7-26

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner

vs

CASE NO.: 77,819

ANDREW E. JOHNSON,

Respondent

RESPONDENT'S ANSWER BRIEF

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_____/

RESPONDENT'S ANSWER BRIEF

PRELIMINARY STATEMENT

Petitioner, plaintiff/appellee below, will be referred to herein as either "the State" or "Petitioner". Respondent, ANDREW E. JOHNSON, defendant/appellant below, will be referred to herein as "Respondent". A copy of the opinion of the case on review has previously been placed into consideration.

References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent is in substantial agreement with Petitioner's statement of the case and facts, with the following exception.

The sentences imposed by the trial court for the violations of probation in cases 86-2201-CF (R.130), 87-4073-CF (R.192), and 87-4137-CF (R.250) were not imposed subject to a finding of habitual felony offender status. Therefore, the decision of the First District Court of Appeal that the trial court's sentence exceeded the one-cell departure permitted by Lambert v State, 545 So. 2d 838 (Fla. 1989), is not subject to review pursuant to this Court's invocation of discretionary jurisdiction to answer the certified question filed April 24, 1991.

SUMMARY OF ARGUMENT

The Respondent request that this Honorable Court answer the certified question in the affirmative and affirm the en banc determination of the First District Court of Appeal holding that the trial judge erred in finding him to be a habitual felony offender since all of his prior convictions were entered on the same date, following its decision in Barnes v State, 16 F.L.W. 562 (Fla. 1 DCA Feb. 22, 1991)

This result is correct because Section 775.084, Florida Statutes, requires that for the imposition of an extended term of imprisonment a defendant must be previously convicted of any combination of two or more felonies in this state or other qualified offenses. The consistent interpretation of this requirement of Florida Courts has been that a defendant must have been convicted of felony offenses on two separate prior occasions to be eligible for habitual offender sanctions. The record in this case demonstrates the respondent's prior felony convictions were all entered on the same date. Therefore, the respondent does not qualify as a habitual felony offender as defined by the Florida Statutes.

ARGUMENT

ISSUE

WHETHER SECTION 775.084 (1)(a)(1), FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

The respondent requests that this Court answer the certified question in the affirmative.

In the opinion below, the appellate court reversed Respondent's habitual felony offender sentence because the predicate felony convictions were entered the same day. The court relied on its recent en banc opinion in Barnes v State 576 So. 2d 758 (Fla. 1 DCA 1991)

The respondent asserted that he did not meet the statutory criteria for classification as a habitual felony offender. The opinion of the court reasoned

> There is no indication that in amending section 775.084 the legislature sought to alter the purpose behind the habitual offender provision or to excise the sequential conviction requirement that had long been a part of the law. Had the legislature intended to overturn long-standing precedent and the construction that the courts had placed on the statue, then it was obliged to use unmistakable language to achieve its objective.
>
> (at 761.)

The habitual felony statue, Florida Statute 775.084, provides in pertinent part;

775.084 Habitual felony offenders and habitual violent felony officers; extended terms; definitions; procedure; penalties.-

1. As used in this act,

(a) "Habitual felony offender" means a Defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:

1. The Defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;

Specifically, respondent asserted he had not "previously been convicted of any combination of two or more felonies in this state or other qualified offenses," when the habitual offender sentences were imposed on November 20, 1989, as defined for purposes of this statute.

The petitioner maintains that the "long-standing precedent and the construction that the courts had placed on the (habitual offender) statute" is misplaced when applied to the present habitual offender statute. The petitioner seeks to distinguish the present statute from prior career criminal statues first by showing that prior statutes more clearly defined how prior convictions should be determined in computing habitual offender status, and second by arguing that criminal justice philosophy has changed since the "halycon days of the 1940's."

The respondent asserts that prior decisions of this court have interpreted earlier forms of Florida habitual offender statues to

provide a standard for a sequential conviction requirement. In Copeland v Mayo 65 So. 2d 743 (Fla 1953), the Supreme Court of Florida considered a life sentence imposed following a determination of Copeland as a "habitual criminal." The record showed that Copeland had been convicted of four felonies but was convicted of them in pairs -- two on each of two days. Because the Supreme Court affirmed its previous conclusion that "the offenses committed, as well as CONVICTIONS therefore, MUST HAVE OCCURRED ON SUBSEQUENT DAYS TO THE LAST PRECEDING offense or CONVICTION (emphasis added, at 744) the habitual criminal finding by the trial court was a nullity as it related to Copeland.

The present case presents the same factual situation as Copeland. While respondent's record contains the necessary two prior felony convictions prior to his classification as a habitual offender, these prior convictions occurred together on the same date. Therefore, just as Copeland's four convictions on two dates were counted as two convictions for habitual classification, so should respondent's prior convictions be counted as one conviction for habitual classification since they occurred on one date.

Similarly, in Kary v State, 279 So. 2d 383 (Fla. 2 DCA 1973) the Second District Court of appeal interpreted the increased punishment statute then in effect and determined that to provide increased penalties for any "second conviction", the second or subsequent conviction cannot be based on simultaneous convictions. The court based its ruling on the fact that for enhanced penalty statutes "the object of the statute, namely to deter future crime,

would be frustrated if the offender were given no opportunity to reform." (at 384)

This reasoning was followed in a subsequent interpretation of the habitual criminal statute by the Third District Court of Appeal in Shead v State, 367 So. 2d 264 (Fla 3 DCA 1979). In that case, Shead had been previously convicted of two prior misdemeanor offenses, which the State argued qualified him under the statute for habitual offender status. Those two prior convictions occurred on the same date. The court reasoned:

> " it is the established law of this state, as well as the overwhelming weight of authority throughout the country, that, when the statute requires two or more convictions as a prerequisite to an enhanced sentence on a present case, the Defendant must have committed the second offense subsequent to his conviction on the first offense. Two or more prior convictions rendered on the same day are, therefore, treated as one offense for purposes of such a provision in a habitual criminal statute."
> (at 266)

This very same reasoning was followed by the fourth District Court of Appeal in Wilken v State, 531 So. 2d 1011 (Fla 4 DCA 1988). In interpreting the habitual misdemeanor statute then in effect, the court repeated that "each successive conviction must be for a crime committed after the previous conviction, in order to satisfy the habitual offender statute requirements." (at 1012)

These prior interpretations of habitual offender statutes in Florida were followed by the court below in determining the trial court erred in finding the respondent to be a habitual felony offender. The petitioner asserts that the 1989 amendment to

section 775.084 (1)(a), Florida Statutes, is unique as to all prior habitual offender statutes in Florida in this regard and that a "rule of judicial convenience" has taken precedence over a "substantive legislative pronoun cement."

The petitioner concedes that every court in Florida that has addressed this issue has considered itself bound by Joyner v State 30 So 2d 304 (Fla 1947). Petitioner asserts, however, that every court that has considered this issue since 1974 has used flawed rationale in its consideration of the habitual offender statutes in effect. The petitioner asserts that the first, third, fourth, and fifth District Court of Appeal are all misplaced in their specific findings that the current habitual felony statute imposes the same requirements for prior convictions as did earlier habitual felony or career criminal statutes.

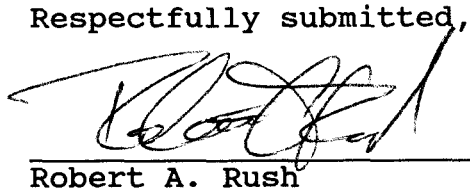
The petitioner asserts that to apply a consistent rationale and interpretation to the statute which has been in effect since 1947 represents judicial legislating. The petitioner supports this argument to redirect the law from the consistent rulings which follow this court only by claiming that there is "no indication whatsoever that the opportunity for reformation policy of the halycon days of the 1940's continues to apply to the crime-ridden 1990's. Therefore the petitioner seeks to challenge the current status of this law by imposing its own criminal justice philosophy upon the law. The petitioner provides absolutely no other basis to reverse the holding of the Supreme Court of Florida in 1947 which has been uniformly followed as the law of this state since

that time.

CONCLUSION

Based on the foregoing argument and citation of legal authorities, Respondent urges this Honorable Court to answer the certified question in the affirmative inasmuch as this issue has been settled law in Florida for forty four years, thus affirming the majority opinion in the en banc decision in Barnes below and vacating the Respondent's habitual felony offender sentence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing has been furnished to Robert A. Butterworth, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399--1050 this 3rd day of July, 1991.