

No Reg. Case

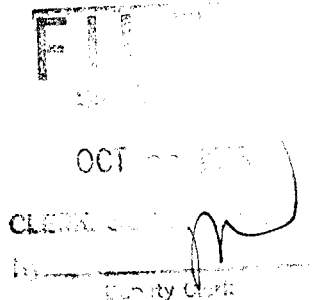
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 68,945

PHILLIP LEE MOULTRIE,
Respondent.



PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>	
AUTHORITIES CITED.....	ii	
STATEMENT OF THE CASE AND FACTS.....	1-2	
SUMMARY OF ARGUMENT.....	3	
ARGUMENT		
A FINDING OF HABITUAL FELONY OFFENDER STATUS IS A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE....		4-10
CONCLUSION.....	11	
DECISION - FIFTH DISTRICT COURT OF APPEAL.....	A-1	
SCORESHEET.....	A-2	
CERTIFICATE OF SERVICE.....	12	

AUTHORITIES CITED

CASES

PAGE

Benyard v. Wainwright
322 So.2d 473 (Fla. 1975).....5

Eutsey v. State,
383 So.2d 219 (Fla. 1980).....8

Ferguson v. State,
481 So.2d 924 (Fla. 2d DCA 1986).....6

Fleming v. State,
480 So.2d 715 (Fla. 2d DCA 1986).....8

The Florida Bar Re: Rules of Criminal Procedure
(Sentencing Guidelines),
482 So.2d 311 (Fla. 1985).....5

Hendrix v. State,
475 So.2d 1218 (Fla. 1985).....2,3,6,7,8

Panzavecchia v. State,
201 So.2d 762 (Fla. 1967).....4

Reynolds v. Cochran,
138 So.2d 500 (Fla. 1962).....8

State v. Dunmann,
427 So.2d 166 (Fla. 1983).....9

State v. Jackson,
478 So.2d 1054 (Fla. 1985).....2,5,10

OTHER AUTHORITIES

§775.084, Fla. Stat.....1,4,5

§921.001, Fla. Stat.....4

STATEMENT OF THE CASE AND FACTS

On November 8, 1984 Phillip Moultrie was charged by information with burglary of a conveyance and grand theft. (R 343) At trial March 11 and 12, 1985, witnesses testified that when a car belonging to Moultrie was repossessed in Orlando on September 27, 1984, the trunk was found to contain camera equipment and other property that was later discovered to have been reported missing from a van belonging to a tourist from Utah. (R 107-128, 129-142, 144-158, 159-169, 170-177) Moultrie denied all knowledge of the items in the trunk of the car, and said he had been pressured into giving an untrue alibi story when he was picked up by the police on October 8, 1984. He maintained he had been at home the night of the burglary. (R 251-257)

On motion for judgment of acquittal the court dismissed the burglary count. (R 228-229,362) Moultrie was found and adjudicated guilty of grand theft (R 323-324,262-264), and on June 10, over objection by defense counsel, was sentenced as an habitual offender to ten years in prison, with 92 days credit, five stages beyond the recommended range of the guidelines sentence. (R 332-337, 356, 370-374) Timely notice of appeal was filed June 21. (R 375)

The departure sentence in this case is based on the adjudication of the defendant as an habitual felony offender under section 775.084, Florida Statutes. The Fifth District Court of Appeal found the adjudication of habitual felony offender status to be sufficient under the above statutes, but that it was not based on reasons which, independent of the

defendant's criminal record, justified a departure sentence. The court, therefore, found the departure sentence to be indirectly and in substance, inconsistent with Hendrix v. State, 475 So.2d 1218 (Fla. 1985), which disapproves a departure sentence based on the defendant's criminal record, which has been factored into the recommended guidelines sentence. In addition, the court found that the reference "habitual offender" on the guidelines scoresheet was inadequate to comply with the dictates of State v. Jackson, 478 So.2d 1054 (Fla. 1985), which requires a written statement of reasons for departure.

This court exercised its discretionary jurisdiction and entered an order accepting jurisdiction and dispensing with oral argument on September 22, 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 in part to determine habitual offender status, it is not merely the convictions which form the basis for finding that a defendant is an 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.

The first area of inquiry in the present case should be whether the operation of the habitual offender act takes a sentence outside of the guidelines scheme altogether. It is clear 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, and specific findings must be made by the trial court to determine that a defendant is an habitual offender. Petitioner submits that logic dictates 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).

Although, generally speaking, the guidelines must apply to all sentences imposed after October 1, 1983, 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." Therefore, under this particular provision, once habitual offender status is determined, the guidelines are not applicable, and sentences must be imposed without reference to the sentencing

guidelines.

The latest December 19, 1985 amendment to the sentencing guidelines committee notes adds this proviso 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). This amendment has subsequently been adopted by the legislature and approved by the governor. The prescribed punishment for criminal offenses, however, 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. See, State v. Jackson, 478 So.2d 1054 (Fla. 1985).

The language of the amended committee note is not inconsistent with the state's position and refers to actual sentencing under section 775.084, with the sentence imposed by operation of the habitual offender act. Thus the phrase "If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply," to comport with

logic and reason, must apply to that portion of the note dealing only with enhancement statutes, which are still subject to guidelines provisions.

Alternatively, the state would strongly argue that the finding of habitual offender status is a clear and convincing reason for departure, contrary to the opinion of the district court below.

Hendrix v. State, 475 So.2d 1218 (Fla. 1985), held that prior convictions which were scored and used to compute the recommended guidelines sentences 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." 475 So.2d at 1220. It cannot seriously be argued that proof of a prior felony conviction is not a vital component of habitual felony offender classification. However, before a defendant can be declared to be an habitual offender, the court must conduct a formal hearing, after due notice by the state, and make a 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 presentence investigation. "Thus, the determination that a person is an 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.

Even though it could be argued that the finding that increased incarceration is necessary for the protection of the public could be partially based on the defendant's prior conviction, even accepting such argument, the precepts of Hendrix are certainly 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, such as the timing of the offenses or whether they form an escalating pattern of criminality. These concepts all inhere in the simple phrase "habitual offender" without further wheel-spinning linguistic efforts.

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 convictions.

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

The reasoning of the court below, in its invocation of Hendrix ignores the fact that the increased severity of the punishment for the subsequent offense is not a punishment of the person a second time for his former offenses but is a more severe punishment for the last offense, the commission of which is a manifestation of a criminal compulsion, likely to resurface in further acts, which may be taken into account in determining the adequacy of punishment. The charge of being a subsequent offender does not involve an accusation of a crime other than, or separate from, the offense principally charged and punishment awarded thereby is awarded for the last offense only. See, Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962).

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 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.


The district court also found that "the mere reference to 'habitual offender' on the guidelines scoresheet does not comply with State v. Jackson, 478 So.2d 1054 (Fla. 1985), which requires a written statement of reasons for departure." A review of the scoresheet reveals that the words "habitual offender" appear in the sentencing box designated "sentence imposed". The reasoning of the trial judge in so sentencing the defendant is thus very clear and can be reviewed on appeal and resentencing on this basis alone is the elevation of form over substance, something the criminal justice system can ill afford, in this era of costly guideline remands.

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, that the reason that the defendant is an habitual offender is in and of itself a clear and convincing reason for departure.

Respectfully submitted,

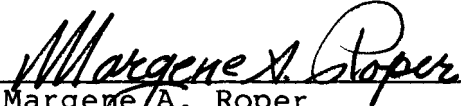
JIM SMITH
ATTORNEY GENERAL


MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioners Brief on the Merits has been furnished, by mail, to Michael L. O'Neill, Assitant Public Defender for responent, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 17th day of October, 1986.


Margene A. Roper
Of Counsel