IN THE SUPREME COURT OF FLORIDA

FILED
MAR 29 1989
CLERK, SUPREME COURT
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TIMMIE L. PARKER,

Appellant,

v. CASE NO. 73,819

STATE OF FLORIDA,

Appellee.

______________________/

PETITIONER'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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Petitioner,	:	
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STATE OF FLORIDA,	:	
Respondent.	:	
______________________________	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This court granted review of the district court opinion, Parker v. State, ____ So.2d ____, 14 FLW 545 (Fla. 1st DCA Feb. 28, 1989), on the ground of court-certified conflict with Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987).

Petitioner appeals from an habitual offender sentence imposed after conviction at jury trial of possession of cocaine and paraphernalia. The district court affirmed.

The transcript and record on appeal will be referred to as "R."

II STATEMENT OF THE CASE

Petitioner was charged by information filed November 4, 1987, with possession of cocaine and paraphernalia (R-190).

At trial February 9, 1988, petitioner's motion for judgment of acquittal was denied (R-142-44). The jury found him guilty as charged (R-186).

February 9, the state filed a motion to declare defendant habitual felony offender (R-191). Petitioner was found to be an habitual offender and was sentenced March 1 to 10 years in prison on Count I, a third-degree felony, and one year consecutive incarceration on Count II, a misdemeanor (R-208-12). There is no guidelines scoresheet in the record, but at sentencing, the state attorney said petitioner scored in the range of 12-17 years (R-194).

Notice of appeal was timely filed March 14, 1988 (R-213). The First District Court affirmed February 28, 1989, holding the findings of fact in support of the habitual offender determination need not be in writing so long as the findings are stated at a reported hearing. The First District declined to follow Hoefert v. State, infra, which did require habitual offender findings to be in writing, and certified conflict to the supreme court.

III STATEMENT OF THE FACTS

October 13, 1987, at 2:00 in the morning, five police officers quietly approached the Parker family home in Escambia County in order to serve an arrest warrant on Terry Parker. The time was chosen so Terry would be home; he was often out earlier in the evening. Several officers were present because, on previous arrests, Officer Stull had to chase Terry down and physically fight him to cuff him and, expecting more of the same, he took other officers to help subdue Terry (R-116-18).

Most were undercover officers in plainclothes. Only one, Al Fryer, was in uniform, and he was to walk up to the door. As Officer Fryer approached the house, he saw a man sitting in a car in the driveway and thought it was who they were looking for.

Although there were some discrepancies in his testimony, Fryer said he approached the vehicle, and shined his flashlight in, whereupon he observed a man with a syringe, a small plastic bag containing a white powder, and a filter on his lap. When he saw the flashlight, the man threw the syringe in between the console and the seat and brushed the bag and filter onto the floor. Unluckily for Timmie Parker, who is the petitioner here, it was he, not his brother Terry, in the car (R-77-78).

Over objection, Fryer was allowed to explain how cocaine is prepared for injection by mixing it with water and heating it in a can or other container, then the liquid is drawn into the syringe through the filter to filter out impurities. Fryer did not, however, find any can or any other container in the

car (R-88-89,109-10). On recall by the state, Fryer said cocaine can be dissolved in saliva or blood, in your hand with piece of paper, although there was no sign of paper, or water, or saliva, or blood in the car (R-114-15).

Over objection, Fryer was permitted to say he was familiar with the effect of cocaine on behavior. In his opinion, people on cocaine act similar to those drinking alcohol. Their attitude toward police is very hostile on some occasions, and Timmie was abusive towards him and the other officers (R-90-93).

On the FDLE report identifying the drug, the "subject's name" is typed as Timmy L. Pariter. "Pariter" is lined through and "Parker" is handwritten above it. "Parker" is not in the handwriting of Mr. Rawls, the chemist who testified, and he did not know who wrote it. He believed the name was typed on the report before it reached the lab. The report number matched the number Rawls himself wrote on the envelopes containing the exhibits. Defense objection to admission of the report itself was sustained. The court said the report should not be in evidence, only the testimony (R-131-40).

Petitioner was sentenced March 1, 1988, as an habitual offender. There is no guidelines scoresheet, no presentence investigation (PSI), and no written order determining habitual offender status. At sentencing, the state said the guidelines call for 12 - 17 years, and the trial court recited his prior record, mostly burglary and theft, with two dealing in stolen property charges (R-194). Petitioner apparently pleaded at a single hearing in 1986 to six counts of burglary, five of grand

theft, and one of petty theft. Defense counsel said Timmie disputed some of those charges but because there had been a plea offer of concurrent time, gave up the disputed charges and pleaded (R-195).

The court said:

> I think all the statutory requirements are here: previously convicted of a felony within five years, no pardon or post-conviction relief. From the record in this case and Mr. Parker's continuing use of drugs, which appears to probably form the basis of his criminal career, and I think imposition of the sentence under the habitual offender statute is necessary for the protection of the public from further criminal activity by him.

(R-198-99). In mitigation, defense argued Timmie had a drug problem and asked that he receive residential drug treatment, noting Timmie had never gone through treatment before, and the crime is against himself rather than the public (R-200).

The court said:

> ...you have a long, extensive criminal history, and I don't doubt that much or maybe all of it is drug related. It is true that anybody who is addicted to drugs is very much tempted to commit crimes to raise the money to buy their drugs, and I gather that's much of what's been involved in your life. You know, there were discussions about trying to get you and put you in drug rehabilitation, and I told you at that time that while I had an open mind about it and was willing for you to do that pending the trial of these cases, I wouldn't commit myself to promise you that's all that was going to happen. But you decided you wanted to take your chances and, you know, give up the court's opportunity to determine whether that might be a viable alternative.
>
> And frankly, with what I know of your case, I doubt that it would have been, but I am not at all convinced that drug

> rehabilitation was your primary goal. I think maybe avoiding the consequences of your act is a primary goal, and I don't think that makes a good candidate for rehabilitation through drug treatment.
>
> I'm on each of these two charges going to adjudge you guilty, and I am going to find you as an habitual felony offender. As to Count I, I am going to sentence you to imprisonment for a term of 10 years. Under Count II, I am going to sentence you to imprisonment to a term of one year consecutive to the other sentence.

(R-201-02).

IV SUMMARY OF ARGUMENT

When almost every Florida scheme permitting extraordinary sentencing requires findings of fact to be in writing, petitioner's sentencing as an habitual offender with less rigorous safeguards violates equal protection principles.

While guideline departure sentences are limited to the statutory maximum, habitual offender sentences may be as long as double the statutory maximum. Then Judge, now Justice, Barkett's discussion in Boynton v. State, infra, adopted by the Florida Supreme Court, of the necessity for written reasons in guideline departure sentences applies with equal or greater force to habitual offender sentences, since habitualized sentences can be twice as long as guideline departures. There is no constitutionally valid reason for this discrepancy in sentencing schemes, which permits a double sentence with less rigorous safeguards.

Not all defendants who meet the threshold criteria are properly sentenced as habitual offenders. It is the discrete second-stage determination of necessity for the protection of the public which sorts out the few defendants properly habitualized from all who meet the threshold criteria. The requirement of specific findings in support of the second-stage determination has lost none of its vitality following the supreme court decision in Winters II, infra, which continued to permit habitual offender sentencing of certain defendants.

The instant case is somewhat unusual in that the problem is less that the findings are too vague and general (the

typical error), as that 1) the findings are not supported by the record, and 2) even if supported by the record, are insufficient as a matter of law because petitioner's offense, drug possession, as a victimless crime, has been held not to be a crime which justifies the finding of necessity to protect the public. See Adams, infra.

V ARGUMENT

ISSUE I
HABITUAL OFFENDER SENTENCING WITHOUT A WRITTEN ORDER DENIED PETITIONER EQUAL PROTECTION OF THE LAW.

This court granted review of the district court opinion, Parker v. State, ____ So.2d ____, 14 FLW 545 (Fla. 1st DCA Feb. 28, 1989), on the ground of court-certified conflict with Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987).

When almost every Florida scheme permitting extraordinary sentencing requires findings of fact and reasons justifying the sentence to be in writing, petitioner's sentencing as an habitual offender with less rigorous safeguards violates equal protection principles. U.S. Const am. XIV; Fla. Const. art. I, section 2. At least one district court has held habitual offender sentencing requires written findings of fact. Hoefert; compare Bell v. State, 382 So.2d 107 (Fla. 5th DCA 1980).

By statute and case law, the required findings of fact and reasons justifying a sentence must be in writing when the death penalty is imposed, a juvenile is sentenced as an adult, or a sentence departs from the guidelines. See, respectively, sec. 921.141(3)(1), Fla. Stat.; Cave v. State, 445 So.2d 341 (Fla. 1984) (death penalty); sec. 39.111(6)(j), Fla. Stat.; Rhoden v. State, 448 So.2d 1013 (Fla. 1985) (juvenile sentenced as adult); Rule 3.701(d)(11), Fla.R.Crim.P.; State v. Jackson, 478 So.2d 1054 (Fla. 1985), reversed on other grounds in Miller v. Florida, 482 U.S. ___, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987);

Boynton v. State, 473 So.2d 703 (Fla. 4th DCA), aff'd, 478 So.2d 351 (Fla. 1985), cert. den. 475 U.S. 1029, 106 S.Ct. 1232, 89 L.Ed.2d 341 (1986) (guidelines departure sentences).

Explaining the necessity for written reasons justifying guidelines departure sentences, the Florida Supreme Court, quoting extensively from Boynton, supra, said, in State v. Jackson, supra:

> The necessity for written reasons for departure is explained by Judge Barkett in Boynton v. State, [supra]:
>
> > The alternative of allowing oral pronouncements to satisfy the requirements for a written statement is fraught with disadvantages which, in our judgment, compel the written reasons.
> >
> > First, it is very possible ... that the "reasons for departure" plucked from the record by an appellate court might not have been the reasons chosen by the trial judge were he or she required to put them in writing. Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders.
> >
> > Second, an absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for the reasons utilized by the trial courts.
> >
> > In R.B.S. v. Capri, the court noted:
> >
> > > It is not the function of an appellate court to cull the underlying record in an effort to locate findings and underlying reasons which would support the order. The statute should be complied with in the future.
> >
> > 348 So.2d [692] at 696-697.
> >
> > Lastly, the development of the law would best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing. The efforts of the State

> of Florida to provide badly needed reforms in the sentencing aspect of the criminal justice system are in the embryonic stages. A mammoth effort has been expended by the Legislature and by the Sentencing Guidelines Commissions, past and present, to develop some uniformity and to respond to some of the major problems which surround the entire sentencing process. For the first time in this state, a body of law is being developed regarding considerations which may or may not be appropriate in sentencing criminal defendants. This effort would best be served by requiring the thoughtful effort which "a written statement providing clear and convincing reasons" would produce. This, in turn, should provide a more precise, thoughtful, and meaningful review which ultimately will result in the development of better law.

> At 706-707. We adopt this reasoning as our own.
>
> The legislature and this Court, by statute and rule, have clearly mandated written orders to assure effective appellate review. The reasons are well articulated by Judge Barkett.

This rationale applies with equal or greater force to habitual offender sentencing. The habitual offender statute also requires findings of fact to justify an extended sentence, but possibly unique among sentencing schemes, does not expressly require such findings to be in writing. Sec. 775.084, Fla. Stat. While the habitual offender statute, unlike the guidelines, is not a relatively new sentencing scheme, the case law provides ample evidence that what constitutes a sufficient reason justifying habitualization is less than crystal clear. See, e.g., Forrest v. State, 513 So.2d 151 (Fla. 1st DCA), appeal dism. 518 So.2d 1274 (Fla. 1987); Hoefert v. State,

supra; Hugger v. State, 496 So.2d 890 (Fla. 2d DCA 1986); Watson v. State, 492 So.2d 831 (Fla. 5th DCA 1986); Rosemond v. State, 489 So.2d 1185 (Fla. 1st DCA 1986); Sims v. State, 487 So.2d 37 (Fla. 2d DCA 1986); Fleming v. State, 480 So.2d 715 (Fla. 2d DCA), appeal after remand 499 So.2d 38 (Fla. 2d DCA 1986); Scott v. State, 446 So.2d 261 (Fla. 2d DCA 1984); Cavallaro v. State, 420 So.2d 927 (Fla. 2d DCA 1982); Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). All the other reasons stated in Jackson for the requirement of written findings apply equally to habitual offender sentences.

If a trial court states clear and convincing reasons in writing, it may depart from the presumptive guideline sentence and impose a sentence up to, but not exceeding, the statutory maximum. Where the recommended guidelines sentence exceeds the statutory maximum, the presumptive sentence is the statutory maximum. Rule 3.701(d)(10), Fla.R.Crim.P. The habitual offender statute, however, permits the trial court to double the statutory maximum sentence, but does not require written findings. In other words, the scheme with less rigorous requirements allows a far worse sentence. There is no constitutionally valid explanation for this discrepancy in sentencing schemes, which permits a doubly long sentence with less rigorous safeguards.

Permitting petitioner to be sentenced to double the statutory maximum under the habitual offender statute without a written order denies petitioner equal protection of the law and must be reversed.

ISSUE II
THE TRIAL COURT'S DETERMINATION THAT PETITIONER WAS AN HABITUAL OFFENDER WAS ERRONEOUS.

To impose sentence under the habitual offender statute, a trial court must make two discrete determinations. First, the defendant must meet the threshold criteria of section 775.084(3), Florida Statutes. Second, the court must find that an extended sentence is necessary to protect the public.

To qualify as an habitual offender, a defendant must have committed another felony within the last five years or be within five years of his release from prison on a felony conviction. In addition, the trial court must find that the conviction relied on has not been pardoned or set aside. The trial court must obtain and consider a presentence investigation. There must be a separate proceeding of which the defendant must be given timely notice and an opportunity to respond.

These findings are so elaborate that trial courts fairly frequently overlook the fact they are merely a threshold determination. See Weston v. State, 452 So.2d 95 (Fla. 1st DCA), review den. 456 So.2d 1182 (Fla. 1984); Cavallaro v. State, supra; Lee v. State, 410 So.2d 182 (Fla. 2d DCA 1982); Whaley v. State, 382 So.2d 802 (Fla. 1st DCA 1980); Bell v. State, supra. The further determination that an extended term is necessary for the protection of the public is a discrete and essential step in imposing sentence under the habitual offender statute. Eutsey v. State, 383 So.2d 219 (Fla. 1980); Adams v. State, supra; see also Mangram v. State, 392 So.2d 596 (Fla.

1st DCA 1981). In Adams, 376 So.2d at 55, this court called it the "more critical second-stage inquiry" (emphasis added).

The threshold criteria of the habitual offender statute are broadly inclusive. A great number of criminal defendants, probably most, have prior records, and many of them meet the threshold criterion of having committed two felonies within five years. This does not mean they should all be sentenced as habitual offenders. If meeting the threshold criteria were all that was required, there would be no need for the second-stage determination of necessity for protecting the public. The statute does not work automatically, that is, meeting the threshold criteria is not in itself enough to justify sentencing as an habitual offender.

Of this issue, the Fourth District said:

> It is quite clear that not every subsequent felony offender must automatically be sentenced as a recidivist under Section 775.084, F.S. 1975. A subsequent felony offender may be sentenced as a recidivist only if the court makes various findings in accordance with Section 775.084.

Chukes v. State, 334 So.2d 289 (Fla. 4th DCA 1976). The Fifth District expressed the principle thus:

> Just because the petitioner was previously convicted of a felony within five years of the commission of the crime in this case does not mean he automatically is subject to the greater term of years in prison.

Bell v. State, supra.

It is that essential and critical second-stage determination which sorts out those properly sentenced as habitual offenders from many others who meet the threshold criteria.

The findings supporting the determination must be sufficient to apprise an appellate court of the underlying facts and circumstances on which the trial court relied in making the findings. Adams, supra; see also Winters v. State, 475 So.2d 1025 (Fla. 1st DCA 1985), appeal after remand 500 So.2d 303 (Fla. 1st DCA 1985) (Winters I); Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985); Weston v. State, supra.

The holding of the Florida Supreme Court in Winters v. State, 522 So.2d 816 (Fla. 1988) (Winters II), while continuing to permit habitual offender sentencing where the guidelines exceed the statutory maximum sentence, in no way abridged the necessity of adequate findings in support of an habitual offender determination. As the supreme court said in Walker v. State, 462 So.2d 452 (Fla. 1985), specific findings are "critical to the statutory scheme and enable meaningful appellate review."

When habitual offender findings are insufficient, they tend to be inadequate for failing to be specific enough, and for being too vague and general. See Forrest v. State, and cases following, cited in Issue I, supra. There are two problems with the findings in the instant case and both are somewhat different from the typical errors found in habitual offender sentencing. The first is the findings, especially the court's central finding of a causal relationship between petitioner's drug problem and past property crimes, are not supported by the record, at least as the record now stands. There is no guidelines scoresheet, no PSI, no written order. While

petitioner through counsel apparently acknowledged he had a drug problem, how the court determined that his previous burglary and theft convictions were drug-related is not revealed by the record, and his admission to a drug problem does not per se create a causal nexus between those facts.

The second problem is that, even were the findings supported by the record, they would be insufficient to justify an extended sentence because the crime of drug possession is a victimless crime, traditionally viewed <u>not</u> as a crime against society, and not an offense from which the public needs protection. While even victimless crimes have some effect on society, an habitualized sentence requires a very direct connection between the defendant's crime and the <u>necessity</u> of protecting the public. Such a connection is not present in the instant case. Compare the trial court's findings herein with those of the First District in <u>Adams</u>:

> Adams was convicted of armed robbery in 1971, violated his parole from prison by using heroin, possessed heroin and paraphernalia as charged on this occasion, and was arrested but not prosecuted for two other crimes[,]

which were insufficient as a matter of law to establish the necessity of an extended sentence for the protection of the public.

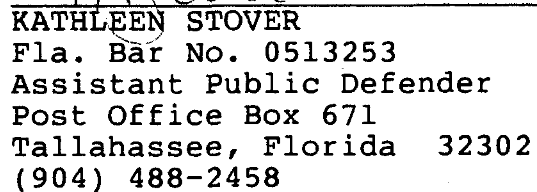
No less than the findings in <u>Adams</u>, the findings herein were insufficient to establish the necessity of an extended sentence for the protection of the public. Petitioner's

sentence should be reversed and remanded for imposition of the statutory maximum sentence, five years.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse his sentence and remand for imposition of the statutory maximum sentence, five years imprisonment.

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 A.E. Pooser IV, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Timmie Parker, #206360, D-47, Baker Correctional Institution, P.O. Box 500, Olustee, Florida 32072, this 23 day of March, 1989.

KATHLEEN STOVER