

IN THE SUPREME COURT OF FLORIDA

DAVID E. KING, :  
Petitioner, :  
vs. :  
STATE OF FLORIDA, :  
Respondent. :  
\_\_\_\_\_ :

Case No. 69,420

FILED  
1988  
DEPUTY CLERK

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

PETITIONER'S BRIEF ON MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner, David E. King, was charged with five counts of Kidnapping and three counts of Armed Robbery. Petitioner was found guilty on all counts by the jury. Petitioner made a motion for judgment of acquittal as to the kidnapping charges, which was granted. Petitioner was adjudicated guilty and sentenced to twenty-five years on each charge to run concurrently. The three year minimum mandatory for possession of a firearm was imposed. Petitioner was also adjudged to be a habitual offender. In so sentencing Petitioner, the court exceeded the guideline recommended sentence of seven to nine years. Petitioner timely filed a Notice of Appeal to the District Court of Appeal, Second District. In a written opinion the Second District Court of Appeal held that the determination of Petitioner to be a habitual offender was sufficient reason in itself to exceed the guideline recommendation. However, recognizing that other districts had held to the contrary, the court certified the following question as being a matter of great public importance.

Is the determination of a defendant as a habitual felony offender pursuant to section 775.084 a sufficient reason for departure from the recommended range of the sentencing guidelines?

Petitioner filed his Petition for Discretionary review, F.R.A.P. 9.030(2)(B)(i) with the Florida Supreme Court, and the court accepted jurisdiction. Petitioner addresses the issue raised by the certified question. That argument follows.

**SUMMARY OF ARGUMENT**

Petitioner's habitualization pursuant to Florida Statute 775.084 was improper because the court failed to make more than mere conclusory findings that Petitioner was a danger to society. Even assuming Petitioner was properly habitualized, habitualization is not a proper basis for departure because by its very nature it is based on factors already used to compute the presumptive sentence.

## ARGUMENT

IS THE DETERMINATION OF A  
DEFENDANT AS A HABITUAL FELONY  
OFFENDER PURSUANT TO SECTION  
775.084 A SUFFICIENT REASON FOR  
DEPARTURE FROM THE RECOMMENDED  
RANGE OF THE SENTENCING GUIDELINES?  
(As certified by the Second  
District Court of Appeal)

Petitioner was sentenced to twenty-five years on each of three counts of armed robbery, all to run concurrently. The recommended sentence pursuant to the sentencing guidelines was seven to nine years. The trial court's sole justification for departure and the only written reason given was that Petitioner was adjudged to be a habitual felony offender. (R57) The order finding Petitioner to be a habitual offender merely states:

"The court finds that the defendant has

1. been previously convicted of a felony
2. said conviction was [within] the last five years
3. There has been no pardon

and the defendant presents a danger to society. For the protection of society this court finds him to be a habitual offender. As such the guidelines will be exceeded."  
(R56)

Petitioner first contends that the court's justification for habitualizing him was insufficient, therefore, the court's sole reason for departure was invalid. Even assuming that the court was correct in finding Petitioner to be a habitual offender, it

was still improper to justify a guideline departure on that basis because the process of habitualization involves factors already used in computing the recommended sentence.

The habitual offender statute, Florida Statute 775.084 specifically requires that the trial court make findings of fact that demonstrate on their face that an extended sentence is necessary to protect the public from the defendant's further criminal conduct. A conclusory statement that an extended sentence is necessary for the protection of the public is insufficient. Hugger v. State, (2d DCA October 17, 1986)[11 F.L.W. 2216], Brown v. State, (5th DCA September 25, 1986)[11 F.L.W. 2049], Walker v. State, 462 So.2d 452 (Fla. 1985), Sims v. State, 487 So.2d 37 (2d DCA 1986) and Cavallaro v. State, 420 So.2d 927 (2d DCA 1982). In the instant case, the written findings supporting habitualization, were no more than blanket conclusions. The written findings first stated that Petitioner met the criteria for habitualization, ie., prior felony conviction within the last five years, and then the statement that Petitioner was a danger to society and for the protection of society, Petitioner was found to be a habitual offender. The court's oral statements during sentencing were of the same ilk. (R73) Clearly, the trial court's findings, both written and oral, failed to meet the statutory requirements of specific facts supporting the conclusion that an extended term is necessary to protect the public.



Even assuming that Petitioner was properly habitualized, in light of Hendrix v. State, 475 So.2d 1218 (Fla. 1985), habitualization is an improper basis for departure as Hendrix disapproves of departures based upon any factor already utilized in arriving at the presumptive sentence. Under the habitual offender statute a defendant's prior conviction(s) and current conviction(s) are the sole necessary factual basis for the determination that the defendant is a habitual offender pursuant to Florida Statute 775.084, Brown, supra, Teague v. State, 491 So.2d 296 (5th DCA 1986), Watson v. State, 492 So.2d 831 (5th DCA 1986), Bouthner v. State, 489 So.2d 784 (5th DCA 1986) and Vicknair v. State, 483 So.2d 896 (5th DCA 1986). Needless to say Petitioner's prior record and current conviction(s) were factored into the scoresheet and utilized in arriving at the recommended sentence, as well as being the trial court's primary consideration for feeling Petitioner should be habitualized and his sentence aggravated beyond the recommended seven to nine years.

From the available decisions on this point it is clear that the Fifth District Court of Appeal's position is that habitualization is an improper basis for departure from the guideline recommendation because it relies on factors already used in arriving at the presumptive sentence. This is not to say that in certain instances that the trial court's reasons for

habitualization may overlap with its reasons for departure, nor that habitualization does not serve any purpose in the current sentencing scheme. The First District Court of Appeal and the Second District Court of Appeal hold that if the defendant is properly habitualized this reason alone justifies a guideline departure. In view of the recent amendments to the guidelines, see The Florida Bar re: Rules of Criminal Procedure (sentencing guidelines, 3.701, 3.988) 482 So.2d 311 (Fla. 1985) the position of the Fifth District Court of Appeal would appear to be more in accord with the rule. The amendment reads:

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

The rule would require that appropriate reasons for departure be given, even if the offender is habitualized. Habitualization increases the statutory maximum sentence, it does not dispense with the requirement for clear and convincing reasons to warrant aggravation when the guidelines are exceeded.

In as much as the trial court's sole basis for exceeding the guidelines was Petitioner's habitualization and the sole basis for habitualization was the court's conclusory statements that it was necessary for the protection of the public, the entire

sentencing structure must collapse. Even if Petitioner's habitualization provided a firmer foundation, it would still not support a departure because it was based solely on Petitioner's prior record, a reason held to be improper in Hendrix, supra. Petitioner's sentence should be vacated and remanded for resentencing.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to vacate Petitioner's sentence and remand for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James Young, Assistant General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to David E. King, Inmate No. 478741, DeSoto Correctional, P.O. Drawer 1072, Arcadia, FL 33821, October 30, 1986.

Respectfully submitted,

Allyn Giambalvo

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