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IN THE SUPREME COURT OF FLORIDA

TIMMIE L. PARKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
APR 12 1989
CLERK, SUPREME COURT
By Deputy Clerk

CASE NO. 73,819

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner-Parker's, Statement of the Case as being accurate. Although Petitioner's Notice of Appeal is dated March 10, 1987, (R 213), the State would agree that the year should have been typed as 1988, and that the Notice was timely.

The State submits the following Statement of the Facts as being more accurate to the resolution of the issues in this appeal:

On February 8, 1988, Parker was brought to trial on charges of possession of cocaine and possession of drug paraphernalia (R 1, 190). The jury returned verdicts of guilty as charged on February 9. Prior to sentencing, the state attorney served notice that he would seek an extended sentence pursuant to the habitual offender statute (R 191).

At the sentencing hearing, held on March 1, 1988 (R 192), Parker's trial counsel acknowledged receipt of copies of the PSI and the State's notice to seek an extended sentence (R 193). The PSI contains the following facts: (1) The five-year history of Parker's record immediately preceding the instant offenses includes convictions of burglary--nine times, grand theft--six times, dealing in stolen property--once, and petit theft--twice, (SR 224-226); (2) Parker had been released from a three-and-one-half-year prison sentence for burglary and grand theft on September 22, 1987, e.g., just 21 days prior to committing the instant

offenses (SR 231); (3) Parker has an eleventh-grade education, no special training or vocational skills, has not held a steady job in the past five years, and earns about \$200 per month at odd jobs (SR 227); yet, Parker also admitted to using cocaine on a regular basis for approximately four years at \$100 per day (SR 299).

The sentencing judge recounted Parker's criminal past and asked if he disputed the PSI (R 194). Parker did not object to the record or any other assertion contained in the PSI, and offered no evidence in mitigation other than his drug dependency which he readily admitted (R 200-201).

The sentencing judge made specific findings that (1) Parker had committed a felony within the past five years, (2) that there was no evidence that he had been pardoned from such conviction or that it had been set aside, and (3) that Parker had a "continuing use of drugs, which appears to probably form the basis of his criminal career... ." (R 198). Based on such findings, the court ruled that an extended sentence as a habitual offender was required for the protection of the public (R 198-199). Accordingly, the court sentenced Parker to 10 year's imprisonment on the possession of cocaine conviction and one year on the possession of drug paraphernalia conviction, to run consecutive (R 202, 210-211).

SUMMARY OF ARGUMENT

Issue I: The underlying reasons for imposing an extended sentence as a habitual felony offender were stated at a reported hearing by the sentencing court, and, therefore, were not required to be in writing. Any change in this procedure must occur through legislative action vice judicial construction.

Issue II: The sentencing court's finding that Parker's drug habit as being the basis for his lengthy criminal career is sufficient to support a finding that an extended sentence as a habitual felony offender is necessary for the protection of the public.

ARGUMENT

ISSUE I

THE UNDERLYING REASONS FOR IMPOSING A SENTENCE UNDER THE HABITUAL FELONY OFFENDER STATUTE ARE NOT REQUIRED TO BE IN WRITING.

Petitioner urges that this court should rule that a trial judge who exercises his discretion in sentencing a habitual felony offender to an extended sentence pursuant to Sec. 775.084, Fla. Stat. (1987), must articulate his reasons for doing so in writing. Petitioner's argument must fail for the following reasons:

First, and perhaps foremost, this court has already held that

Section 775.084(3)(d) requires that the trial court make findings of fact that show on their face that an extended term is necessary to protect the public from defendant's further criminal conduct. These findings, however, need not be in writing but may be reported in the transcript of the sentencing hearing.

Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980) (emphasis supplied).

In the instant case, the trial court's specific findings are reported in the transcript (R 198-199); therefore, the Eutsey requirement has been satisfied.

Secondly, petitioner argues that since reasons must be in writing for imposing the death penalty [Sec. 921.141(3), Fla. Stat. (1987)], adult sanctions on a juvenile offender [Sec. 39.111(7)(d), Fla. Stat. (1987)], and departure from the presumptive guidelines sentence [Fla.R.Crim.P. 3.701(d)(11)], then, logically, a similar requirement must obtain for imposing an extended sentence under the habitual offender statute. What petitioner overlooks, however, is that in the first three instances, the applicable statute or rule specifically requires the underlying reasons be in writing. The legislature did not include a similar requirement in Sec. 775.084, Fla. Stat. (1987).

Even if it could be shown that the failure to include a written requirement clause in Sec. 775.084 was a result of legislative oversight, the "courts should not rewrite legislation to cure an omission by the legislature just because it seems to fit overall legislative policy." Capeletti Bros. Inc. v. Department of Transportation, 499 So.2d 855, 857 (Fla. 1st DCA 1986), review denied, 509 So.2d 1117 (Fla. 1987). And, courts should not adjust "the statutory scheme to accommodate perceived equities... ." Williams v. Harrington, 460 So.2d 533, 537 (Fla. 2d DCA 1984).

In Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), the court held that the use of the word "or" in the presumptive guidelines sentence directing "community control or 12 to 30 months' incarceration", actually permitted imposition of both

sanctions. In State v. Van Kooten, 522 So.2d 830 (Fla. 1988), this court disapproved the Francis decision, holding "(a)ny change in that presumptive guideline must occur through appropriate legislative and court rule action, rather than by judicial construction." 522 So.2d at 831.

So it is here. If Sec. 775.084, Fla. Stat., is to be amended to require the reasons for imposing an extended sentence be in writing, it remains for the legislature to do so, and not by judicial construction.

ISSUE II

THE SENTENCING COURT DID NOT ERR IN SENTENCING APPELLANT AS A HABITUAL FELONY OFFENDER.

Sentencing a criminal defendant as a habitual felony offender requires a two-step process: one, that the defendant is a habitual offender, and, two, that an extended sentence "is necessary for the protection of the public." Section 775.084(3), Florida Statute (1987).

To establish the first step, the sentencing court must find (1) that the defendant has previously been convicted of a felony or two first-degree misdemeanors, (2) that the felony for which he is to be sentenced was committed within five years of his last offense, or within five years of his release from prison, and (3) that he has not been pardoned from such prior offense or had same set aside in a post-conviction proceeding. Section 775.084(1)(a), Florida Statute (1987).

The record evinces ample support for a finding that Parker qualifies as a "habitual felony offender." On July 20, 1983, petitioner was adjudged guilty of one count each of burglary of a conveyance and petit theft, and was sentenced to six months in the County jail. On May 13, 1986, he pled nolo to five counts of burglary, four counts of grand theft, and one count of dealing in stolen property, was adjudicated guilty and was sentenced to three years in the State Prison. On June 25, 1986, he again pled

nolo to three counts of burglary, two counts of grand theft and one count of petit theft, was adjudged guilty, and was sentenced to three-and-one-half years imprisonment, from which he was released on September 22, 1987, just three weeks prior to the instant offenses (SR 224-226, 231).

Parker's challenge to the sufficiency of the evidence of the second step, e.g., that an extended sentence is necessary for the protection of the public, must fail for the following reason:

While Section 775.084, Florida Statute (1987), sets out the elements which must be found in order to establish the first step, it does not similarly do so for the second. The courts have been less than illuminary in guiding bench and bar below on the quantum of evidence necessary to sustain a finding that extended sentencing of a habitual felon is necessary for the protection of the public, stating merely that the trial court must either "make specific findings of fact", Walker v. State, 462 So.2d 452, 454 (Fla. 1985), or "state the underlying facts and circumstances relied upon", Rosemond v. State, 489 So.2d 1185, 1186 (Fla. 1st DCA 1986). In any event, "a mere conclusory statement" is never sufficient. Rosemond, supra., at 1186.

Parker relies upon Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). However, that case undercuts rather than supports his position. There, a habitual felony offender who was convicted of possession of heroin had a prior felony conviction for armed

robbery. The First District Court of Appeals held that the trial court failed to make sufficient findings that Adams' extended sentencing was required. The court also pointedly noted that "(t)he trial court made no finding that Adams was at sentencing addicted to heroin, so we do not consider whether heroin addiction would add to weight to the trial court's findings under Section 775.084." Adams at 58.

In the instant case, the PSI alleged that Parker had a \$100 per day cocaine habit (SR 229), which not only went unchallenged by Parker, but both he and his trial attorney admitted his "drug problem." (R 200-201). The sentencing judge found that the second stage, e.g., extended sentencing necessary to protect the public, was based upon "the record in this case and Mr. Parker's continuing use of drugs, which appears to probably form the basis of his criminal career" (R 198). Thus, as stated in Winters v. State, 500 So.2d 303, 305 (Fla. 1st DCA 1987), approved 522 So.2d 816 (Fla. 1988),

although there are no magic words that constitute the "specific findings of fact", Walker, (supra.), or "the underlying facts and circumstances", Rosemond (supra.), required to support an habitual offender determination, in the instant case the lower court clearly expressed more than a mere conclusive statement that appellant was a danger to the community.

The "specific findings of fact" and "underlying facts and circumstances" are no less "clearly expressed" in the instant appeal, and should, therefore, be affirmed.

CONCLUSION

Based upon the record, argument and citation of authorities,
the sentence imposed below must 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 via U. S. Mail to Kathleen Stover,
Assistant Public Defender, Post Office Box 671, Tallahassee,
Florida 32302, this 12th day of April, 1989.



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