Q-25

IN THE SUPREME COURT OF FLORIDA

HORACE LEE HOLMES,

Petitioner,

vs. CASE NO. 70,269

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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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.

The record on appeal consists of one bound record volume and three transcript volumes. Citations to the record volume will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the transcript volumes will be indicated parenthetically as "T" with the appropriate page number(s). Citations to Petitioner's brief on the merits will be indicated parenthetically as "P" with the appropriate page number(s).

Citations to the appendix attached to Petitioner's brief on the merits will be indicated parenthetically as "PA" with the appropriate page number(s).

For the Court's convenience, a copy of the First District's decision herein, along with other pertinent documentation, has been attached hereto as an appendix. Citations to the appendix will be indicated parenthetically as "A" with the approprite page number(s).

The decision below is currently reported as Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987).

STATEMENT OF THE CASE AND FACTS

For the purpose of resolving the issue raised herein Respondent accepts as accurate Petitioner's Statement of the Case and Facts (PB 2-3).

SUMMARY OF ARGUMENT

Petitioner, relying upon this Court's decision in Whitehead v. State, infra, contends that contrary to the decision of the lower court, the Habitual Offender Act is no longer a viable vehicle to increase the statutory maximum term of imprisonment and permit the imposition of a guidelines sentence that would have been in excess of the original statutory cap or a departure sentence up to the enhanced cap if clear and convincing reasons for departure, other than the habitual offender findings, exist. Respondent argues that the lower court correctly concluded that Whitehead does not preclude utilization of the Habitual Offender Act for this purpose.

ARGUMENT

ISSUE

THE LOWER COURT CORRECTLY HELD THAT THIS COURT'S DECISION IN WHITEHEAD DOES NOT PRECLUDE USE OF THE HABITUAL OFFENDER ACT TO ENHANCE THE ORIGINAL STATUTORY SENTENCING CAP TO PERMIT IMPOSITION OF A GUIDELINES RECOMMENDED SENTENCE OR A DEPARTURE SENTENCE NOT PREDICATED UPON THE HABITUAL OFFENDER FINDING. [Restated by Respondent].

Petitioner seeks quashal of the opinion below and remand of the cause to the trial court with directions to resentence him to no more than five years in prison (P 6). As the ground for such relief Petitioner contends that the lower court erred in holding that the Habitual Offender Act, Florida Statutes §775.084, could be utilized to extend the original statutory sentencing cap in light of this Court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986), which Petitioner suggests should be read as stripping the Habitual Offender Act of any viability for any purpose. Petitioner's position is untenable and he is therefore not entitled to the relief he seeks.

In an effort to cast the lower tribunal in the role of a judicial maverick, Petitioner cites a host of cases from this Court, as well as the other district courts of appeal, which applied this Court's holding in Whitehead (PA 15-16). Each of those cited cases relied upon Whitehead for the proposition that an habitual offender finding is not a valid reason for departure

or that the Habitual Offender Act is not an alternative to guidelines sentencing, or both. None of those cases dealt with the issue that is before this Court in this case and they most certainly do not cite Whitehead as authority for the proposition that the Habitual Offender Act can no longer be employed to extend the original statutory sentencing cap. Interestingly enough, the lower court in conformity with this Court's decisions and decisions of the other district courts of appeal, has consistently relied upon Whitehead as authority for holdings that an habitual offender finding is not a valid reason for departure and that the Habitual Offender Act is not an alternative to guidelines sentencing. See Sharp v. State, 497 So.2d 736 (Fla. 1st DCA 1986); Hill v. State, 498 So.2d 544 (Fla. 1st DCA 1986); Strong v. State, 498 So.2d 652 (Fla. 1st DCA 1986); Walker v. State, 499 So.2d 884 (Fla. 1st DCA 1986); Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986), review pending, Case No. 70,017; Smith v. State, 499 So.2d 912 (Fla. 1st DCA 1986); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); Johnson v. State, 503 So.2d 959 (Fla. 1st DCA 1987); Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987); Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986); Avery v. State, 505 So.2d 596 (Fla. 1st DCA 1987); Harmon v. State, 506 So.2d 500 (Fla. 1st DCA 1987); Allen v. State, 506 So.2d 1149 (Fla. 1st DCA 1987); Slay v. State, 12 F.L.W. 1329 (Fla. 1st DCA May 27, 1987); Brooks v. State, 12 F.L.W. 1484 (Fla. 1st DCA June 16, 1987); Brown v. State, 12

F.L.w. 1528 (Fla. 1st DCA June 23, 1987); Hall v. State, 12 F.L.W. 1630 (Fla. 1st DCA July 7, 1986); Wilson v. State, 12 F.L.W. 1716 (Fla. 1st DCA July 15, 1987).

Sub judice the lower court, while recognizing that Whitehead precluded using an habitual offender finding as a reason for departure, held:

> The trial court may still make a determination that an enhanced sentence under the habitual offender statute is needed. Once it does so, the trial court may then consider whether to sentence up to the guidelines limit or, upon clear and convencing reasons, impose a departure sentence up to the new cap of 10 years.

Holmes v. State, supra at 1303. Put simply, the lower court, in this case as well as Myers v. State, supra and Winters v. State, supra, has concluded that this Court's decision in Whitehead does not preclude using the Habitual Offender Act to extend the original statutory sentencing cap for a given offense so that a guidelines recommended sentence in excess of the original cap can lawfully be imposed or so that departure sentence up to the enhanced cap can be imposed if proper reasons for departure, other than an habitual offender findings exist. Employed in this manner, the Habitual Offender Act still serves a useful function and operates in harmony with the legislative guidelines scheme. In a well-reasoned opinion, which Respondent adopts and advances in support of its position herein, the Second District Court of

Appeal followed the lower court's decisions in Myers v. State, supra, and Winters v. State, supra, and reached the same conclusion. The court held:

> Because we are remanding with permission for the trial judge to again adjudicate appellant a habitual offender if the proper findings are made, we must address an issue not raised by appellant and, in our opinion, left unanswered in Whitehead v. State, 498 So.2d 863 (Fla. 1986). That issue can be stated as follows:
>
> > 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?
>
> That issue was answered in the affirmative by our colleagues of the First District Court of Appeal in Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986). Then because of concern over some of the language in Whitehead, the question posed was again answered in the affirmative and certified to our supreme court in Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986).
>
> We have also expressed concern over Whitehead's application to the limited issue stated above in Patterson v. State, No. 86-777 (Fla. 2d DCA May 8, 1987) [12 F.L.W. 1203] and Rasul v. State, No. 86-266 (Fla. 2d DCA Apr. 15, 1987) [12 F.L.W. 1065]. However, in neither Patterson nor Rasul were we required to address the issue to decide those cases. Now that we are faced squarely with the issue, we have concluded, after considerable study of Whitehead and its progeny and Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), No. 69,411 (Fla. Apr. 2, 1987)

[12 F.L.W. 162], that the question posed should be answered in the affirmative.

We start first with The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988-Sentencing Guidelines), 468 So.2d 220 (Fla. 1985). In subsection (h) of the footnote to that opinion, the supreme court specifically states:

> The Committee Note to rule 3.701(d)(10) is revised to clarify the relation of both types of enhancement statute, i.e., reclassification and habitual offender, to the sentencing guidelines. The present text of the note speaks only to reclassification and has generated confusion.

The problem the supreme court was addressing in that footnote arises from Rule 3.701(d)(10), which provides:

> Sentences exceeding statutory maximums: If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

The very specific language added in the revision of Committee Note to Rule 3.701(d)(10), and adopted in its opinion by the supreme court in 468 So.2d at 225 so as to alleviate the confusion, is as follows:

> If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. 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.

In Whitehead, the supreme court, rather than rejecting the added language in the Committee Note it had specifically adopted in 468.So.2d at 225, uses that very added language, particularly the last sentence thereof, as support for its holding that habitual offender status is not an adequate reason to depart from recommended guidelines sentences absent compliance with Rule 3.701(d)(11) as the Committee Note explains.

Recently, we were further confused by language in Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), No. 69,411 (Fla. Apr. 2, 1987) [12 F.L.W. 162]. That opinion states, at page 164 under section VIII of the opinion: "We reject the commission's request to revise the committee note to rule 3.701.d.11 as it relates to the Habitual Offender Act. See Whitehead v. State, 498 So.2d 863 (Fla. 1986). "Justice Grimes, in a special concurring opinion addressed only to section VIII of the opinion, states:

> For the reasons expressed in Whitehead v. State, 498 So.2d 863 (Fla. 1986), I can understand the Court's reluctance to accept the commission's recommendation that sentences imposed under the Habitual Offender Act need not conform to the guidelines. However, I do find merit in the suggestion of Public Defender, Louis O. Frost, Jr., that the Habitual Offender Act could be utilized in those instances in

> which the permitted guidelines range exceeds the total statutory maximums for the offenses charged.
>
> Unfortunately, we do not have access or knowledge as to specifically what "the suggestion of Public Defender, Louis O. Frost, Jr." implied. We are unable to tell whether the supreme court majority felt the issue was already adequately spoken to and need not be further addressed and Justice Grimes felt it should be specifically addressed, or whether the majority rejected the merits of Public Defender Frost's suggestion.
>
> We are persuaded in our ultimate conclusion, however, by the fact that the majority opinion rejects only a request to revise Rule 3.701(d)(11), which addressed only departures from guideline sentence ranges. The majority opinion does not speak to Rule 3.701(d)(10) but, on the contrary, readopts the Committee note to Rule 3.701(d)(10) [12 F.L.W. at 166] that it had adopted in revised form in its earlier opinion in 468 So.2d at 225.
>
> We, therefore, conclude that the habitual offender statute remains a viable method to enhance the statutory maximum penalty of an offense so as to be useful in connection with rule 3.701(d)(10). However, like our colleagues on the First District Court of Appeal, we certify as a question of great public importance the question as hereinabove posed. [Emphasis original; Footnote omitted].

Hoefert v. State, 12 F.L.W. 1250-1251 (Fla. 2d DCA May 13,

1987).[1] [2] But See Frierson v. State, 12 F.L.W. 1616 (Fla. 5th DCA July 2, 1987) where the court, in an opinion devoid of any in-depth analysis, took the contrary position.

In sum, as the lower court and the Second District Court of Appeal have concluded, this Court's opinion in Whitehead v. State, supra, does not preclude employment of the Habitual Offender Act to extend a statutory sentencing cap so that the guidelines recommended range in excess of the original statutory maximum could be imposed or so that a departure sentence could be imposed provided that clear and convencing reasons therefor, other than the habitual offender findings exist. Indeed, utilization of the act in this manner serves rather than detracts from the legislative guidelines scheme.

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[1] Petitioner cites Rasul v. State, 12 F.L.W. 1065 (Fla. 2d DCA April 15, 1987) for the proposition that "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." (PA 18). Hoefert makes it clear that the Second District Court of Appeal has disavowed the foregoing dicta.

[2] For the Court's convenience a copy of the Louis Frost's letter, referred to in Hoefert, has been included in the appendix attached hereto.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, the decision of the First District Court of Appeal in this cause should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Carl S. McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 31st day of July, 1987.

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ASSISTANT ATTAORNEY GENERAL

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