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S.D. WHITE

MAY 16 1991

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,790

3d DCA Case No. 89-2781

ANDRE HENRY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The petitioner, Andre Henry, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The respondent, The State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the petitioner and respondent will be referred to as defendant and the state, respectively. The symbol "A" will be used to designate the appendix to this brief.

STATEMENT OF THE CASE

The State accepts the statement of the case put forth by defendant as substantially correct.

QUESTION PRESENTED

WHETHER THE SUPREME COURT OF
FLORIDA HAS DISCRETIONARY
JURISDICTION TO REVIEW THE
DECISION BELOW?

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal does not expressly and directly conflict with a decision of another district court, thus, this Court does not have the authority to review of the decision below.

ARGUMENT

THE SUPREME COURT OF FLORIDA DOES
NOT HAVE DISCRETIONARY
JURISDICTION TO REVIEW THE
DECISION BELOW.

Article V, section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) limit the discretionary jurisdiction of this Court to review conflict among the district courts of appeal with the following:

(2) *Discretionary Jurisdiction.* The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that:

...
(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

The decision of which the Petitioner seeks review does not "expressly and directly" conflict with a decision of another district court, thus, this Court lacks the authority to review the decision below.

Petitioner has failed to establish the jurisdiction of this Court by demonstrating that the decision of the lower court, in ruling on sentencing one convicted of a first degree life felony as a habitual offender, is in direct conflict with a decision of

another district court. As stated by this Court in Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Conflict between the Third District, in the instant case, and the First District, in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), is not apparent from the four corners of the majority decision. (Appendix A). The Third District held Barber to be inapplicable as (1) the language in Barber regarding sentencing those convicted of first degree life felonies as habitual offenders was "purely dicta", and (2) the statute addressed in Barber was the 1987 version which was substantially different from the statute addressed in the instant case. (App. A, pp. 2-3). The same question of law was not presented to the district courts in both this case and Barber, therefore conflict does not exist.

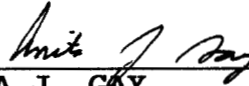
Although petitioner contends that conflict exists with Gholston v. State, 16 F.L.W. 46 (Fla. 1st DCA January 4, 1991), the Third District denied petitioner's motion for rehearing which relied on Gholston as controlling. (Appendices B and C). By both rejecting the applicability of Barber and denying the motion for rehearing, the Third District did not expressly and directly conflict with the First District on the same question of law.

CONCLUSION

Based upon the foregoing arguments and citations of authority the petition for review should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to ELLIOT H. SCHERKER, Assistant Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125, on this 13th day of May, 1991.



ANITA J. GAY
Assistant Attorney General

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1991

EDWARD WESTBROOK,

**

Appellant,

**

vs.

**

CASE NO. 89-3017

THE STATE OF FLORIDA,

**

Appellee.

**

Opinion filed February 12, 1991.

An Appeal from the Circuit Court for Dade County, Ellen M. Morphonios, Judge.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Monique T. Befeler, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and NESBITT and LEVY, JJ.

PER CURIAM.

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 nonapplicability 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).

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 89-3017

EDWARD WESTBROOK,

Appellant,

vs.

MOTION FOR REHEARING

THE STATE OF FLORIDA,

Appellee.

The appellant, Edward Westbrook, by and through undersigned counsel, moves this Court to grant rehearing in the above-styled cause pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, and states:

1. In its opinion issued in this cause on February 12, 1991, this Court declined to follow the statement in *Barber v. State*, 564 So.2d 1169 (Fla. 1st DCA 1990), regarding the inapplicability of the habitual-offender statute, § 775.084(4)(a), Fla.Stat. (1989), to first-degree felonies punishable by life imprisonment, for two reasons: (1) because the statement is "purely dicta," and (2) because the habitual-offender statute reviewed in *Barber* permitted guideline sentencing. *Westbrook v. State*, No. 89-3017 (Fla. 3d DCA Feb. 12, 1990)(slip opinion at 2-3.

2. As to the first reason, this Court overlooked or failed to consider the subsequent decision in *Gholston v. State*, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990), as to which appellant filed a notice of supplemental authority on January 9, 1991. In *Gholston*, the First District followed *Barber* to hold expressly that "Section 775.084, Florida Statutes, makes no provision for

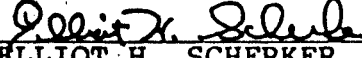
enhancing penalties for first-degree felonies punishable by life, life felonies, or capital felonies." 16 F.L.W. at D46 (citing *Johnson v. State*, 15 F.L.W. 2631 (Fla. 1st DCA Oct. 22, 1990) and *Barber*). The court applied this holding to vacate an habitual-offender sentence imposed for a first-degree felony punishable by life imprisonment (armed burglary) in that case, *ibid*, dispelling any notion that the *Barber* holding was dicta.

2. As to the second reason for declining to follow *Barber*, this Court overlooked or failed to consider that the pertinent aspects of the 1989 habitual-offender statute are unchanged from the statute before the court in *Barber*. Compare § 775.084(4)(a), Fla.Stat. (1987), with § 775.084(4)(a), Fla.Stat. (1989). The 1989 statute is, in many respects, more onerous, see § 775.084(4)(e), Fla.Stat. (1989), but that does not affect the correctness of the rationale set forth in *Barber*.

WHEREFORE, appellant requests this Court to grant rehearing in this cause.

Respectfully submitted,

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BY: 
ELLIOT H. SCHERKER
Assistant Public Defender
Florida Bar No. 202304
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was forwarded by mail to MONIQUE T. BEFELER, Assistant Attorney General, 401 Northwest 2nd Avenue, Room N921, Miami, Florida 33128, this 14th day of February, 1991.



ELLIOT H. SCHERKER
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1991
MARCH 19, 1991

EDWARD WESTBROOK,

Appellant(s),

vs.

THE STATE OF FLORIDA,

Appellee(s).

** CASE NO. 89-03017

**

**

** LOWER
TRIBUNAL NO. 89-12873

**

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: 
Deputy Clerk

cc: Elliot H. Scherker
/NB

Monique T. Befeler