is, especially police officers, he was alerted. He saw that the car was parked in such a place, that is, approximately 200 feet away from the minute market and with its lights off, off to the side of the building rather than some place where it could be seen. The car did not park in front of the minute market although there was ample parking space there. As a matter of fact, the officer said there was no other cars parked in front of the Minit Market. And questioned by [defense counsel], he asked the question how did the officer know they

came from the car, and/or words to that effect, the officer said, 'Well, they were blacks and it was an all white neighborhood,' which is another factor.

> He also testified that the car -- that the defendant Payne, as he was walking, he and the other person were walking towards the convenience store, and when the officer drove up, Payne turned around and walked back towards the car, got inside and the car drove away without turning on its driving lights, and he followed and stopped the car.
>
> He says that he saw the guns in the car in plain view, and based on that he made the stop and arrest.
>
> . . .
>
> I think that the aggregate circumstances here are certainly sufficient to have a founded suspicion of some criminal activity. And I find that the motion is not well taken, I deny it.

T 49-51. Continuing the suppression hearing to address the seizure of the firearms, the defense contended the stop was improper as merely walking down the street past businesses which were closed toward one which was open does not give rise to reasonable suspicion of criminal activity. A similar argument is advanced before this Court premised instead upon the presence of black men in a white neighborhood at night.

However the foregoing factor is not the sole basis upon which the police officer acted. If that factor alone supported the stop, then the case law cited by Petitioner might control. Officer Skie testified to the foregoing as

well as other facts which demonstrate "a well founded reasonable suspicion based upon objective, specific articulable facts that the person temporarily detained 'has committed, is committing, or is about to commit a violation of the laws of this State.'" PMB at p. 7 quoting Section 901.151(1), Florida Statutes; Terry v. Ohio, 392 U.S. 1 (1968); State v. Webb, 398 So.2d 820 (Fla. 1981).

It is true that being out on the public street during late or unusual hours cannot constitute a valid basis to temporarily detain and frisk an individual under the stop and frisk law. Levin v. State, 449 So.2d 288,289 (Fla. 3d DCA 1983) (and authority cited therein), affirmed, State v. Levin, 452 So.2d 562 (Fla. 1984); Ward v. State, 453 So.2d 517 (Fla. 2d DCA 1984). See also, State v. Hundley, 423 So.2d 548 (Fla. 4th DCA 1982). However considerable more factors were present in the instant case which indicated Appellant and his companions were involved in criminal activity.

Officer Skie observed a small shopping center in which all stores were closed except for the Minit Market. The shopping center was in a predominantly white neighborhood. T 29. Two black men were walking toward the market from a car parked in the "farthest" end of the lot away from the market, approximately 200 feet away. T 24-25,29,31-32. The officer observed the brake or parking lights of the parked vehicle flash. T 25. This

indicated another individual(s) waiting in the vehicle. He was immediately suspicious and queried why the car was parked there. There were no cars in the spaces provided in the front of the store. T 32-33. The car was the only vehicle observed in the whole area. T 31-32.

> . . . there was nobody at the Minit Market and I saw them walking there. It seemed obvious that if they were the ones leaving the car why didn't they just park in front of the Minit Market.

T 25. The officer was so suspicious that he turned his car around even though his shift had ended, he has checked off-duty and was on his way home. T 24,30. As Skie turned the squad car around in the intersection, one of the black males returned to the car and the other left the area.[3] T 26. The parked car "started driving off without its lights". Id. The vehicle's start was made "hurriedly", hastily Id.; T 29. The officer positioned his vehicle behind the departing car, flashed his lights, informed headquarters that he was stopping a suspicious car and pulled over the vehicle. T 26-27. The officer requested identification from the driver and passenger; he then radioed for back-up assistance. T 27. When the second officer arrived and the passenger door was opened Skie observed a firearm in plain view on the floor board. T 27-28. The weapon appeared to be a .45 caliber revolv-

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3 This individual was never apprehended. T 26.

er, but later upon closer examination, the weapon proved to be a pellet gun. T 28. By this time, a search of the vehicle revealed a .38 caliber revolver under the front seat. Id. Petitioner was arrested for prowling and carrying a concealed weapon. T 28-29.

The legality of each stop is dependent upon the facts within the detailing officer's knowledge which reasonably suggests the possible commission of a crime, existing or imminent, on the part of the suspect(s). Clements v. State, 396 So.2d 215,217 (Fla. 4th DCA 1981), rehearing denied. Consequently, each decision must be viewed individually. The "probable cause" necessary to conduct an investigatory stop under Florida's Stop and Frisk Law is exceedingly less than that necessary for arrest. State v. Webb, 398 So.2d 824 (Fla. 1981). Sufficient "suspicion" can easily be gleaned from the facts of this cause.

The Fourth District discussed the stop and frisk principle in In the Interest of G. A. R., 387 So.2d 404 (Fla. 4th DCA 1980):

> Stop and Frisk is a pragmatic, yet constitutionally permissible response to the need for effective law enforcement. It asks that a citizen endure modest intrusion so that an officer might pursue leads suggested by his training, knowledge and expertise. In all situations the officer is entitled to assess the facts in light of his experience. . . Once Appellant was stopped, the police could have pursued several options. For example, Section 901.151(3) holds that a detention reasonably effected

> must also be reasonable in duration. So long as the delay was not unduly extended, there was nothing to prevent some of the officers from checking with nearby businesses while another officer continued to talk with appellant.

Id. at 409. In addition, the United States Supreme Court has stated:

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 146 92 S.Ct. 1921, 1923 (1972). See also, Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983).

The brief investigatory detention described herein does not violate Section 901.151, Florida Statutes. The attempt to flee upon observation of the approaching officer further heighted the suspicion of criminal activity. The officer would have been derelict of his duty had he not pursued the circumstances. As it was, the Petitioner was detained no longer than was reasonably necessary to investigate. State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978). The observation of the firearm in plain view during this detention provided probable cause for arrest.

The instant stop was founded upon sufficiently greater indication of criminal activity than the presence of a U-Haul truck in a business district late at night,

Colodonato v. State, 348 So.2d 326 (Fla. 1977), the mere riding of a bicycle slowly through a residential area at night, Mullins v. State, 366 So.2d 1162 (Fla. 1978), the act of leaning into the passenger side of a vehicle parked at a service station and walking briskly away upon noticing the police, Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980), or presence on a public street late at night in an area where residential burglaries had occurred. Levin v. State.

This latter observation was deemed insufficient indication of criminal activity where the men carried a fishing pole and were heading toward a body of water. Id. The Second District had ruled that while lateness of the hour alone could not justify a stop by an officer, the hour in addition to the knowledge of recent burglaries, was sufficient. Id. This finding was disapproved in State v. Levin.

In the instant case, there are factors in addition to presence late at night and knowledge of recent crimes (or the liklihood of crime). The placement of the car, the flash of the brake light, the attempt to flee upon the presence of the police officer, all added to the officer's suspicion that criminal activity was afoot. Each factor when isolated may not sufficiently demonstrate a well-founded suspicion. When these facts are reviewed together and are evaluated fully, as was done by the trial and appellate courts, it is apparent that reasonable suspicion

to suspect criminal activity existed to justify the stop of Petitioner's vehicle.

POINT II

A FINDING OF HABITUAL FELONY OFFENDER STATUS IS A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE AND IS NOT AN IMPERMISSIBLE DOUBLE COUNTING OF PRIOR CONVICTIONS.

ARGUMENT

In other cases pending before this Court in which this identical issue is raised, the State argued that application of the habitual offender statute altogether removes the cause from the guidelines scheme. *See*, *State v. Vicknair*, No. 68,536 and *Tillman v. State*, No. 68,041. This is based upon legislature enactment of a statutory provision, Section 775.084, Florida Statute, which is a sentencing scheme entirely separate from the guidelines provisions. To utilize habitual felony offender sentencing, formal specified procedures must be followed. The sentencing court *must* convene a separate proceeding, after advance written notice. The hearing *must* be conducted with fully rights afforded including confrontation, cross-examination and assistance of counsel. There are specific findings which *must be made* by the trial court to determine whether a defendant is a habitual offender. These specific statutory provisions control the general statutory provision of Section 921.001, Florida Statutes (1985). *E.g.*, *Panzavecchia v. State*, 201 So.2d 762 (Fla. 1967).

Admittedly the rule states that the guidelines must apply to all sentences imposed after October 1, 1983.

Rule 3.701, F.R.Crim.P. However, committee note (a), which is adopted as part of the sentencing guidelines, clearly states that, "the operation of this rule is not intended to change the law or requirements of proof as regards sentencing." Id. The specific statutory provision of the habitual offender act must control over the general sentencing guidelines provisions. Once habitual offender status is determined, the guidelines are not applicable, and sentence must be imposed without reference to the sentencing guidelines.

The latest amendment to the sentencing guidelines committee notes adds the following subsection (d)(10):

> If the offender is sentenced under §775.084 (habitual offender), the maximum allowable sentence is increased as provided by operation of that statute. If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

The Florida Bar re: Rules of Criminal Procedure (Sentencing Guidelines), 482 So.2d 311, 317 (Fla. 1985). This amendment has not been adopted by the legislature.

It is settled law that prescribed punishment for criminal offenses is substantive law. State v. Garcia, 229 So.2d 236 (Fla. 1969). In the case of conflict between a statute and a procedural law on a substantive matter, the statute must control. Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975). Therefore, despite the discussion of the habitual offender act in the amended committee note, it cannot supersede a substantive statute passed by

the legislature since it is only a procedural rule. The habitual offender act supersedes the sentencing guidelines because the guidelines are procedural in nature. State v. Jackson, 478 So.2d 1054 (Fla. 1985). Even if the legislature adopts the latest amendments, the specific habitual offender act must still control over the general sentencing scheme. This is because the habitual offender act is separate and distinct from the sentencing guidelines, and once habitual offender status, as prescribed by that statute, is found to exist, the sentence is outside of the ambit of the guidelines.

Should this Court disagree with the foregoing argument, the State submits that the finding of habitual offender status is a clear and convincing reason for departure and does not violate this Court's holding in Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

Hendrix mandated that prior convictions, scored and used to compute the recommended guidelines sentence, could not be used as a reason for departure. This was considered to be a reweighing of a factor already computed into the presumptive sentence.

> To allow the trial judge to depart from the guidelines based upon a factor which has already been weighed in arriving at a presumptive sentence would in effect be counting the convictions twice which is contrary to the spirit and intent of the guidelines.

Id. at 1220.

It is true that proof of at least one prior felony is vital to determining habitual felony offender classification. However substantially more than existence of a prior felony is required. The felony must be recent -- within the last five years. Section 775.084(2), Florida Statutes. The conviction must not have been pardoned. Section 775.084(3), Florida Statutes. The trial court must evaluate the total evidence and determine if the defendant is an habitual felony offender. Section 775.084(b)(3), Florida Statutes. Presumably this evaluation includes assessment of the presentence investigation report, the nature and frequency of the crimes committed, prior attempts and success of alternative sentencing efforts, the unamenability or resistance to rehabilitation, and the pattern and/or escalating nature of criminality. Finally the trial judge must determine whether an enhanced habitual offender sentence is necessary for the protection of the public from further criminal activity by the defendant. Section 775.084(b)(3) and (4), Florida Statutes.

In order to reach this conclusion, the sentencing court must follow prescribed procedures and make the requisite findings. There must be a separate and formal hearing with due notice with explicit factual findings on the record. Id. As indicated, substantially more is involved than merely counting prior convictions. The

Second District reached this exact conclusion in Ferguson v. State, 481 So.2d 924, 925 (Fla. 2d DCA 1986). Under examination of what is required to determine an habitual offender classification, it is apparent that the Hendrix is not violated. If so, the decision in Hendrix is too broadly interpreted and should be reexamined by this Court.

In recent months, the district courts have decided numerous cases on this precise point.[4] There are also

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4 Bogan v. State, No. 84-2679 (Fla. 2d DCA May 28, 1986) [11 FLW 1245]; Hale v. State, No. 85-1391 (Fla. 2d DCA 1986) [11 FLW 1098]; [escalating pattern of similar criminal conduct valid]; Hale v. State, No. 85-1391 (Fla. 5th DCA May 7, 1986) [11 FLW 1098]; (proper ground); Massard v. State, No. 84-1741 (Fla. 4th DCA May 7, 1986) [11 FLW 1090] (H.O. status valid ground); Bouther v. State, No. 85-1455 (Fla. 5th DCA May 8, 1986)(error); [11 FLW 1069]; Fuller v. State, No. 85-1090 (Fla. 2d DCA May 2, 1986) [11 FLW 1040] [clear and convincing]; Smith v. State, No. 85-1092 (Fla. 2d DCA May 2, 1986) [11 FLW 1041] [clear and convincing]; Allen v. State, No. 85-2011 (Fla. 4th DCA April 30, 1986) [11 FLW 1004] [H.O. statutory requirements not fulfilled]; Gonzalez v. State, No. 85-1856 (Fla. 3d DCA April 22, 1986) [11 FLW 946] (valid ground) Moultrie v. State, No. 85-968 (Fla. 5th DCA April 17, 1986) [11 FLW 913] [violates Hendrix]; Welsh v. State, No. 85-1407 (Fla. 2nd DCA April 2, 1986) [11 FLW 811]; Anderson v. State, No. BD-182 (Fla. 1st DCA June 6, 1986) [11 FLW 1279] [clear and convincing]. See also, Ballard v. State, No. 85-455 (Fla. 4th DCA May 21, 1986 [11 FLW 1179] [escalating pattern valid]; Degroat v. State, No. 85-1313 (Fla. 5th DCA May 15, 1986) [11 FLW 1127]; Cassell v. State, No. 85-1469 (Fla. 2 DCA May 16, 1986) [11 FLW 1161]; [reasons relating to resistance to rehabilitation valid].

numerous cases raising the same issue pending before this Court.[5]

In Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986), the Second District remarked:

> Is is evident from section 775.084 that the presence of a prior conviction in a defendant's criminal history simply ignites the procedural events which must precede the imposition of a habitual offender sentence. In resolving whether to impose a habitual offender sentence , however, the trial court's assessment of relevant circumstances is neither dependent upon nor related to 'the determination of guilt of the underlying substantive offense, and new findings of fact separate and distinct from the crime charged are required.' Eutsey v. State, 383 So.2d 219,223 (Fla. 1980). Eutsey makes it equally plain that even though a prior conviction is mechanically essential to the invocation of section 775.084, it is the subsequent conviction 'which triggers the operation of the act.' Id. Thus, the habitual offender sentence can readily be differentiated from pre-Hendrix departure sentences which were bottomed solely on the fact of prior conviction. See e.g., Francis v. State, 475 So.2d 1366 (Fla. 2d DCA 1985). The habitual offender sentence, by contrast, follows from the subsequent offense coupled with 'identifiable discrete facts such as general course of behavior, . . . family, . . . education, vocation and so on.' Eutsey, 383 So.2d at 255. It is our view that the reference in Section 775.084 to a prior conviction is 'merely ancillary' to the critical findings forming the bases for the enhanced sentences. Cf. Smith v.

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5 Whitehead v. State, No. 67,053; Ferguson v. State, No. 68,146; State v. Vicknair, No. 68,536; Tillman v. State, No. 68,041.

> State, 480 So.2d 663, 664 (Fla. 5th DCA 1985).

Id. at 716, 717. [Emphasis in original].

Habitual offender status is not used to compute the recommended guidelines score, neither is consideration of such a determination prohibited by the guidelines. The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective criteria indicating recidivism. Eutsey v. State, 383 So.2d 219 (Fla. 1980). The stated purpose of the sentencing guidelines includes:

> 2. The primary purpose of sentencing is to punish the offender.
>
> 4. The severity of the sanction should increase with the length and nature of the offender's criminal history.
>
> 7. Because of the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons . . . who have longer criminal histories.

Rule 3.701, F.R.Crim.P. Committee Note (d)(11) authorizes departure based on factors which are consistent with the statement of purpose and a finding of habitual offender status satisfies those criteria in every respect.

It is significant that in adopting the sentencing guidelines the legislature was silent as to its intent that the new scheme preempt existing law on the subject of sentencing, including the habitual offender act. Ch. 84-324, Laws of Florida. The general presumption is that

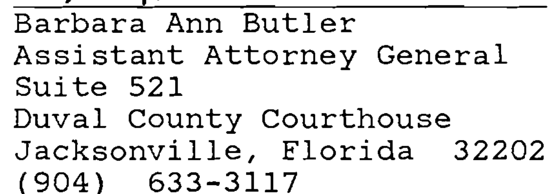
the legislature passes statutes with knowledge of prior existing laws. A general law covering an entire subject matter supersedes a former, more specific statute on the subject _only when that is the manifest intent of the legislature_. _State v. Dunmann_, 427 So.2d 166 (Fla. 1983). Repeal by implication is not favored. The practical effect and consequence of the habitual offender act survives the sentencing guidelines if, and only if, the habitual offender status is a clear and convincing reason for departure. If the only effect of Section 775.084 is to set the outer limit on the maximum extent of departure, the statute is for all practical purposes eviscerated. Only in extremely rare cases where the recommended sentence exceeds the statutory maximum, would the habitual offender status have any effect. Such an intent cannot be ascribed to the Florida Legislature.

CONCLUSION

Based on the foregoing reasons and citations of authority, Appellee respectfully submits that the opinion of the Court of Appeal, First District, which approves judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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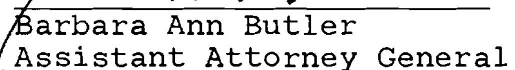
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to P. Douglas Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida 32302, this 25th day of June, 1986.



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AG66.10861