

Supreme Court of Florida

No. 68,536

STATE OF FLORIDA, Petitioner,

vs.

CHARLES J. VICKNAIR, a/k/a
ROBERT NOEL VICKNAIR, Respondent.

[November 26, 1986]

BARCKETT, J.

The Fifth District Court of Appeal certified the following question in Vicknair v. State, 483 So.2d 896, 898 (Fla. 5th DCA 1986):

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 guideline sentencing criteria?

We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The district court reversed the sentence of the trial judge which departed from the recommended sentencing guidelines on the basis of the following four reasons:

- (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 364 days county jail and/or five years probation would be inappropriate in this case.

483 So.2d at 896-97.

The district court correctly recognized that because there was no factual basis for the trial court's determination of habitual offender status other than the defendant's prior criminal record which had already been factored into the guidelines, a departure sentence would conflict with our holding in Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

Subsequent to accepting jurisdiction in this case, we have answered the certified question in the negative in Whitehead v. State, No. 67,053 (Fla. Oct. 30, 1986). In accordance with Whitehead, we approve the decision of the district court below.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, EHRLICH and SHAW, JJ., Concur
OVERTON, J., Concur in result only

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

Application for Review of the Decision of the District Court
of Appeal - Certified Great Public Importance

Fifth District - Case No. 85-409

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