

IN THE SUPREME COURT OF FLORIDA

PETER WINTERS,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

APR 19 1987

CASE NO. 70,164

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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II STATEMENT OF THE CASE AND FACTS

This case reached the First District Court on appeal after remand in Winters v. State, 475 So.2d 1025 (Fla. 1st DCA 1985).

Petitioner was arrested December 18, 1983 and charged by information filed January 5, 1984 with armed robbery, kidnapping and sexual battery (R-1; 4). The information was amended May 29, 1984 to change armed robbery to unarmed (R-6). At trial, petitioner was found guilty of attempted unarmed robbery and acquitted of all other charges (R-8). Petitioner's recommended guidelines sentence was 7 - 9 years, and he was sentenced June 27 to nine years imprisonment under the habitual offender statute (R-10-13).

In his first appeal, petitioner's court-appointed counsel filed an Anders brief, but this Court reversed his sentence for the trial court's failure to make specific findings in support of its determination that an extended sentence was necessary for the protection of the public (R-16-19).

Petitioner was resentenced January 2, 1986 before a different judge¹ and again received nine years imprisonment, an enhanced penalty under the habitual offender statute (R-33). In writing, the trial court based its finding that the extended sentence was necessary for the protection of the public on "the Defendant's past criminal record, for both personal and property crimes" (R-38). Orally, the court added that petitioner's prior

¹

The original sentencing judge, Nelson Harris, had died in the interim.

convictions

. . . involved crimes which posed great possibility of a threat to the safety of persons and property.

* * *

I also find that he has the propensity within short periods of time after being released from incarceration to come back on the commission of other violent and dangerous types of criminal activity within a very short period. As the State argued, he committed this offense a little more than a month after being paroled on his last offense.

In its decision on the appeal after remand, the First District Court held that the trial court's findings were adequate to support the finding that petitioner was an habitual offender:

. . . in the instant case the lower court clearly expressed more than a mere conclusive statement that petitioner was a danger to the community.

Winters II, infra. The district court also held that Winters' sentence did not violate Whitehead because it was not a departure from the guidelines, but certified the question which is now before the court.

Rehearing was denied February 2, 1987 and the notice to invoke this court's discretionary jurisdiction filed March 4, 1987.

III SUMMARY OF ARGUMENT

Where the recommended guidelines sentence exceeds the statutory maximum, the presumptive sentence is the statutory maximum. An extended sentence under the habitual offender statute, therefore, is a departure from the presumptive sentence, even if it is not a departure from the guidelines. An habitual offender sentence is a departure for which the trial court must provide specific reasons.

While a departure from the guidelines must be supported by credible reasons proved beyond a reasonable doubt, however, reasons which justify habitualization need be proved merely by a preponderance of the evidence. In other words, there are two standards for departures from a presumptive sentence, and no rational basis for the distinction. The result is that grounds which would not stand up under appellate review as reasons for departure may be found adequate to support habitualization.

Further, the sentences set under the habitual offender statute took into account the effect of parole practices on the sentences inmates actually served. Petitioner was given a guidelines sentence extended by the habitual offender statute, but without the parole eligibility contemplated by that statute.

The statute and sentencing guidelines are irreconcilably inconsistent and incompatible. It was improper to extend petitioner's sentence based on grounds which would be impermissible as reasons for a guidelines departure, and without parole, petitioner received a sentence harsher than that intended by the legislature when it enacted the habitual offender statute. Petitioner must be resentenced to the statutory maximum.

IV ARGUMENT

ISSUE PRESENTED

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?

In Whitehead v. State, 498 So.2d 863 (Fla. 1986), this court held that a defendant's status as an habitual offender did not in itself justify a departure from the recommended guidelines sentence. The habitual offender statute does not justify departure because:

. . . 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 both of these considerations.

Id. at 865. The instant case presents the issue not reached in Whitehead: whether the habitual offender statute may be used to exceed the statutory maximum where the sentence imposed does not exceed the guidelines recommendation, in other words, where the recommended guidelines sentence exceeds the statutory maximum.

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 the statutory maximum. 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)

§ 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 trial court cited petitioner's prior record, an impermissible ground for departure under Hendrix v. State, 475 So.2d 1218 (Fla. 1985), but an apparently adequate basis for an habitual offender finding according to the district court.

The findings which support an habitual offender determination must be specific. Walker v. State, 462 So.2d 452 (Fla. 1985); Eutsey v. State, 383 So.2d 219 (Fla. 1980); Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985); Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). In the instant case,

[t]he trial judge concluded that all but one of appellant's crimes posed a great possibility of threat to the safety of persons or property. He further concluded that appellant's criminal history indicated that appellant is a person who is more than willing to put himself and other people in a great deal of danger, and from which society deserves protection.

Winters v. State, ___ So.2d ___, 12 FLW 104 (Fla. 1st DCA Dec. 24, 1986). These findings were anything but specific. The trial court did not cite a single fact from a single conviction to support this conclusion. Further, the only facts available to the court were those in the presentence investigation (PSI). A review of the PSI reveals few facts upon which the trial court might have rationally grounded its conclusion as to petitioner's dangerousness.

The documentation provided by the state as proof of petitioner's prior record included: 1) certificate of parole dated November 9, 1983 (R-22); 2) judgment and sentence dated October 19, 1978 for possession of a firearm by a convicted felon (R-24); 3) order dated July 21, 1966, placing petitioner on probation in Ohio for unarmed robbery (R-26); 4) judgment and sentence dated August 17, 1973 for breaking and entering (R-27); 5) judgment and sentence dated February 10, 1975 for possession of a stolen boat (R-29); 6) judgment and sentence dated October

19, 1978 for burglary of a building (concurrent sentence) (R-31).

A comparison of the convictions proved by the state with the hearsay statements contained in the PSI reveals: 1) while its disposition is not explicit, the flavor of the Ohio probation order indicates that petitioner was not adjudicated guilty in that case; adjudication is a prerequisite to use in an habitual offender proceeding; 2) the PSI contains no details of the August, 1973 breaking and entering conviction; 3) in connection with his arrest on the stolen boat charge of February, 1975, petitioner was also charged with resisting arrest with violence; the PSI describes the incident only as a "struggle" and reports that petitioner was taken to a hospital before booking; the judgment and sentence provided by the state refers only to the stolen boat; the disposition of the resisting arrest charge is unknown; 4) the PSI alleges petitioner was involved in a fight at a convenience store in March, 1978; he was not charged with assault or battery as a result, however, but merely with disorderly intoxication; 5) in connection with the possession of a firearm charge of October, 1978, petitioner had also been charged with aggravated assault and making threats, these latter charges were dropped or abandoned.

The variance between the narrative portion of the PSI concerning petitioner's prior record and the charges of which petitioner was actually convicted is quite significant as it relates to the trial court's finding that petitioner was dangerous. Despite a great amount of hearsay and innuendo contained in the PSI, petitioner has been convicted of no crime

involving force or violence other than the instant offense. It is highly improper to use offenses for which no convictions were obtained as a reason to depart. Rule 3.701(d)(5), Fla. R. Crim. P. It is equally improper to use such convictionless arrests as the basis for an habitual offender finding. Further, many of the hearsay facts stated in the PSI, such as the struggle resulting in a charge of resisting arrest with violence, are inherent in the offenses alleged. Inherent factors do not support departure, nor can they justify an habitual offender finding. State v. Mischler, supra; State v. Cote, 487 So.2d 1039 (Fla. 1986).

Further, because this case is before the court on an appeal after remand, the record includes only transcripts of the second sentencing hearing and does not provide transcripts of the trial and original sentencing. Nevertheless, there are indications in the record, at R 46-52 and the PSI, that the jury verdict finding petitioner guilty of attempted unarmed robbery is inconsistent with its acquittal on sexual battery and kidnapping charges, because the acquittals necessarily mean that the jury rejected the state's arguments that the use of force was involved in the incident. Yet, petitioner was convicted of robbery, another offense of which force is an element.

The trial court's final reason for finding petitioner to be an habitual offender was his alleged propensity for committing new offenses shortly after his release from prison. This reason is based factually on the single incident of the instant offense, which incident occurred about a month after his release from

prison. A single incident does not establish a pattern nor demonstrate propensity. This reason is essentially another impermissible comment on prior record.

In Whitehead, this court noted that the habitual offender statute was enacted when parole was available, but that prisoners sentenced under the guidelines are not eligible for parole. Id. at 866. The absence of parole eligibility under the guidelines is no less a problem in the instant case than in Whitehead. The habitual offender statute was created in large part as a response to parole practices. Petitioner has received a sentence enhanced by the habitual offender statute but without the ameliorative effect of parole contemplated by that statute. Without the possibility of parole, petitioner has indeed received a sentence:

. . . harsher than those the legislature originally envisioned in enacting the habitual offender statute.

Id.

This court went on to say in Whitehead of enhanced but non-parolable offenses:

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).

In his dissent in Whitehead, Justice Overton criticized the majority opinion as having repealed the habitual offender

statute by implication, while he believed the statute and the guidelines could have been construed so as to allow both to remain in effect. The statutes are, unfortunately, irreconcilably inconsistent and cannot be construed so that both remain in effect.

The guidelines provide an omnibus sentencing scheme, which applies to all felonies except capital offenses and precludes parole. Sections 921.001(4)(a), (8), Florida Statutes. The guidelines require reasons for departure from the presumptive sentence to be proved beyond a reasonable doubt. There is no rational basis for allowing reasons for exceeding the statutory maximum under the habitual offender statute to meet a lesser burden of proof. Such a situation results in reasons which would not stand up as grounds for departing from the guidelines being found adequate to justify habitualization. It further results in an equal protection violation, in that prisoners sentenced solely under the guidelines are afforded more protection in the form of a higher burden of proof for departure than prisoners sentenced under the habitual offender statute. See United States Constitution, Amendment XIV; Florida Constitution, Article I, section 2.

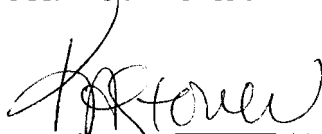
Further, there is no parole from guidelines sentences. The habitual offender statute, on the other hand, clearly contemplated the effect of parole practices on the sentences inmates actually served. Petitioner, nevertheless, received a sentence extended by the habitual offender statute, but without the ameliorating effect of parole contemplated by the statute.

V CONCLUSION

Based on the foregoing reasoning, argument and citation of authority, petitioner is entitled to have his sentence reversed, and the case remanded for resentencing to the statutory maximum.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

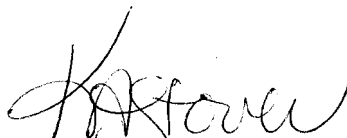


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida and mailed to Petitioner, Peter Winters, #039366, Post Office Box 518, Zephyrhills, Florida, 34283, on this 13 day of April, 1987.



KATHLEEN STOVER