

IN THE
SUPREME COURT OF FLORIDA

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By _____
Chief Deputy Clerk

ALANDER CRAPPS,
Petitioner,

vs.

CASE NO. 68,485

STATE OF FLORIDA,
Respondent.

_____ /

RESPONDENT'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

PATRICIA CONNERS
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

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ALANDER CRAPPS,

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RESPONDENT'S BRIEF ON JURISDICTION
PRELIMINARY STATEMENT

Alander Crapps, the defendant in the trial court and the appellant before the First District Court of Appeal, will be referred to as "petitioner." The State of Florida, the prosecuting authority in the trial court and the appellee before the First District, will be referred to as "respondent" or "the State." The appendix contains a copy of Crapps v. State, 11 F.L.W. 488 (Fla. February 21, 1986) and reference thereto will be designated by A followed by the appropriate page number and enclosed in parentheses. Other relevant documents also appear in the appendix.

STATEMENT OF THE CASE AND FACTS

Inasmuch as the First District's opinion sufficiently sets forth the facts relevant to this Court's disposition of the jurisdictional issue, the State joins the petitioner in adopting those facts as its statement of the case and facts.

SUMMARY OF ARGUMENT

The First District Court of Appeal does not expressly and directly conflict with Vicknair v. State, 11 F.L.W. 574 (Fla. 5th DCA March 6, 1986). Although the Fifth District in Vicknair

expressly limited its previous holdings regarding the use of an habitual offender determination as a basis for departure from the guidelines to those situations where the habitual offender determination is based upon factual considerations independent of the defendant's prior criminal record and current offense, the First District's decision sub judice does not conflict with that holding inasmuch as the trial court did not rely upon a factual basis beyond the defendant's prior criminal record and current offense in making its habitual offender finding.

Regardless, even if the instant decision could be construed to be in conflict with Vicknair, the State suggests that the more practical approach for this Court in the instant case would be to stay any determination as to jurisdiction until such time as the certified question in Vicknair is answered.

ISSUE

(RESTATED) THE FIRST DISTRICT'S HOLDING SUB JUDICE THAT THE TRIAL COURT'S HABITUAL OFFENDER DETERMINATION WAS A PERMISSIBLE GROUND FOR DEPARTURE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH VICKNAIR v. STATE, 11 F.L.W. 574 (FLA. 5th DCA MARCH 6, 1986).

As noted by the First District in its opinion below, the trial court entered an order adjudging petitioner to be an habitual offender, finding that he met the threshold requirements of section 775.084(1), Florida Statutes (A-8), and finding, as required by section 775.084(3), Florida Statutes (A-8), that imposition of habitual offender status is necessary for the protection of the public. (A-2 - A-5). In support of this latter determination, the trial judge stated:

In making this determination the Court has considered the testimony presented at hearings and trial, and the pre-sentence investigation report. The Court finds that the Defendant has a juvenile history as well as an adult criminal history in Circuit and County Court.

At the trial on case number 83-2695, the Defendant took the stand and denied any involvement in this burglary. Obviously, by its verdict the jury found that the Defendant had perjured himself. At trial on case number 83-1704, the Defendant did not testify or offer any defense. It is clear that the Defendant is unwilling to accept the blame for his wrongs and in light of his his [sic] extraordinary vindictiveness and violent character, there is no likelihood that this Defendant will ever be rehabilitated. It is this Court's belief that only extended incarceration can protect the public from further criminal acts by this Defendant.

(A-6).

The judge went on in a separate order to set forth his grounds for departure. They were as follows:

1. The Court has found that this Defendant qualifies as a habitual offender pursuant to Section 775.084, Florida Statutes. Based on this proceeding, the Court has specifically found that incarceration is necessary to protect the public from further criminal activity by this Defendant. The Court hereby specifically incorporates into this Order the findings made pursuant to the habitual offender proceedings.

2. Testimony of the victim and her family demonstrated that the Defendant's extended campaign [sic] of harassment and violence against them caused great emotional distress.

3. The Defendant's testimony at trial and comment in the pre-sentence investigation indicates that he refuses to accept any responsibility for his crimes or demonstrates [sic] any remorse.

4. The Defendant perjured himself at trial of 83-2695.

(A-7). While ruling the latter two reasons improper, the First District sustained the first two, expressly finding that the

petitioner's habitual offender status was a proper basis for departure. (A-3).

Petitioner now contends that the First District's decision in the instant case is in express and direct conflict with Vicknair v. State, 11 F.L.W. 574 (Fla. 5th DCA March 6, 1986). Vicknair is a case requiring careful scrutiny. In Vicknair, the defendant was found to be an habitual offender and this determination, in turn, was used as a basis for departure from the recommended guidelines sentence. Specifically, the court's four reasons for departure were:

(1) Defendant was found to be an habitual felony offender pursuant to F.S. 775.084;

(2) Defendant was twice previously convicted of possession of illegal drugs;

(3) Defendant has previously received a suspended sentence with five years probation and fine, and a term of one year imprisonment, all of which have failed to deter or rehabilitate him;

(4) A guideline sentence of 384 days county jail and/or five years probation would be inappropriate in this case.

Vicknair, 11 F.L.W. at 574.

Recognizing its previous opinions holding that a habitual offender determination is sufficient reason to depart from the recommended guidelines sentence, see Smith v. State, 461 So.2d 995 (Fla. 5th DCA 1984); see also Howard v. State, 469 So.2d 216 (Fla. 5th DCA 1985); Gann v. State, 459 So.2d 1175 (Fla. 5th DCA 1984), the Fifth District noted that those decisions had been rendered prior to this Court's opinion in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), in which this Court barred guidelines departures grounded upon prior convictions because prior convictions are already factored into the scoring of the presumptive sentence.

Accordingly, the Fifth District considered the effect of the Hendrix on the validity of using a defendant's habitual offender status as a ground for departure. The Fifth District stated:

Under the habitual offender act (§ 775.084, Fla. Stat.), a defendant's prior convictions and current conviction are the sole necessary factual basis for the determination that the defendant is an habitual offender under section 775.084(1) and (2). The only additional requirement is a finding by the trial court (by a preponderance of the evidence) that it is necessary for the protection of the public to sentence the defendant to an extended term. § 775.084(3), Fla. Stat. Therefore, this finding can be but a conclusion based solely on the defendant's prior record and current conviction. When this is the case, the finding under section 775.084(3) that the defendant is an habitual offender is not a sufficient ground for departure under Hendrix. On the other hand, if factual matters other than prior criminal record and current conviction constitute clear and convincing reasons for a departure sentence, then it is immaterial that those reasons also support a determination of an habitual offender status except that such a determination authorizes an extended term of imprisonment thereby raising the maximum legal sentence under section 775.084(4)(a). However, the sentencing judge must still give clear and convincing reasons for departure in order to impose this extended term of imprisonment if it is greater than the guideline sentence. Under the sentencing guidelines and Albritton, while the maximum legal sentence sets the outside limit to the term of a departure sentence, it does not otherwise appear to be a material factor in formulating a lawful sentence. Accordingly, in view of Hendrix, the holdings in Smith, Howard, and Gann are limited to cases where the determination of habitual offender status is based on reasons which are themselves clear and convincing reasons for imposing a departure sentence independent of the defendant's prior criminal record and current offense. [Footnotes omitted].

Id. Because the four reasons given by the trial court for departure in Vicknair provided "no factual basis for the court's

habitual offender status other than the defendant's criminal record and current conviction [already a part of the habitual offender determination pursuant to section 775.084(1) and (2)], and those matters, having been factored in the guidelines sentence, the Fifth District vacated Vicknair's sentence and remanded the cause for resentencing.

Petitioner contends that the First District's decision in the instant case conflicts with the holding in Vicknair because the findings supporting the trial court's habitual offender determination sub judice allegedly "are no more than the statutory criteria under the habitual offender act." (Petitioner's brief at 6). However, Vicknair clearly disapproves only of using a defendant's habitual offender status as a basis for departure when the trial court has, pursuant to section 775.084(1) and (2), relied upon the defendant's prior convictions and his current conviction as the sole factual basis for his determination, and has made the further finding pursuant to section 775.084(3) that an extended sentence is necessary for the protection of the public. Clearly, if the court's determination of habitual offender status is based upon factors other than the defendant's criminal record and current conviction and those factors constitute clear and convincing reasons for departure independent of the habitual offender finding, the Fifth District has made it plain that, under such facts, it would sustain the use of habitual offender status as a basis for departure.

Given this, there is no question that the First District's opinion in the instant case does not conflict with Vicknair. Unlike in Vicknair, where the trial court's four reasons for departure

related only to Vicknair's prior convictions, the trial court in the instant case, after making the necessary determination pursuant to section 775.084(1) and (2) (A-5), and after finding that an extended sentence was necessary for the protection of the public (A-5), went on to provide a factual basis in support of the habitual offender determination which was quite independent of any consideration of the petitioner's prior convictions. (See A-6)

Admittedly, while some of these factors may not have been sufficient bases for departure, it appears that most of them do constitute clear and convincing reasons, especially the court's finding that petitioner's "extraordinary vindictiveness and violent character" indicated that the petitioner would never be rehabilitated.

As a result, although the First District has yet to render a decision which expressly indicates its view regarding the effect of Hendrix on the utilization of an habitual offender determination as a basis for departure, it is clear that the instant decision does not conflict with Vicknair because its facts are such that even under Vicknair, the First District's decision was correct.

Regardless, even if the instant decision could be considered to be in conflict with Vicknair, it is asserted that Vicknair is clearly wrong and the better result has been rendered by the Second District in Fleming v. State, 11 F.L.W. 112 (Fla. 2d DCA January 10, 1986) and Ferguson v. State, 11 F.L.W. 111 (Fla. 2d DCA January 10, 1986). Given that the Fifth District in Vicknair has recognized the contrary view of the Second District in those cases, 11 F.L.W. at n.5, and has certified to this Court a question of great public importance


the respondent suggests, in the interests of avoiding potentially "senseless makework," that this Court stay its determination on jurisdiction in the instant case pending the resolution of the certified question by this Court in Vicknair. Were this Court to impose such a stay and then quash Vicknair, there would no longer be any alleged conflict between Vicknair and the instant case and this Court would have avoided the necessity of reviewing a case on a moot issue. This rationale is especially significant at this juncture inasmuch as the Fifth District is, as yet, the only district court to construe Hendrix as substantially limiting its pre-Hendrix decisions regarding the use of the habitual offender status as a basis for departure. Thus, were this Court to disagree with the rationale of Vicknair, any alleged conflicts between Vicknair and any post-Hendrix cases from the other district courts on this issue, would immediately be eradicated by this Court's quashal of Vicknair without the necessity of further review.

CONCLUSION

Based on the foregoing this Court should decline to accept jurisdiction in this cause or, in the alternative, stay its determination on jurisdiction until it resolves the certified question presented in Vicknair.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



PATRICIA CONNERS
ASSISTANT ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32301
(904) 488-0600
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by United States Mail to Mr. Terry P. Lewis, Special Assistant Public Defender, Post Office Box 100508, Tallahassee, Florida 32302 on this the 24th day of April, 1986.

Patricia Conners

PATRICIA CONNERS
ASSISTANT ATTORNEY GENERAL