047

IN THE SUPREME COURT OF FLORIDA

JAMES ODELL ALLEN,

Petitioner,

v. CASE NO. 77,321

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

The instant decision of the Second District Court of Appeal is not in conflict with Brown, infra. The legislature has made clear its intent to override Brown by taking habitual offender sentences outside the guidelines. That the legislature chose not to correct the "editorial error" of the word "shall" in section 775.084(4)(a) only indicates that it is the true intent of the legislature that, once qualified as an habitual offender, Petitioner must be sentenced to life in prison.

The issue of the constitutionality of Section 775.084 is not part of the certified question and should not be dealt with by this Court. Nonetheless, many district court's of this state have passed upon, and affirmed, the constitutionality of the habitual offender statute. That the statute may appear to give habitual violent felony offenders a break over habitual felony offenders does not mean that the statute is not rationally related to a legitimate governmental goal.

ARGUMENT

ISSUE I

HAS THE 1988 AMENDMENT OF SECTION 775.084, FLORIDA STATUTES, ALTERED THE SUPREME COURT'S RULING IN BROWN, HOLDING THAT THE LEGISLATURE INTENDED SENTENCING UNDER SECTION 775.084(4)(A) TO BE PERMISSIVE, RATHER THAN MANDATORY, AS STATED IN DONALD V. STATE, 562 So.2d 792 (Fla. 1st DCA 1990).

Petitioner Allen, in his attack upon the district court's decision, has overlooked several major aspects of the current version of Section 775.084 that militate against his conclusion that the legislature did not intend a mandatory life sentence outside the Florida sentencing guidelines.

Petitioner advocates many different rules of statutory construction. Therefore, he must certainly agree that "[O]ne of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter" and that "[W]ords and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening penal statues". Perkins v. State, 16 F.L.W. S207 (Fla. March 14, 1991). The legislature has not rendered 775.084 in any sense vague when it comes to mandatory sentencing under its provisions.

Section 775.084(4)(e) clearly and literally states that "[A] sentence imposed under this section shall not be subject to the provisions of §921.001" (otherwise known as the sentencing guidelines). Nothing could constitute any clearer legislative

intent. Accordingly, once the legislature determined that habitual criminals are to be treated differently than those who undergo guidelines sentencing, it takes no legal gymnastics to conclude that sentences calling for life in prison, far in excess of the guidelines, are the intended result under (4)(a) 1 thru 3.

Yet, Petitioner proceeds to get bogged down in the "may" versus "shall" controversy and concludes that the word "shall", as employed in (4)(a) is merely permissive, allowing the sentencer to give a lesser sentence than those called for in 1 thru 4, even though the criminal meets the criteria for habitualization. Petitioner obviously advocates the continued vitality of this Court's opinion in State v. Brown, 530 So.2d 51 (Fla. 1988) where the word "shall" in the statute was relegated to a mere "editorial error". However, as Petitioner duly notes, "the legislature is presumed to know the law and how it is being interpreted by the courts of this state". Brief of Petitioner at page 8. If such is the case, then when the legislature amended the statute in 1988 and 1989, it can well be concluded that their failure to correct the "editorial error" of "shall" only means that such was indeed no clerical error but, rather, was the true intent of the people.

The instant scenario of statute, judicial opinion construing statute, and amended statute, has been seen before. Recently, this Court faced the issue of whether the opinion in Carawan v. state, 515 So.2d 161 (Fla. 1987) survived the legislature's amendment to Section 775.021(4), Florida Statutes,

as amended after Carawan. See State v. Smith, 547 So.2d 613, 617 (Fla. 1989). Sub judice, the legislature, in view of the decision in Brown holding that a habitualized criminal cannot be sentenced in excess of the guidelines, mandatory language not withstanding, clearly set habitualized sentencing outside the confines of the guidelines. Therefore, it takes no convoluted leap of legal logic to properly conclude that the legislature meant the sentences described in (4)(a) 1 thru 4 to be mandatory. Moreover, by not correcting the "editorial error" during the past two legislative sessions, it must further be concluded that "shall" indeed means "shall" and that Brown can no longer be read to take the legislature's words so lightly.

Ultimately, the plain meaning of the word "shall", coupled with the legislature's clear intent to take the habitual offender statute well outside the guidelines, leaves one with the same conclusion that was reached in Smith, supra. The legislature has overridden Brown and has determined that habitual criminals shall indeed be sentenced more severely because their past criminal conduct has earned them a place apart from those defendants who learn from their experience with the criminal justice system.

ISSUE II

WHETHER THE CONSTITUTIONALITY OF SECTION 775.084, FLORIDA STATUTES, SHOULD BE CONSIDERED BY THIS COURT INASMUCH AS IT WAS NOT ADDRESSED IN THE CERTIFIED QUESTION?

For his second issue, Petitioner attacks the constitutionality of Section 775.084. This issue was not encompassed within the certified question and therefore should not be addressed by this Court. See Gould v. State, Case No. 75,833, opinion entered March 21, 1991, at footnote 1.

In the event that this Court determines that such rules do not apply to Petitioner, Respondent offers the following, but does not waive the foregoing argument.

Many decisions have reached the conclusion that the habitual offender statute does not violate either due process or equal protection. Debose v. State, 566 So.2d 367 (Fla. 5th DCA 1990), habitual offender statute not unconstitutionally inequitable, irrational or vague; Smith v. State, 567 So.2d 555 (Fla. 2d DCA 1990), amended version of statute did not violate due process or equal protection; Arnold v. State, 566 So.2d 37 (Fla. 2d DCA 1990), classification of habitual offenders is rationally related to a legitimate governmental goal based on the idea that recidivists should be treated more severely than first time offenders and that the statute does not create an arbitrary classification; Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), statute does not violate due process on the ground that it

does not contain a method for determining who it should be applied to or that it does not make any provision for enhancing sentences involving first-degree felonies punishable by life, life felonies, or capital offenses; Roberts v. State, 559 So.2d 289 (Fla. 2d DCA 1990), sentencing guidelines are substantive law and legislature has power to exclude certain classes of defendants from the guidelines and that protection of the public from persons from whom additional protection is needed does not violate equal protection; King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), classification scheme of statute does not offend Constitution merely because it might result in some inequality.

Furthermore, this Court has long since held that the habitual offender statute does not violate traditional notions of equal protection or due process. See Cross v. State, 119 So. 380 (1928). This Court reaffirmed the same in Eutsey v. State, 383 So.2d 219 (Fla. 1980), Chief Justice England concurring in part. The above cited district court opinions have fallen in line with this Court's long standing declaration of constitutionality.

Petitioner has attacked the statute on all of the foregoing grounds as addressed by this State's district courts of appeal. This Court is urged to follow such precedent in view of the clear uniformity of analysis employed by the lower appellate courts of this State.

Additionally, Petitioner points out the "unreasonableness" of having a distinction made between habitual felony offenders and habitual violent felony offenders on the basis that the

statute only uses the word "may" in subsection 4(b), thus allowing seemingly greater sentencing permissiveness for the more dangerous class of habitual criminals. However, that such a distinction may seem unfair or even illogical when compared to (4)(a) does not mean that the classification and punishment scheme is not rationally related to the legitimate goal of treating habitual criminals, in general, more harshly than other more deserving defendants. That the people of the State of Florida felt it best to give the sentencing judge a tad more discretion when it comes to habitual violent felony offenders does not mean the legislature is irrational. It only means that this Court should not accept the invitation to tell the legislature whether its purported leniency is a good policy or not.

Furthermore, and as a corollary to those arguments posed in Issue I, whose to say that the word "may" in 4(b) is not an editorial error and that the legislature really meant to say "shall" in conformity with (4)(a)? Can the rule of "lenity" be accurately applied to convert a "shall" to a "may" where the legislature has so clearly indicated its intent to treat repeat offenders more harshly without respect to the guidelines? When one reads the dictates of subsection (e) in *pari materia* with the word "shall" in subsection (4)(a), it can equally well be concluded that the "may" word in (4)(b) is but a aberration in view of the legislatures strengthening of the statute in 1988 and

1989.[1] Accordingly, it cannot be concluded that the tension between the "shall" of 4(a) and the "may" of 4(b) creates the kind of irrationality that renders Section 775.084 unconstitutional.

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[1] In 1989, the legislature amended subsection (1)1 to include more offenses within the ambit of the statute.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the judgment and sentence 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 furnished by U.S. mail to ANDREA NORGARD, Assistant Public Defender, P. O. Box 9000 Drawer PD, Bartow, Florida 33830, on this 25th day of March, 1991.

OF COUNSEL FOR RESPONDENT