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102 app.

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SUPREME COURT
TALLAHASSEE, FLORIDA

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
CHARLES J. VICKNAIR, a/k/a,
ROBERT NOEL VICKNAIR,
Respondent.

CASE NO. 68,536

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

Respondent was charged by amended information on November 11, 1984, with one count of trafficking in cocaine and one count of possession of cocaine. §§ 893.13(1)(e), 893.135(1)(b)(3), Fla. Stat. (1983) (R 287).¹ A trial by jury was conducted in the Circuit Court, Ninth Judicial Circuit, Osceola County, on February 5 and 6, 1984 (R 1). Respondent was acquitted by the jury on the trafficking charge, but convicted of the possession charge (R 238).

On February 7, 1985, the state filed its Notice of Intention to Seek Sentencing as a Habitual Offender (R 279). A presentence investigation was prepared and is part of the record on appeal.

The sentencing hearing was held on February 28, 1985 (R 242). At this time, the judgment was amended to reflect respondent's true name, Charles Jonathan Vicknair, rather than his brother's name which he gave when arrested (R 243). The state introduced certified copies of two felony convictions from the state of Louisiana (R 248). One of these prior felony convictions was for possession of marijuana, the other, possession of quaaludes (R 249). After argument, the court made the finding that respondent had been convicted of a felony in the state of Louisiana (R 253). Second, the court found that the crime respondent was being sentenced for was committed

¹(R) refers to the record on appeal.

within five years of the expiration of the sentence for the Louisiana conviction (R 254). The court found that no evidence had been presented to suggest that respondent had been pardoned or that the conviction had been set aside on appeal (R 254). Lastly, the court found that the protection of the public required an enhanced sentence (R 254). The prosecutor argued that respondent was a habitual narcotic offender, in that all of his prior convictions as well as the instant offense were all drug related (R 250). This reason, prior drug convictions, was listed as a reason for departure (R 273). After computing a guidelines scoresheet and hearing further argument on the presence or absence of reasons for departure, the court sentenced respondent to five years incarceration (R 275).

Notice of Appeal was filed on March 12, 1985 (R 271). The briefs were written before this court's decision in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). On March 6, 1986, the District Court of Appeal, Fifth District, entered its opinion in this cause, which certified the following question as being a question of great public importance:

Is the determination of a defendant as an habitual offender pursuant to section 775.084, Florida Statutes, a permissible reason to depart from a recommended guideline sentence where the sole factual basis for the habitual offender determination is the defendant's criminal record and current conviction which have already been weighed in arriving at the guideline sentence, or when the factual basis for the habitual offender determination, other than the defendant's criminal record, is not a clear and convincing

reason for departure under guide-
line sentencing criteria?

Notice to Invoke Discretionary Jurisdiction was timely
filed on April 1, 1986.

SUMMARY OF ARGUMENT

Assuming that sentences for habitual offenders are to be imposed pursuant to the sentencing guidelines, then habitual offender status is a clear and convincing reason for departure. Although an offender's prior record is used to determine in part habitual offender status, it is not merely the convictions which form the basis for finding that a defendant is a habitual offender. The court must make the factual finding that enhanced incarceration is necessary for the protection of the public. Further, the state must establish the timing of the prior felonies, an aspect of an offender's record which cannot be included in the computation of the recommended guidelines sentence. Therefore, a finding of habitual offender status requires much more than a simple consideration of scored prior felonies and so does not violate Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

The reliance upon habitual offender status as a reason for departure is not prohibited by the guidelines, in fact, the purposes of the habitual offender act are in complete harmony with the stated purposes of the sentencing guidelines.

ARGUMENT

A FINDING OF HABITUAL FELONY
OFFENDER STATUS IS A CLEAR AND
CONVINCING REASON FOR DEPARTURE
FROM THE RECOMMENDED GUIDELINES
SENTENCE, IF UNDER THE RULE AT ALL.

The District Court of Appeal, Fifth District has framed the issue in this cause as stated in the statement of case and facts, infra. As a threshold inquiry, however, petitioner respectfully suggests that an equally compelling question of great public importance is whether the operation of the habitual offender act takes a sentence outside of the guidelines scheme altogether. Petitioner contends that the legislature has enacted substantive law in the form of the habitual offender act that is an entirely separate sentencing scheme. Section 775.084, Florida Statutes has a formal procedure that must be followed. The court must conduct a separate proceeding, after advance written notice, with the assurance of many rights including confrontation, cross-examination and assistance of counsel. There are specific findings which must be made by the trial court to determine that a defendant is a habitual offender. Petitioner suggests that 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).

In anticipation of respondent's retort that the guidelines must apply to all sentences imposed after October 1, 1983, petitioner submits that 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." The specific statutory provision of the habitual offender act must control over the general sentencing guidelines provisions. Therefore, once habitual offender status is determined, the guidelines are not applicable, and sentences must be imposed without reference to the sentencing guidelines.

Petitioner recognizes that the latest version of the amendments to the sentencing guidelines committee notes adds these sentences to note (d)(10): "If the offender is sentenced under section 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).

However, to date these amendments have not been adopted by the legislature. The 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, since it is only a procedural rule, it cannot supercede a substantive statute passed by the legislature. The habitual offender act supercedes 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. Petitioner contends that 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 honorable court disagree with the foregoing argument, petitioner respectfully suggest that the finding of habitual offender status is a clear and convincing reason for departure.

Hendrix v. State, 475 So.2d 1218 (Fla. 1985), held that prior convictions which were scored and used to compute the recommended guidelines sentence could not be used as a reason for departure. "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 one prior felony is a vital component of habitual felony offender classification. However, before a defendant can be declared to be a habitual offender, the court must conduct a formal hearing, after due notice by the state, and make the factual finding on the record that an enhanced sentence is necessary for the protection of the public.

This finding is predicated upon matters revealed in the pre-sentence investigation. "Thus, the determination that a person is a habitual offender requires more than a simple consideration of prior felonies." Ferguson v. State, 481 So.2d 924, 925 (Fla. 2d DCA 1986). It is true that this factual finding must be established by the preponderance of the evidence. However, once habitual felony offender status is determined, this status is a clear and convincing reason for departure.

The decision of the fifth district points out that the finding that increased incarceration is necessary for the protection of the public can be based solely on the defendant's prior convictions. Petitioner submits that Hendrix is not violated when an offender's prior criminal record is consulted to reach another conclusion that is itself a clear and convincing reason for departure. These permissible conclusions include the timing of the offenses, whether they form an escalating pattern, or as here, that the prior crimes are all drug related.

Further, the state must establish that the sentence for the prior conviction used to find habitual offender status expired within five years of the commission of the offense for which the offender is being sentenced. The timing of the offenses cannot be included in the computation of the recommended guidelines sentence. A finding of habitual offender status requires much more than a simple consideration of scored prior convictions and so does not violate Hendrix.

It 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.

Fleming v. State, 480 So.2d 715, 716 (Fla. 2d DCA 1986).

Habitual offender status is not used to compute the recommended guidelines score, neither is its consideration prohibited by the guidelines. In fact, the purpose of the habitual offender act was stated in Eutsey, supra, to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism. The stated purpose of the sentencing guidelines include:

(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 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.

Committee Note (d)(11) authorizes departure based on factors which are consistent with the statement of purpose. Departure based upon a finding of habitual offender status certainly satisfies this criteria.

When 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. 84-328, Laws of Fla. Although there is a general presumption that the legislature passes statutes with knowledge of prior existing laws, a general law covering an entire subject matter supercedes 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. Petitioner respectfully suggests that the practical effect and consequences of the habitual offender act survives the sentencing guidelines if and only if habitual offender status is a clear and convincing reason for departure. If the only effect of habitual felony offender status is to set the outer limit on the maximum extent of departure, for all practical purposes, the habitual offender act is rendered impotent. Only in those extremely rare cases where the recommended sentence exceeds the statutory maximum will the status have any effect. To so interpret the habitual offender act eviscerates it. Such an intent cannot be ascribed to the legislature.

CONCLUSION

Based upon the authorities and arguments presented herein, petitioner respectfully requests this honorable court determine that sentences pursuant to the habitual felony offender act are outside the ambit of the sentencing guidelines, or alternatively, to answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on the Merits has been furnished, by mail, to Christopher S. Quarles, Assistant Public Defender for appellant, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 2nd day of May, 1986.

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