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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,626

THE STATE OF FLORIDA,

Petitioner,

vs.

LEM ADAM WASHINGTON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The Petitioner relies upon its statement of the case and facts as set forth in its initial brief as it relates to the conflict that this Court based its jurisdiction on. However, in the answer brief, Respondent has raised two additional issues: one which was raised on direct appeal and one which was not. Although the State strongly urges this Court to exercise its discretion and not reach the additional issues, the State will, in the exercise of caution, address the merits. The additional facts will only pertain to the new issues.

The Respondent was tried with a co-defendant Robert Smith (A-1). During voir dire, co-defendant Smith challenged the State's use of its peremptory challenges based on in a Neil-Slappy violation. (A-1). The Respondent did not raise, join or adopt the Neil-Slappy objection. (A-4). In fact the Respondent struck two blacks during voir dire. (T. 118). Respondent himself made a personal statement that he was satisfied with the jury selection process. (A-4, T. 113). Whereas, co-defendant Smith accepted the panel without waiving his Neil-Slappy objection. (T. 110). The Third District found that Respondent waived the issue for review on direct appeal, and found that it would be better served if the issue was raised on a Rule 3.850 motion in order to determine, after an hearing thereon, if trial counsel made a strategic decision in waiving the objection and accepting the jury. (A. 4-5).

POINTS INVOLVED ON APPEAL

I

WHETHER THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(a) FOR HABITUAL FELONY OFFENDERS AND THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(b) FOR HABITUAL VIOLENT FELONY OFFENDERS ARE MANDATORY WHEN THE TRIAL COURT HAS FOUND THE DEFENDANT TO BE EITHER A HABITUAL FELONY OFFENDER OR A HABITUAL VIOLENT FELONY OFFENDER AND WHEN THE TRIAL COURT HAS DETERMINED THAT IMPOSITION OF SENTENCE UNDER THE HABITUAL OFFENDER STATUTE, AND NOT PURSUANT TO THE SENTENCING GUIDELINES, IS NECESSARY FOR THE PROTECTION OF THE PUBLIC.

II

WHETHER THE DEFENDANT WHO FAILS TO EXPRESSLY JOIN IN A NEIL OBJECTION MAY BE DENIED RELIEF WHERE A CO-DEFENDANT RAISING THE NEIL OBJECTION IS GRANTED A NEW TRIAL.

III

WHETHER A DEFENDANT CONVICTED OF A FIRST DEGREE FELONY PUNISHABLE BY LIFE IMPRISONMENT OR A TERM OF YEARS IS SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT UNDER SECTION 775.084(4)(b)(1), FLORIDA STATUTES.

ARGUMENT

I

THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(a) FOR HABITUAL FELONY OFFENDERS AND THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(b) FOR HABITUAL VIOLENT FELONY OFFENDERS ARE MANDATORY WHEN THE TRIAL COURT HAS FOUND THE DEFENDANT TO BE EITHER A HABITUAL FELONY OFFENDER OR A HABITUAL VIOLENT FELONY OFFENDER AND WHEN THE TRIAL COURT HAS DETERMINED THAT IMPOSITION OF SENTENCE UNDER THE HABITUAL OFFENDER STATUTES, AND NOT PURSUANT TO THE SENTENCING GUIDELINES, IS NECESSARY FOR THE PROTECTION OF THE PUBLIC.

The State relies, in total, upon its argument contained in its initial brief.

II

A DEFENDANT WHO FAILS TO EXPRESSLY JOIN IN A NEIL OBJECTION MAY BE DENIED RELIEF WHERE A CO-DEFENDANT RAISING THE NEIL OBJECTION IS GRANTED A NEW TRIAL.

The Respondent contends that his failure to object to or join his co-defendant's Neil objection should not be held as a waiver of his right to review since the purpose of a contemporaneous objection was met by his co-defendant's Neil objection. The Third District disagreed with this analysis on the ground that there might have been a tactical reason for the failure to object and as such the proper procedure to determine the issue would be by a post conviction relief motion.

The Third District's analysis has been tacitly approved by this Court in Wright v. State, 318 So.2d 477 (Fla. 4th DCA 1975) cert. denied, 334 So.2d 609 (Fla. 1976) where it was held that the failure to join in or make his own motion for severance precluded review of the denial of the co-defendants motion for severance. The Court reasoned that such a holding was sound since "[t]here are undoubtedly a myriad of reasons why a defendant may choose to waive his right to sever in such a situation and having made such tactical decision, he should not have the same right to reversal and new trial as is accorded the co-defendant whose timely motion for severance was denied." Id. at 478.

Since this decision not to interpose a Neil objection could have been tactical, the Third District correctly ruled that Respondent should raise it in a Rule 3.850 claim. The trial court would be the correct procedural setting where evidence could be taken on whether it was a tactical choice and if so whether if it was a reasonable one. State v. Barber 301 So.2d 7 (Fla. 1974).

III

A DEFENDANT CONVICTED OF A FIRST DEGREE FELONY PUNISHABLE BY LIFE IMPRISONMENT OR A TERM OF YEARS IS SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT UNDER SECTION 775.084(4)(b)(1), FLORIDA STATUTES.

The Respondent was convicted of robbery with a deadly weapon. Pursuant to Section 812.13(2)(a) Florida Statutes said crime is a felony of the first degree punishable by life or pursuant to Section 775.082 Florida Statutes, a term of years not exceeding thirty. The Respondent was found to be a habitual violent felony offender and sentenced to a habitual offender life sentence. The Respondent now, for the first time, contends, that since this felony was a first degree punishable by life, and that the habitual offender statute does not mention life, then the habitual offense life sentence was illegal.

The claims raised by Respondent have been squarely addressed and rejected by the Third District in Westbrook v. State, 574 So.2d 187 (Fla. 3rd DCA 1991). The State adopts the opinion as its argument herein.

Defendant was convicted of robbery and sentenced to life imprisonment as a habitual offender. He claims error in his sentence. We affirm based on the following analysis.

Defendant's basic premise is that the robbery with a deadly weapon

statute, § 812.13(2)(a), Fla.Stat. (1989), which he violated is a first-degree felony punishable by life imprisonment. Thus, he claims the court erred in sentencing him under the habitual offender statute, § 775.084(4)(a), Fla.Stat. (1989), because that statute does not provide for the enhancement of life felonies. He cites Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), to support this theory.

We find that neither the applicable statutes nor Barber supports his argument. First, the robbery statute on its face permits sentencing under the habitual offender statute. Even though conviction under section 812.13(2)(a) is a first-degree felony punishable by life imprisonment, the trial judge is required to enter a guidelines sentence. In defendant's case, his guidelines scoresheet total provided for a recommended sentence of twelve to seventeen years, not life imprisonment. The defendant's highest permitted sentence under the guidelines, without the necessity of written reasons for departure, would have been twenty-two years imprisonment with a one-cell upward departure. However, because the robbery statute permits sentencing under the habitual offender statute where applicable, the trial judge, upon finding the defendant recidivist, was permitted to impose the enhanced life sentence.

Secondly, the statement in Barber, 564 So.2d at 1173, concerning the possible non-applicability of the habitual offender statute to those convicted of a first degree life felony is purely dicta. Moreover, Barber is not controlling here since the habitual offender statute addressed in that case was the 1987 version which was substantially rewritten by the Florida Legislature in 1989 to take penalties prescribed under the habitual offender statute outside the province of the

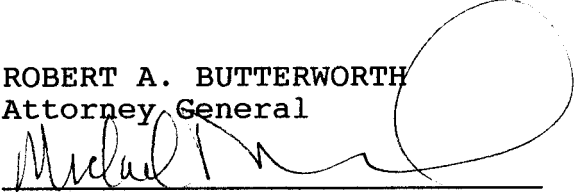
sentencing guidelines and to allow the trial court to impose the penalty of life imprisonment on a defendant by simply making a determination that the defendant fit the statutory definition of a habitual felony offender. See Owens v. State, 560 So.2d 1260 (Fla. 1st DCA 1990).

CONCLUSION

Based on the foregoing points and authorities the State respectfully requests that this Court disapprove of and quash the instant decision and to exercise its jurisdiction and not review the additional issues raised by Respondent.

Respectfully submitted,

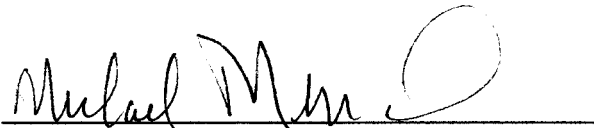
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER ON THE MERITS was furnished by mail to RONALD S. LOWY, Attorney for Respondent, Barnett Bank Building, 420 Lincoln Road, Penthouse (7th Floor), Miami Beach, Florida 33130 on this 3rd day of September, 1991.



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mls/