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IN THE SUPREME COURT OF FLORIDA

PAUL MYERS,

Petitioner,

v. CASE NO. 70,017

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #197890
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. A one volume record on appeal, including transcripts, will be referred to as "R", followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

By information filed August 7, 1985, petitioner was charged with attempted burglary, a third degree felony (R 104). He was convicted after a jury trial (R 108). The state filed a notice of intent to seek habitual offender sentencing (R 111). Petitioner's sentencing guidelines scoresheet recommended a 27-40 year sentence (R 144).

On January 28, 1986, petitioner was found to be a habitual offender and sentenced to 10 years in prison (R 125-42; 145-46). On appeal, the lower tribunal found that petitioner's habitual offender sentence was permissible, even though this Court had, by intervening caselaw, held that the habitual offender statute was no longer a viable sentencing alternative after the guidelines were enacted (App. at 4).

Pursuant to petitioner's timely request for discretionary review, this Court accepted jurisdiction by order dated June 5, 1987.

SUMMARY OF ARGUMENT

In Issue I petitioner argues this Court in Whitehead v. State, 498 So.2d 863 (Fla. 1986), eliminated the habitual offender statute as an alternative sentencing scheme to the sentencing guidelines. Because of that, this Court should hold that the habitual offender statute is not available to extend the permissible maximum sentence.

Secondly petitioner argues that should the Court disagree with petitioner in Issue I, the sentence should be nevertheless reversed and remanded. The trial court failed to articulate any specific facts to justify the habitual offender determination, and the state failed in its burden of proof.

ARGUMENT

ISSUE I

THE HABITUAL OFFENDER STATUTE IS NOT OPERATIVE FOR THE PURPOSE OF EXTENDING THE PERMISSIBLE MAXIMUM PENALTY.

This Court concluded that the habitual offender statute cannot be used as a basis for departure from the recommended guidelines sentence nor can it be utilized as an alternative to guidelines sentencing. In Whitehead v. State, 498 So.2d 863, 864-65 (Fla. 1986), this Court opined:

> In determining the continued viability of the habitual offender statute in light of the subsequently enacted sentencing guidelines, we recognize that we must attempt to preserve both statutes by reconciling their provisions, if possible. See State v. Digman, 294 So.2d 325 (Fla. 1974). We find that we cannot do so. In order to retain the habitual offender statute, we would have to conclude that either the sentencing guidelines are not applicable too "statutory" habitual offenders (i.e., those defendants whom the state seeks to punish pursuant to the specific provisions of section 775.084, Florida Statutes) or, if applicable, that the habitual offender statute may be used in and of itself as a legitimate reason to depart from the guidelines. We can find no logical support for either proposition. The habitual offender statute was originally enacted as a scheme to impose and enhanced sanction upon those defendants who had committed other crimes in the past and posed a danger to society in the future thereby evincing an increased need for a lengthier term of incarceration.
>
> * * * *
>
> Section 921.011(4)(a), Florida Statutes (1985), requires that:
>
> The guidelines shall be applied to all felonies, except capital

> felonies and life felonies, committed prior to October 1 , 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act. [Emphasis added].

This language is explicit and unambiguous. The only exceptions to the sentencing guidelines scheme are capital felonies and offenses committed prior to October 1, 1983, in which the defendant does not affirmatively select to be sentenced under the guidelines. The statute does not exempt defendants sentenced under the habitual offender statute.

Although the legislature did not repeal section 775.084 when it adopted the guidelines, we believe the goals of that section are more than adequately met through application of the guidelines. The habitual offender statute provides an enhanced penalty based on consideration of a defendant's prior criminal record and a factual finding that the defendant poses a danger to society. The guidelines take into account of these considerations.

* * * *

In short, the objectives and considerations of the habitual offender statute are fully accommodated by the sentencing guidelines. In light of this, and the clear language of section 921.001(4)(a), we must conclude that section 775.084 cannot be considered as providing an exception for a guidelines sentence.

[Footnote omitted]

The Court further noted:

> that the habitual offender statute was enacted when parole was available. Under the guidelines, however, prisoners are not eligible for release on parole. See section 921.001(8), Florida Statutes (1985). If we permitted application of the enhanced penalties available under the habitual offender statute to sentences without

> parole, "statutory" habitual offenders would receive sentences which are harsher than those the legislature originally envisioned in enacting the habitual offender statute. Moreover, such sentences would be disproportionately harsh when compared to the sentences of other offenders who have committed similar crimes and have similar criminal records but were not subjected to habitual offender proceedings. Such a result would be contrary to the explicit purpose of the sentencing guidelines which is "to eliminate unwarranted variation in the sentencing process." See Fla.R.Crim.P. 3.701(b).

Id. at 866.

Since Whitehead was issued, this Court has repeatedly reaffirmed its holding. E.g. Payne v. State, 498 So.2d 413 (Fla. 1986); Crapps v. State, 498 So.2d 415 (Fla. 1986); State v. Vicknair, 498 So.2d 416 (Fla. 1986); Ferguson v. State, 498 So.2d 867 (Fla. 1986); State v. Moultrie, 503 So.2d 892 (Fla. 1987); State v. Teague, 502 So.2d 1238 (Fla. 1987); and Massard v. State, 504 So.2d 403 (Fla. 1987).

Four of the five District Courts of Appeal have had no difficulty in understanding the plain meaning of Whitehead. "The habitual offender statute appears no longer available as a sentencing tool" and cannot be preserved in the context of the sentencing scheme provided by the guidelines." Duval v. State, 500 So.2d 570, 571 (Fla. 2d DCA 1986). The statute was "effectively subsumed by the sentencing guidelines," Smith v. State, 503 So.2d 457 (Fla. 2d DCA 1987) and is "not an alternative to guidelines sentencing." Whipple v. State, 504 So.2d 38 (Fla. 2d DCA 1987); Harrelson v. State, 499 So.2d 939 (Fla. 3d DCA

1987); Jones v. State, 501 So.2d 178, 179 (Fla. 4th DCA 1987). The "legislature's adoption of the guidelines effectively superseded Section 775.084," which now "cannot be considered as providing an exemption for a guidelines sentence." Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986). Accord e.g. Randall v. State, 497 So.2d 1326 (Fla. 4th DCA 1986); Albritton v. State, 497 So.2d 1329 (Fla. 4th DCA 1986); Canty v. State, 497 So.2d 1330 (Fla. 4th DCA 1986); Robinson v. State, 497 So.2d 1335 (Fla. 4th DCA 1986); Morganti v. State, 498 So.2d 557 (Fla. 4th DCA 1986); Neeley v. State, 498 So.2d 690 (Fla. 5th DCA 1986); Duques v. State, 499 So.2d 7 (Fla. 4th DCA 1986); Fleming v. State, 499 So.2d 38 (Fla. 2d DCA 1986); Gonzalez v. State, 499 So.2d 50 (Fla. 3d DCA 1986); Paschall v. State, 501 So.2d 1370 (Fla. 2d DCA 1987).

Initially the First District Court of Appeal acknowledged Whitehead:

> The Florida Supreme Court has recently held that habitual offender status does not provide an exemption to guidelines sentencing nor is it an adequate reason to depart from the recommended sentence.

Hill v. State, 498 So.2d 544, 545 (Fla. 1st DCA 1986). Further, "the objectives and considerations of the habitual offender statute are fully accommodated by the sentencing guidelines." Strong v. State, 498 So.2d 653 (Fla. 1st DCA 1986). Accord Sharp v. State, 497 So.2d 736 (Fla. 1st DCA 1986); Smith v. State, 499 So.2d 912 (Fla. 1st DCA 1986); Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986); Bell v. State, 503 So.2d 217 (Fla. 1st DCA 1986) [on rehearing after

per curiam affirmance of November 3, 1986]; Johnson v. State, 503 So.2d 955 (Fla. 1st DCA 1987).

However the First District recently has sought to recede from the clear meaning of Whitehead. Compare Walker v. State, 499 So.2d 884, 886 (Fla. 1st DCA 1986) ["the habitual offender statute does not provide an alternative to sentencing under the guidelines."] with the instant case, Myers v. State, 499 So.2d 895, 898 (Fla. 1st DCA 1986) ["In our opinion, Whitehead does not repeal section 775.084."]; Winters v. State, 500 So.2d 303, 305 (Fla. 1st DCA 1986) [affirming the increase of a third degree felony maximum sentence from five to ten years by use of the habitual offender determination and certifying the question: Is the habitual offender statute still an effective basis on which to exceed the statutory maximum as long as the sentence imposed does not exceed the guidelines recommendation?];[1] Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987) [permitting the increase in maximum allowable sentence from five to ten years on a third degree felony due to a habitual offender finding];[2] and Avery v. State, 12 FLW 999 (Fla. 1st DCA April 10, 1987):

> [B]ecause of the questionable vitality of the habitual offender statute in light of some of the language in Whitehead, we certify the following

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[1]This question is currently pending in this Court under Case No. 70,164.

[2]Appellant has sought discretionary review under Case No. 70,269.

> question as being one of great public importance: Does a trial court retain the authority to classify and sentence a defendant as a habitual offender, following the adoption of guidelines sentencing?]

See also Rasul v. State, 12 FLW 1065 (Fla. 2d DCA April 15, 1987) ["It now appears that the supreme court has considered and rejected the suggestion that the habitual offender act can be utilized [where] the permitted guidelines range exceeds the statutory maximum."]

Recently this Court has rejected suggestions it recede from Whitehead. In Florida Rules of Criminal Procedure re Sentencing Guidelines (Rules 3.701 and 3.988), 12 FLW 162, 164 (Fla. April 2, 1987), the Court declined "to revise committee note to rule 3.701(d)(11) as it relates to the Habitual Offender Act" which would revive the language in the committee note 3.701(d)(10) ["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"], specifically rejected by Whitehead.

Additionally, there is no parole from guidelines sentences, yet the habitual offender scheme contemplated the effect of parole practices on the sentence inmates actually served. Petitioner received a sentence extended by the habitual offender statute, but without the ameliorating effect of parole contemplated by the statute.

Petitioner submits that the habitual offender status should be vacated and the cause remanded for resentencing under the guidelines.

ISSUE II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A HABITUAL OFFENDER BECAUSE THERE WERE NO SPECIFIC FACTUAL FINDINGS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE EXTENDED SENTENCE WAS NECESSARY FOR THE PROTECTION OF THE PUBLIC AND EVEN IF THAT STANDARD WERE MET, IT CONFLICTS WITH THE HIGHER STANDARD FOR DEPARTURES SET FORTH IN STATE V. MISCHLER.[3]

Assuming arguendo, that the Court disagrees with Issue I, petitioner contends that the sentencing order adjudging him to be a habitual offender failed to make the specific factual findings mandated by the statute, let alone being proven beyond a reasonable doubt.

Section 775.084, Florida Statutes (1985) authorizes extended terms of imprisonment for habitual felony offenders where "it is necessary for the protection of the public to sentence the defendant to an extended term." Pursuant to section 775.084(3)(d):

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

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[3]Once this Court acquires jurisdiction, it has the authority to consider the entire case on the merits. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). See also Bell v. State, 394 So.2d 979, 980 (Fla. 1981); Zirin v. Charles Pfizer and Co., 128 So.2d 594 (Fla. 1961).

Case law requires that the court find the extended sentence necessary for the protection of the public from further criminal activity and that this finding include the underlying facts and circumstances which the trial judge relied on in making that finding. E.g. Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979); Eutsy v. State, 383 So.2d 219 (Fla. 1980). The trial judge must further "make specific findings of fact as to why it is necessary for the protection of the public to sentence appellant to an extended term." [Emphasis by the Court]. Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985). Bare, conclusory findings are insufficient under section 775.084. Walker v. State, 465 So.2d 452 (Fla. 1985). There must be specific findings other than prior record or a general statement that the public must be protected. Bogan v. State, 489 So.2d 157 (Fla. 2d DCA 1986); Watson v. State, 492 So.2d 831 (Fla. 5th DCA 1986); Dean v. State, 493 So.2d 1114 (Fla. 1st DCA 1986); Brown v. State, 497 So.2d 887 (Fla. 5th DCA 1986); Avery v. State, supra.

Petitioner argues that the state offered no evidence on which the court could make a specific finding that the protection of the public required that he be sentenced to an enhanced penalty. Admittedly the state's evidence at the sentencing hearing did reveal that petitioner had a prior record. Since he did not contest that the convictions were more than five years prior to this sentencing or that he received a pardon to this sentencing or that he received a pardon or post-conviction relief, those elements were established. However, to adjudge a

person as a habitual felony offender, those four threshold criteria had to be established. See Mangram v. State, 392 So.2d 596 (Fla. 1st DCA 1981).

Petitioner contends that his enhanced sentence must be reversed because of failure to meet the second prong of section 775.084, the specifics - the whys to conclude it was necessary for the protection of the public.

At best the trial judge held that because petitioner had a felony record he should be deemed an habitual offender. In reversing an extended sentence, the Fourth District Court of Appeal stated:

> It is quite clear that not every subsequent felony offender must automatically be sentenced as a recidivist under section 775.084, Florida Statutes 1975. A subsequent felony offender may be sentenced as a recidivist only if the court makes various findings in accordance with section 775.084. Such findings must be based upon some evidence.

Chukes v. State, 334 So.2d 289, 290 (Fla. 4th DCA 1976). The court further noted that to justify an extended sentence, the trial judge must "make findings of fact supported by the record which justify such sentenced." Id. at 291.

Merely relying on petitioner's prior record, speculating that he will continue in criminal activity, does not meet the 'specific' test. See Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986); Weston v. State, 452 So.2d 95, 96 (Fla. 1st DCA 1984); accord Scott v. State, 446 So.2d 261 (Fla. 2d DCA 1984); Cavallaro v. State, 420 So.2d 927 (Fla. 2d DCA 1982); Watson v.

State, supra; Williams v. State, 492 So.2d 1388 (Fla. 1st DCA 1986).

In Adams v. State, supra at 59, the First District held the trial court's findings were "insufficient on their fact to show that the public requires Adams' extended imprisonment for its protection against this further criminal activity." despite being convicted of armed robbery in 1971, violating parole by possessing and using heroin, and being arrested for two other crimes. Similarly, in Scott v. State, 423 So.2d 986 (Fla. 3d DCA 1982), the court held the state's findings that the enhanced sentence was "necessary for the protection of society" to be "woefully short of what is required by statute," and ordered resentencing. Accord, Mangram v. State, supra.

In most criminal cases, the presumptive sentence is the recommended guidelines sentence. In the instant case, however, because the recommended guidelines sentence exceeds the statutory maximum, the presumptive sentence is not the guidelines recommendation, but is the statutory maximum. Fla.R.Crim.P. 3.701(d)(10). The instant case, therefore, while it does not involve a departure from the guidelines, nevertheless does involve a departure from, or enhancement of, the presumptive sentence. The departure in the instant case is governed, however, by the habitual offender statute, rather than the guidelines.

Reasons which justify departure from the guidelines must be proved beyond a reasonable doubt. State v. Mischler, 488 So.2d 523 (Fla. 1986). Reasons which support an habitual

offender finding, however, are required to meet a much less demanding burden of proof:

> Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence . . . (emphasis added).

Section 775.084(3)(d), Florida Statutes. If the habitual offender statute survives the advent of the sentencing guidelines, then there are two standards for departures from a presumptive sentence. The burdens of proof required for a guidelines departure and for an habitual offender finding are irreconcilably inconsistent and without a rational basis for the distinction.

The result of inconsistent standards for guidelines departures and habitual offender status is that reasons which would never stand up under appellate review as grounds for departure have, nevertheless, been upheld by the First District Court as justifying petitioner's enhanced sentence under the habitual offender statute.

The sentencing guidelines commission recommended a retreat from both Whitehead v. State, supra, and State v. Mischler, supra. This Court specifically rejected the invitation to reduce the level of proof for a departure to a "mere preponderance" and to include habitual offender as a departure reason. Florida Rules of Criminal Procedure re Sentencing Guidelines (rules 3.701 and 3.988), supra at 163, 164. Clearly this Court did not intend for the habitual offender statute to survive the guidelines as a sentencing scheme.

Under Section 921.011(4)(a), Florida Statutes (1985), the guidelines provide an omnibus sentencing scheme which applies to all felonies except capital offenses and precludes parole. There is no rational basis to allow reasons which ordinarily would not meet the required burden of proof under the guidelines to be used for habitualization. This creates an equal protection violation in that prisoners sentenced under the guidelines are afforded more protection in the form of a higher burden of proof than prisoners sentenced under the habitual offender statute. See U.S. Constitution, Amendment XIV; Florida Constitution, Article I, Section 2.

Petitioner's ten year habitual offender sentence must be reversed.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court hold that the habitual offender statute has no application to one who is sentenced under the guidelines. In the alternative, petitioner requests that this Court vacate the order finding him to be a habitual offender. Under either alternative, petitioner requests that his 10 year sentence be vacated, and that he be resentenced to no more than 5 years, the maximum for a third degree felony.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Florida Bar #197890
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Raymond Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Paul Myers, #072083, Post Office Box 1100, Avon Park, Florida, 33825, this 11 day of June, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER