IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 71,101

MARCUS L. BROWN,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, Marcus L. Brown, was convicted of armed robbery with a firearm (R-18; 59-62). Before sentencing, counsel stipulated that respondent had two prior felony convictions (T-189-91). State counsel requested that the trial found respondent an habitual offender (T-193). State counsel also argued that the statute required the imposition of a mandatory life sentence. Id. The court found respondent to be an habitual offender (T-201-04) and imposed the life sentence, not the recommended guideline sentence of seven to nine years (R-63).

On appeal, respondent argued only that the life sentence imposed was "illegal." Petitioner argued that the trial court properly sentenced respondent as the life sentence was mandatory, taking precedence over the recommended guideline sentence, pursuant to Fla.R.Crim.P. 3.701(d)(d). Petitioner argued that the trial court's sentence could not be considered a departure sentence. Slip opinion, page two. The First District concluded that the trial court could not impose the mandatory life sentence required by the habitual offender statute. The court remanded for resentencing, rejecting petitioner's argument that a recommended guideline sentence could not take precedence over a mandatory sentence required by §775.084(4) Fla. Stat. (1985).

On August 5, 1987 the district court denied the state's motion for rehearing or rehearing en banc, filed July 7, 1987.

Petitioner timely filed a notice of appeal on September 4, 1987, pursuant to Fla.R.App.P. 9.120,

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to Art, V, §3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

The First District's decision expressly conflicts with the Second District's holding in Hoeffert v. State, 12 F.L.W. 1250 (Fla. 2d DCA May 22, 1987) that " the habitual offender statute remains a viable menthod to enhance the statutory maximum penalty, . . ." The lower court sub judice effectively repealed the habitual offender statute where it required the imposition of a mandatory sentence.

ARGUMENT

ISSUE

THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SECOND DISTRICT COURT OF APPEAL ON THE QUESTION OF WHETHER THE HABITUAL OFFENDER STATUTE REMAINS IN EFFECT.[1]

The trial court properly found respondent to be an habitual offender, and he did not argue the finding on appeal (T 189-201). The prosecuting attorney correctly argued "if the court does find that the defendant is a habitual offender, the sentence is mandated, basically, by the statute that he would have to be given life imprisonment. . . ." (T 193). In sentencing, the court so found respondent to be an habitual offender, although it characterized the sentence as a "deviation" from the guidelines. With all due respect, the trial court reached the right result without delineating the most appropriate legal reasoning requiring the sentence. The court's discussion of departure was legally irrelevant to the mandatory sentence required to be imposed by section 775.084(a)(1), Fla. Stat; See Committee Notes, Fla.R.Crim.P. 3.701(d)(10): "if the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by operation of that

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[1] Interingly, the First District's opinion sub judice also conflicts with other panel decisions on the same question of law, cited in this brief.

statute . . . ." Of course, the notes would not refer to a repealed statute!

Respondent was convicted of armed robbery (R 21), a first degree felony, §812.13(2)(b), and pursuant to 775.084(4)(a)1 the trial judge was required to sentence him to life imprisonment. Walker v. State, 473 So.2d 694, 698 (Fla. 1st DCA 1985), rev'd on other grounds on remand, 499 So.2d 884 (Fla. 1st DCA 1986). In Walker the Court held that a sentence imposed pursuant to §775.084(4)(a)1, where the defendant has been convicted of a first degree felony, is a "mandatory sentence" 473 So.2d at 698.

Since the sentence imposed was a mandatory sentence, Rule 3.701(d)(9) applies, and not (d)(11), the latter being for departure sentences for which clear and convincing reasons must be given. Rule 3.701(d)(9) provides:

> For those offenses having a mandatory penalty, a scoresheet should be completed and the guidelines sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guidelines sentence exceeds the mandatory sentence, the guidelines sentence should be imposed.

Under the aforementioned provision of the sentencing guidelines, because the mandatory sentence of life exceeds the recommended sentence of 7-9 years, the mandatory sentence of life had to be imposed. Consequently no reasons for the "departure" from the

recommended sentence were required. The First District's opinion necessarily repeals the habitual offender statute by prohibiting its mandatory requirements.

The First District's decision here expressly and directly conflicts with the Second District's opinion in Hoeffert v. State, 12 F.L.W. 1250, 1252 (Fla. 2d DCA May 13, 1987), which held that the habitual offender statute remains a viable method to enhance the statutory maximum penalty of an offense. This conflict is undeniable as the lower court's decision sub judice refused to recognize the viability of the habitual offender statute even where the statute imposed a mandatory sentence. If the statute cannot be relied upon even where it purports to impose a mandatory sentence, then a fortiori the statute must be repealed. This holding by the lower court also conflicts with its own decisions in Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987); and Hester v. State, 503 So.2d 1346 (Fla. 1st DCA 1987). All of these cases hold the habitual offender statute remains viable.

The Second District's decision in Hoeffert v. State, supra discussed whether the enhancement statute could be utilized to impose a sentence beyond the statutory maximum, but within the recommended guideline range. However, the First District's reasoning that the habitual offender statute cannot operate even

where it explicitly requires the imposition of a mandatory sentence contradicts the reasoning in Hoeffert, because to prohibit the enhancement statute's imposition of a mandatory sentence necessarily repeals the act.

The First District's opinion, necessarily eliminates the habitual offender statute from Florida law; after all, if the habitual offender statute cannot operate to authorize a mandatory sentence, it is repealed. This reasoning conflicts with this Court's recent holding in Carawan v. State, 12 F.L.W. 445, 447 (Sept. 4, 1987) where Justice Burkett wrote "a construction is favored that gives each statute a field of operation, as opposed to a construction that considers the former statute repealed by implication. [Citations to Oldham v. Rooks, 361 So.2d 140, 143 (Fla. 1978)]. The lower court decision does just what Justice Burkett stated is disfavored: it interpreted Whitehead v. State, 498 So.2d 863 (Fla. 1986), so as to completely repeal the habitual offender statute by implication. Just as in Carawan, the guidelines were promulgated after the passage of the habitual offender statute, and "courts must presume that later statutes are passed with knowledge of prior laws." Id. of course, the committee notes make crystal clear that no repeal is contemplated. The lower court's decision conflicts with the

noted cases, and this court's reasoning in Carawan. This court should accept jurisdiction and apparent conflict created by the First District's opinion.

CONCLUSION

Based on the foregoing, the state urges this court to invoke its discretionary jurisdiction to resolve the express and direct conflict between the First District's opinion and the Second District's opinion concerning the imposition of sentences mandated by The Habitual Offender Statute.

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 P. Douglas Brinkmeyer, Post Office Box 671, Tallahassee, Florida **32302** on this 15 day of September, 1987.

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