QA 1-7-92 047 appeal

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,788

EDWARD WESTBROOK,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW

BRIEF OF PETITIONER

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INTRODUCTION

This cause is before this Court on a grant of discretionary review of a decision of the District Court of Appeal of Florida, Third District. The parties will be referred to as they stood in the trial court. The symbol "R" will be used to designate the record on appeal, the symbol "Tr" the transcript of trial proceedings, and the symbol "A" the appendix to this brief, which is comprised of the decision of the court below.

STATEMENT OF THE CASE

An information, charging Westbrook with robbery with a deadly weapon (a knife) and possession of cocaine, was filed on June 19, 1989 (R. 2-3A).[1] Westbrook stood mute to the charges (R. 6).

Trial commenced on July 11, 1989, and a mistrial was declared on the following day (R. 8, 12-13). A second trial commenced on August 23, 1989, and a guilty verdict on the

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[1] This information superseded the original charging document, which had alleged that the robbery had been committed with a firearm (R. 1-1A).

robbery charge was returned on August 25, 1989 (R. 14, 18, 25).[2] The trial court entered judgment on that date (R. 26-27), and, on November 9, 1989, imposed a life sentence (R. 28-29).

Notice of appeal was filed on December 6, 1989 (R. 34). On February 12, 1991, the District Court of Appeal issued its decision affirming the judgment and sentence (A. 1-2), and denied a timely motion for rehearing on March 19, 1991. *Westbrook v. State,* 574 So.2d 1187 (Fla. 3d DCA 1991). Westbrook timely invoked this Court's discretionary-review jurisdiction, and this Court issued its order granting review on September 10, 1991.

QUESTION PRESENTED

WHETHER THE HABITUAL-OFFENDER STATUTE, SECTION 775.084, FLORIDA STATUTES (1989), APPLIES TO FIRST-DEGREE FELONIES SPECIALLY MADE PUNISHABLE BY LIFE IMPRISONMENT.

STATEMENT OF THE FACTS

The charge in this case arose from the robbery at knifepoint of Armando Rodriguez, a security guard, at approximately 5:00 a.m. on April 5, 1979, which robbery occurred while Rodriguez was making his rounds on Commodore Plaza in Coconut Grove, Florida (R. 304-13). Rodriguez suffered wounds to his hand and leg during the robbery (Tr. 308, 313).

The police were called by a person who had heard the incident (R. 314, 333-34), and arrived at the scene shortly after the robbery had occurred (Tr. 367). Officer Miguel Reboyro subsequently stopped Westbrook a short distance away, and Rodriguez was taken to that location, where he identified Westbrook as the perpetrator (Tr. 319, 369-70, 401-02). A $2,000 check, approximately $300 in cash, and a Rolex watch were taken in the robbery (R. 308-12, 324-25); the watch and approximately $100 were recovered when Westbrook was arrested (R. 352, 373-74, 388-89, 391, 401-02). The knife was not found by the police (Tr. 416).

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[2] The state abandoned the cocaine charge during the first trial (R. 11), and thereafter filed an information charging only the robbery (R. 4-4A).

The scoresheet filed by the state placed Westbrook in the 12-17 year range (R. 30-30A). The prosecutor requested habitual-offender proceedings after the jury verdict was returned, and the court ordered a presentence investigation and set a sentencing hearing (Tr. 492). At the hearing, the state introduced Westbrook's prior criminal record (Tr. 499-504), and the court, overruling counsel's objection that the habitual-offender statute does not apply to first-degree felonies punishable by life imprisonment (Tr. 506-07), imposed an habitual-offender life sentence (Tr. 512; R. 31).

In upholding the sentence, the Third District ruled as follows:

> [T]he robbery statute on its face permits sentencing under the habitual offender statute. Even though the 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.

Westbrook v. State, 574 So.2d at 1188.

SUMMARY OF ARGUMENT

Westbrook was charged with and convicted of armed robbery, which is a first-degree felony punishable by life imprisonment. Section 775.084(4)(a)1, Florida Statutes (1989), provides for a life sentence for habitual offenders found guilty of first-degree felonies, but makes no provision for imposing habitual-offender sentences upon persons found guilty of first-degree felonies punishable by life imprisonment. Under fundamental principles of statutory construction, the habitual offender statute cannot be applied to such felonies.

ARGUMENT

THE HABITUAL-OFFENDER STATUTE, SECTION 775.084, FLORIDA STATUTES (1989), DOES NOT APPLY TO FIRST-DEGREE FELONIES SPECIALLY MADE PUNISHABLE BY LIFE IMPRISONMENT.

Petitioner Westbrook was convicted of robbery with a deadly weapon, which offense is a first-degree felony punishable by life imprisonment. § 812.13(2)(a), Fla.Stat. (1989). The question presented on review to this Court is whether that offense is subject to sentencing under the habitual-offender statute, Section 785.084, Florida Statutes (1989), pursuant to which statute an habitual offender found guilty of a first-degree felony is subject to a life sentence. § 775.084(4)(a)1, Fla.Stat. (1989).

In *Barber v. State,* 564 So.2d 1169 (Fla. 1st DCA), *review denied,* 576 So.2d 284 (Fla. 1990), the First District, in passing upon the constitutionality of the recently-amended provisions of Section 775.084, found that first-degree felonies specially made punishable by life are excluded from the ambit of the statute:

> Barber contends that the law does not bear a reasonable and just relationship to a legitimate state interest. He claims that while the statute *appears* to be aimed at the most dangerous criminals, it excludes by its very terms those who have committed the most serious crimes. Barber states that "[a] person cannot be sentenced as a habitual felony offender if his offense is classified as a first degree felony punishable by life, a life felony, or a capital offense. Section 775.084(4) (a), Florida Statutes (1987)." Although subsection (4) makes no provision for enhancing sentences if the original sentence falls into one of the above categories, this is not a basis for finding that the statute fails to bear a reasonable and just relationship to a legitimate state interest. The legislature may have determined that these punishments are already sufficiently severe to keep the felon in prison for an extended period of time. Section 775.084, on the other hand, enhances sentences of habitual offenders when the statutes criminalizing their offenses do *not* take such recidivism into account.

Id. at 1173 (original emphasis).

Thereafter, in *Gholston v. State,* 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990), the First District expressly held that Section 775.084 "makes no provision for enhancing penalties

for first-degree felonies punishable by life, life felonies or capital felonies," and applied that construction of the statute to vacate an habitual-offender sentence imposed upon the defendant, who had been convicted of armed burglary, a first degree felony punishable by life imprisonment. *Id.* at D46 (citing *Johnson v. State,* 568 So.2d 519 (Fla. 1st DCA 1990) and *Barber*). The court below took a different view of the statute, relying exclusively upon the reference to Section 775.084 in Section 812.13(2)(a) to find that first-degree felonies specially made punishable by life imprisonment are subject to habitual-offender sentencing. *Westbrook v. State,* 574 So.2d 1187, 1188 (Fla. 3d DCA 1991).[3]

The First District, in its subsequent *en banc* decision in *Burdick v. State,* 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991)(*en banc*) retreated from *Barber* and adopted the view expressed by the court below, holding that "a first degree felony, no matter what the punishment imposed by the substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement" under Section 775.084. *Id.* at D1964.[4] In addition to the Third District, the Second, Fourth, and Fifth Districts, prior to *Burdick,* had so construed Section 775.084. *Lock v. State,* 582 So.2d 819 (Fla. 2d DCA 1991); *Newton v. State,* 581 So.2d 212 (Fla. 4th DCA 1991); *Paige v. State,* 570 So.2d 1108 (Fla. 5th DCA 1990).[5]

It is submitted that these courts have failed to apply one of the most fundamental principles of statutory interpretation, *i.e.,* "that the mention of one thing implies the exclusion

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[3] The Third District also set forth this view of the statute in *Henry v. State,* 576 So.2d So.2d 409 (Fla. 3d DCA 1991). The decision in *Henry* is pending on a grant of discretionary review by this Court in Case No. 77,790, and has been consolidated with the present case for oral argument.

[4] Although *Burdick* does not mention the First District's decision in *Gholston,* subsequent First District decisions have held that the court receded from *Gholston* in *Burdick. E.g., Mixon v. State,* 16 F.L.W. D2188 (Fla. 1st DCA 1991); *Green v. State,* 16 F.L.W. D2137 (Fla. 1st DCA 1991); *West v. State,* 16 F.L.W. D2044 (Fla. 1st DCA 1991).

[5] *Burdick* is pending before this Court in Case No. 78,466, the First District having certified the question addressed in that case. The First District decisions cited in n.4, *supra,* also certified the question to this Court.

of another; expressio unius est exclusio alterius." *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976). It must be presumed that the legislature deliberately chose to omit first-degree felonies punishable by life imprisonment from the scope of the habitual-offender statute, since, "where a statute enumerates the things on which it is to operate . . . it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." *Ibid* (citation omitted). Moreover, "in construing a statute, courts cannot attribute to the legislature an intent beyond that expressed," *Board of County Commissioners v. Department of Community Affairs,* 560 So.2d 240, 242 (Fla. 3d DCA 1990)(citations omitted), and "may not invade the province of the legislature and add words which change the plain meaning of the statute." *Metropolitan Dade County v. Bridges,* 402 So.2d 411, 414 (Fla. 1981)(citation omitted).

It is therefore unnecessary to revert to rules of statutory construction to determine the proper scope of Section 775.084. *E.g., Reino v. State,* 352 So.2d 853, 860 (Fla. 1977)(where "[t]he language of the statute is clear and unequivocal, . . . legislative intent may be gleaned from the words used without applying incidental rules of construction")(citation omitted). Moreover, even if there could be reasonable debate as to the legislative intent in this regard, such would not dictate the result reached by the court below: to the contrary, it would militate in favor of a restrictive reading of the statute. *In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender,* 561 So.2d 1130, 1137 (Fla. 1990)("[c]ourts should not add additional words to a statute not placed there by the legislature, *especially* where uncertainty exists as to the intent of the legislature")(citation omitted; emphasis supplied).[6] Nonetheless, if it were necessary to apply statutory-construction principles, two

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[6] This principle eviscerates the only basis upon which the Third District rested its construction of the statute, *i.e.,* the reference in Section 812.13(2)(a) to Section 775.084. *Westbrook v. State,* 574 So.2d at 1188. The insubstantiality of this basis is explicated by Judge Ervin, dissenting from the First District's decision in *Burdick v. State,* as follows:

> The state, however, points out that the statute establishing appellant's underlying felony offense, armed burglary, specifically provides that the offense is punishable either by a term of years

(continued...)

fundamental rules would independently lead to a rejection of the decision below: the requirement that criminal statutes be construed favorably to the accused, and the prohibition against unreasonable interpretations of legislative enactments.

"[T]o the extent that a definiteness is lacking, a statute must be construed in the manner most favorable to the accused." *Perkins v. State,* 576 So.2d 1310, 132 (Fla. 1991)(citations omitted); *accord, e.g., State v. Jackson,* 526 So.2d 58, 59 (Fla. 1988); *Palmer v. State,* 438 So.2d 1, 3 (Fla. 193); *Reino v. State,* 352 So.2d at 860. Indeed, the legislature specifically has provided that its enactments are to be so construed:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

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[6](...continued)

> not exceeding life imprisonment, or as provided in section 775.084, the habitual offender statute. Hence, the state argues, the legislature has expressly manifested its intent by stating in the specific statute proscribing the underlying offense for which appellant was convicted that appellant may be habitualized and an enhanced life sentence imposed. I cannot agree that the statute's reference to the habitual offender statute is, under the circumstances, a clear reflection of legislative intent.
>
> The reference in section 810.02(2) to section 775.084 appears in all noncapital felony and misdemeanor statutes listed under Title XLVI of the Florida Statutes. Thus, even though offenses which are designated life felonies were never made subject to enhanced sentencing under the habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty of life felonies. Additionally, although section 775.084 had formerly provided enhanced sentencing for habitual misdemeanants, the legislature, effective October 1, 1988, deleted the provisions relating to habitual misdemeanants. *See* Ch. 88-131 §§ 6, 9 Laws of Fla. In the 1989 Florida Statutes, however, the legislature failed to delete references to section 775.084 in providing punishments for specific misdemeanors. Considering the legislature's wholesale indiscriminate reference to the habitual offender statute through the Florida Statutes, many of which are inapplicable, I do not consider that the state can take any comfort in the reference made in section 812.02(2) to section 775.084.

Burdick v. State, 16 F.L.W. at D1965 (Ervin, J., dissenting).

§ 775.021(1), Fla.Stat. (1989).

Thus, in construing Section 775.084(4)(a), the possibility that the legislature *may* have intended to include first-degree felonies punishable by life is not enough to sustain the interpretation forwarded by the court below. Rather, the question is whether the result urged by Westbrook can be reached if the statute is strictly construed in his favor -- and, undeniably, such a result can be reached when the statute is so construed. It is simply not irrational to assume that the legislature omitted first-degree felonies specially made punishable by life imprisonment from the scope of the habitual offender statute when it made no provision for such felonies in the language of that statute. *Burdick v. State,* 16 F.L.W. at D1965 (Ervin, J., dissenting)("it is illogical to assume that the legislature intended for a trial judge to have the authority to impose an enhanced sentence of life upon one who was already subject to a maximum sentence of life imprisonment for the offense for which he or she was convicted").

Secondly, the maxim that "an interpretation of a statute which leads to an unreasonable or ridiculous conclusion or a result obviously not designed by the legislature will not be adopted" by the courts, *Drury v. Harding,* 461 So.2d 104, 108 (Fla. 1984)(citations omitted); *accord, e.g., City of St. Petersburg v. Siebold,* 48 So.2d 291, 294 (Fla. 1950)("[t]he courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred"), would prevent a contrary construction of the statute. This is so because -- as the Florida courts thus far uniformly have held -- life felonies are beyond the scope of the habitual-offender statute. *E.g., Mixon v. State,* 16 F.L.W. D2188 (Fla. 1st Aug. 16, 1991); *West v. State,* 16 F.L.W. D2044 (Fla. 1st DCA Aug. 7, 1991); *Graham v. State,* 16 F.L.W. D2031 (Fla. 1st DCA Aug. 5, 1991); *Newton v. State,* 581 So.2d at 213; *Paige v. State,* 570 So.2d at 1109; *Johnson v. State,* 568 So.2d 519, 520 (Fla. 1st DCA 1990. Thus, as Judge Ervin stated in his dissent from the holding in *Burdick v. State,*

> Even though the legislature as early as 1972 created the

> classification of life felonies, it never amended the habitual felony offender statute to include enhanced sentencing for life felonies. . . . . Consequently, the result reached by the majority is that persons who commit severe felony offenses categorized as life felonies after October 1, 1983 are eligible for guideline sentencing, whereas persons such as appellant who commit first degree felonies punishable for a term of years not exceeding life imprisonment are denied such consideration upon being classified as habitual felons, because section 775.084(4)(e) excludes habitual felony sentences from guideline sentencing and other benefits. My thesis is, of course, not that the legislature *could not* validly make this kind of distinction -- only that it did *not intend* to make it.

Burdick v. State, 16 F.L.W. at D1965 (Ervin, J., dissenting)(footnote omitted; original emphasis).

"Unreasonable or ridiculous interpretations distort fundamental principles of statutory construction and mandate the use of reasonable interpretations." *Drost v. State, Department of Environmental Regulation,* 559 So.2d 1154, 1156 (Fla. 3d DCA 1990)(citations omitted). The most reasonable interpretation of Section 775.084 is that urged by Judge Ervin his dissent in *Burdick,* while that of the court below would require adding words to a statute which change its plain meaning -- a course which runs afoul of fundamental statutory construction principles. *Perkins v. State,* 576 So.2d at 1312-13 (constitutional allocation to legislature of "power to create crimes and punishments" can "be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature").

CONCLUSION

Based on the foregoing, petitioner requests this Court to quash the decision of the court below and to remand with directions to vacate the sentence in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to ANITA J. GAY, Assistant Attorney General, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 30th day of September, 1991.

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ELLIOT H. SCHERKER
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