IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 71,568

DEAN ROBERT KERSEY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with the offense of a lewd act in the presence of a child pursuant to section 800.04, Florida Statutes (1985) (App. 1). The case proceeded to trial and resulted in a verdict of guilty as charged (App. 2). A guidelines scoresheet indicated that respondent's presumptive sentence was between 15 and 17 years (App. 3). Respondent's actual sentence was 30 years incarceration based upon the habitual offender statute (App. 4-5). The trial court did list a number of reasons to depart from the presumptive guidelines sentence (App. 6-7). Thereafter, respondent appealed to the Fifth District Court of Appeal (App. 8-17). This direct appeal, however, did not challenge the use of the habitual offender statute. The petitioner filed an answer brief (App. 18-33). The fifth district per curiam affirmed the judgment and sentence (App. 34).

In the present case, respondent filed a motion pursuant to Florida Rule of Criminal Procedure 3.850 contending that the habitual offender statute was repealed, and that his thirty year sentence was in excess of the general terms provided by law. Petitioner filed a response as ordered by the Fifth District Court of Appeal. The fifth district issued its opinion in Kersey v. State, 12 F.L.W. 2305 (Fla. 5th DCA Sept. 24, 1987), which vacated and remanded the sentence based upon Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987). The latter case held that the habitual offender act was no longer applicable and had been completely repealed by implication based upon the promulgation of

the guidelines. Presumably, that opinion was predicated upon the decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986).

After the Kersey opinion was issued, petitioner requested the district court to certify conflict between that opinion and the cases of Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987) and Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987). The district court granted such request and, as a result, this case is now presented to this court on the merits.

SUMMARY OF ARGUMENT

The habitual offender act has not completely been repealed. The latter statute is still viable to use in conjunction with the guidelines under two circumtances. First, the habitual offender statute may be utilized to increase a maximum sentence where there are clear and convincing reasons to depart. Secondly, if the presumptive guidelines sentence is in excess of the maximum sentence as provided by law, the habitual offender act can be utilized to impose the presumptive guidelines sentence which is above the term provided by general law. Repeal by implication is not favored, and under the latter two theories, the habitual offender is still a viable concept.

ARGUMENT

THE HABITUAL OFFENDER ACT HAS NOT BEEN REPEALED BUT MAY BE USED TO EITHER JUSTIFY A SENTENCE GREATER THAN THE TERM PROVIDED BY GENERAL LAW BASED UPON DEPARTURE REASONS OR BASED UPON THE FACT THAT THE PRESUMPTIVE GUIDELINES SCORE IS GREATER THAN THE MAXIMUM TERM PROVIDED BY GENERAL LAW.

The question presented to this court is whether the habitual offender statute has been repealed altogether or whether that statute can be utilized in conjunction (and not in lieu of) the guidelines. § § 775.084; 921.001, Fla. Stat. (1985). Petitioner would note that repeals by implications, are not favored and if two statutes can be read in pari materia, then both statutes should be allowed to stand. Petitioner submits that the habitual offender statute may be construed in such a manner.

Presumably, respondent would base his argument on the holding of Whitehead v. State, 498 So.2d 863 (Fla.1986). Whitehead noted that section 775.084 could not be considered as providing an exemption from a guildeines sentence, nor could the habitual offender act in and of itself be a reason to depart. Yet such a holding does not implicitly nor explicitly repeal the habitual offender act altogether. As such, the habitual offender act can be utilized to increase the maximum sentence based upon departure reasons.

As argued by the petitioner in the response ordered by the fifth district, it is not now open to debate at this juncture in the proceedings that the trial court did not have clear and convincing reasons to depart. That issue has already been

litigated and, in any event, the respondent is not contesting any of the reasons for departure. Rather, respondent's position is that guidelines limit departures to the statutory maximum provided by general law so that the habitual offender act is completely inoperable.

Yet caselaw is contrary to the latter conclusion. The fifth district in Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1986), allowed a departure sentence which was based upon the habitual offender statute, as long as there were valid clear and convincing reasons to do so under the guidelines. That court held:

> The operation of the habitual offender statute in extending the maximum legal term of confinement gives that statute a useful function under the sentencing guidelines. Id. 897 n.3.

The district court then certified the question to this court. In State v. Vicknair, 498 So.2d 416 (Fla. 1986), this court answered the certified question in the negative and held:

> ... we have answered the certified question in the negative in Whitehead v. State, 498 So.2d 863 (Fla. 1986). In accordance with Whitehead, we approve the decision of the district court below.

Furthermore, petitioner would note that State v. Vicknair was decided on November 26, 1986, which was after the Whitehead decision was promulgated. Had this court wanted to disapprove that part of the district's court opinion in Vicknair, supra, which explained that the habitual offender statute was limited (albeit not completely repealed) to the extent that it only

defined the maximum legal parameters of a sentence, this court would have done so. In the absence of such a decision, especially in light of the fact that State v. Vicknair was promulgated after Whitehead, supra, petitioner submits that the habitual offender statute cannot be considered repealed by implication, at least to the extent argued herein.

This court recently re-ratified the committee note to Florida Rule of Criminal Procedure 3.701(d)(10). That note refers to Florida Rule of Criminal Procedure 3.701(d)(11), as noted by the following quotation:

> ... if the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

Such language indicates that the holding ratified by this court in Vicknair, supra, is still viable under the guidelines.

Section 921.001(4)(b), Florida Statutes (1985), mandates that the supreme court may review proposed revisions in the guidelines and can implement them in part or in whole. That statutes further mandates:

> ... However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revived.

In other words, a guidelines revision, to be effective, not only must be promulgated by the supreme court under a rule, but it must also be adopted by the legislature. Petitioner submits the effect of Whitehead, supra, is to circumvent this procedure, inasmuch as the habitual offender statute has and is a viable

concept under the guidelines pursuant to the committee note of Rule 3.701(d)(10). To maintain that guidelines have repealed the habitual offender statute by implication and then have that statute continue to operate under the committee note to Rule 3.701(d)(10), is totally inconsistent. Therefore, unless and until the supreme court adopts a rule proposing the change announced in Whitehead, and unless and until that has been adopted by the legislature, petitioner submits that a departure based upon the habitual offender statute is proper.

The next issue is whether a trial court may impose a sentence based upon the habitual offender statute where the guidelines recommendation is above the statutory maximum for the specific offense in question. Kersey v. State, 12 F.L.W. 2305 (Fla. 5th DCA Sept. 24, 1987), acknowledged that other district court cases conflict with Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987), to the extent that those cases allowed the habitual offender statute to be utilized under the latter circumstances.

One of those cases was Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987). That district court was, likewise, presented with the issue of whether the habitual offender statute could be utilized to exceed the statutory maximum where the sentence imposed did not exceed the guidelines recommendation. Hoefert noted some specific language added to the committee note pursuant to Rule 3.701(d)(10). That language indicated that if a defendant was sentenced under section 775.084, the maximum allowable sentence would be increased as provided by the

operation of that statute. This language was first published in the Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 468 So.2d 220, 225 (Fla. 1985). More importantly, Hoefert, noted that this language was re-adopted in Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rule 3.701 and 3.988), 12 F.L.W. 162, 166 (Fla. Apr. 2, 1987). Hoefert also explained that an amendment to this rule was proposed concerning the habitual offender statute, but was rejected by this court. Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 509 So.2d 1088-1089 n. 1 (Fla. 1987). The district court did not know what the rejected suggestion entailed, but held that in light of the re-adoption of the committee note under Rule 3.701(d)(10), it would be inconceivable that Whitehead, supra, appealed the habitual offender act entirely. In accord, Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987); Myers v. State, 499 So.2d 895, 898 (Fla. 1st DCA 1986); Smith v. Wainwright, 508 So.2d 768 (Fla. 2d DCA 1987); Washington v. State, 508 So.2d 565 (Fla. 2d DCA 1987); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986). (The latter case has been certified to this court to answer the question whether the habitual offender statute may be used to increase the sentence from the statutory maximum of five years to nine years where the recommended guidelines sentence was between seven and nine years.)

In light of the latter analysis, petitioner submits that the trial court had the authority to sentence respondent up to at least 17 years based upon the Whitehead holding.

Petitioner urges this court to overrule Frierson, supra, and to hold that the habitual offender statute may be utilized to imcrease the maximum sentence based upon clear and convincing reasons for departure or, at least, based upon the fact that the presumptive guidelines sentence is beyond the statutory maximum term provided by general law. If either of these latter arguments are adopted by this court, then, petitioner submits that the law promulgated under this interpretation does not represent a retroactive change in the law involving issues of a fundamental nature. In Witt v. State, 387 So.2d 922, 930 (Fla. 1980), this court declared that only it and the United States Supreme Court could adopt a change in the law which would apply retroactively. Such changes are considered constitutional and fundamental. Inasmuch as the habitual offender statute had (and does have) a place in the current guidelines scheme, the Whitehead decision should not be tantamount to a fundamental change in the law. Indeed, had it been such a fundamental change, this court would have indicated so.

Finally, it is possible that the legislature itself would enact a statute revitalizing the habitual offender statute and, in effect, overrule any implications created by the Whitehead decision to the effect that the habitual offender statute may have been completely repealed. An example of the latter occurred in State v. Lanier, 464 So.2d 1192 (Fla. 1985), where the legislature promulgated a new statute and declared that the new statute was and is the intent of the legislature. If and when that does occurr, under Article X, Section 9 of the Florida

Constitution*, appellant could be lawfully sentenced under the habitual offender statute up to thirty years as was done in the case at bar. Petitioner is only making the latter argument, in the event that the legislature does, indeed, promulgate a statute similar to what was promulgated in Lanier. In any event, petitioner submits that Whitehead has not repealed the habitual offender statute. Furthermore, as noted above, it is up to this court to indicate whether the Whitehead decision represents a fundamental change in the law, or whether the holding should be promulgated as a rule change and adopted by the legislature pursuant to section 921.001(4)(b).

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*"Repeal or amendment of a statute shall not effect prosecution or punishment for any crime previously committed."

CONCLUSION

WHEREFORE, petitioner moves this honorable court to overrule the Fifth District Court of Appeal's opinion in Kersey v. State, 12 F.L.W. 2305 (Fla. 5th DCA Sept. 24, 1987), and to issue mandate affirming the trial court's sentence in all respects.

Respectfully submitted

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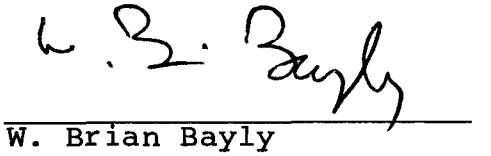
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by mail to Dean Robert Kersey, 912957 Mail # 267, Lake Correctional Inst. P. O. Box 99, Clermont, Florida 32711 this 8th day of January, 1988.



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