

IN THE SUPREME COURT OF FLORIDA

HORACE LEE HOLMES,

Petitioner,

vs.

CASE NO. 70,269

STATE OF FLORIDA,

Respondent.

CLERK

By

RESPONDENT'S BRIEF ON JURISDICTION

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RESPONDENT'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Horace Lee Holmes, the criminal defendant and appellant below, will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below, will be referred to herein as Respondent.

Citations to the appendix attached hereto, containing the opinion of the lower court, will be indicated parenthetically as "A" with the appropriate page number(s). Citations to Petitioner's jurisdictional brief will be indicated parenthetically as "PB" with the appropriate page number(s).

The opinion below is currently reported as Holmes v. State, 12 F.L.W. 597 (Fla. 1st DCA Feb. 23, 1987).

STATEMENT OF THE CASE AND FACTS

For the purpose of resolving the jurisdictional issue raised herein, Respondent accepts Petitioner's Statement of the Case and Facts (PB 2).

JURISDICTIONAL STATEMENT

Petitioner evidently seeks to invoke this Court's discretionary review of the First District's decision herein pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(iv) on the ground that said decision is in express and direct conflict with a decision of this Court.

SUMMARY OF ARGUMENT

Respondent argues that Petitioner has failed to demonstrate the requisite conflict between the instant case and Whitehead v. State, infra, since nothing in the majority opinion therein remotely suggests that the Habitual Offender Act has been repealed or has no legal operation in conjunction with the Sentencing Guidelines Act. Moreover, Respondent argues that Petitioner's reliance on Jollie v. State, infra, as an additional foundation for the exercise of this Court's jurisdiction over this cause is entirely misplaced.

ARGUMENT

ISSUE

PETITIONER HAS FAILED TO DEMONSTRATE THE REQUISITE CONFLICT BETWEEN THE LOWER COURT'S DECISION HEREIN AND THIS COURT'S DECISION IN WHITEHEAD V. STATE, 498 So.2d 863 (Fla. 1987). [Restated by Respondent].

Petitioner, in an effort to invoke this Court's discretionary jurisdiction, claims that the lower court's recognition that the Habitual Offender Act, Florida Statutes §775.084, may not be used as a reason for departure from the guidelines recommended range but that the act has continued viability, is in express and direct conflict with this Court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986). Petitioner's claim is predicated upon his position that "Whitehead repealed the habitual offender statute by implication and therefore Section 775.084, Florida Statutes (1985) cannot be utilized for any sentencing purpose" (PB 4,5). Petitioner's position is untenable and his claim necessarily must fail.

In Whitehead this Court held that the Habitual Offender Act cannot operate as an alternative to guidelines sentencing nor could it be utilized as a reason for departure. Id., at 867. In the case at bar, the lower court indicated that the Habitual Offender Act, assuming the proper findings were made, could be used to permit a guidelines sentence of 5½ years where the statutory maximum would otherwise have been five years and that



a departure sentence up to the new 10-year cap could be imposed given clear and convincing reasons therefor (A 2). The lower court did not hold that the Habitual Offender Act was an alternative to guidelines sentencing nor did it hold that the act could serve as a reason for departure (A 2).

The bottom line is that nothing in the majority opinion pretends to hold the Habitual Offender Act has been repealed or has no legal operation within the Sentencing Guidelines Act. In fact, the guidelines recognize the interrelationship of the act with the guidelines scheme as stated in the Committee Note to Fla.R.Crim.P. 3.701(d)(10) which provides in pertinent part:

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.

Only Justice Overton in his dissent concluded that the majority opinion had repealed the act and, of course, conflict jurisdiction may not be predicated upon a dissenting opinion. Reaves v. State, 485 So.2d 829 (Fla. 1986).

Finally, Petitioner's reliance upon Jollie v. State, 405 So.2d 418 (Fla. 1981) as an additional ground for the exercise of this Court's jurisdiction is entirely misplaced. On its face Jollie is clearly inapplicable because it speaks to per curiam affirmances by the district courts which merely cite another case as controlling authority. Here, the lower court reversed the cause and issued a written opinion.


CONCLUSION

Based upon the foregoing arguments and the authority cited herein, Respondent contends that Petitioner has failed to establish the necessary basis for the exercise of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(iv).

WHEREFORE, Respondent respectfully requests this Honorable Court decline to exercise its discretionary review of the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carl S. McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 by hand delivery on this 16<sup>th</sup> day of April, 1987.

  
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