047

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 77,853

BERLIE DANIELS, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

LOUIS O. FROST, JR.
PUBLIC DEFENDER
FOURTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner accepts the Statement of Facts by Respondent because the facts in Respondent's brief were included in Petitioner's Initial Brief on the Merits.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY STACKED THREE MINIMUM, MANDATORY TERMS FOR OFFENSES ARISING OUT OF THE SAME CRIMINAL EPISODE BECAUSE, ALTHOUGH PETITIONER WAS CLASSIFIED AS A HABITUAL VIOLENT FELONY OFFENDER, THERE IS NO EXPRESS LEGISLATIVE AUTHORITY TO STACK MINIMUM, MANDATORY TERMS PURSUANT TO SECTIONS 775.084 AND 775.021(4), FLORIDA STATUTES, AND State v. Boatwright, 559 So.2d 210 (Fla. 1990), AND Murray v. State, 491 So.2d 1120 (Fla. 1986).

A. The sentences in this cause - Petitioner received three consecutive life sentences each with a 15 year minimum, mandatory term pursuant to Section 775.084(4)(b)1: The equivalent of a life sentence with at least a 45 year minimum, mandatory term.

Respondent has not disputed Petitioner's claim that his sentence is the functional equivalent of a life sentence with a 45 year minimum, mandatory term.

B. Petitioner's offenses occurred during the same criminal episode at the same place and during a single time period.

Respondent conceded that Petitioner's offenses occurred during a single criminal episode (See Respondent's Brief, page 15).

C. This Court's decisions on consecutive minimum, mandatory terms.

Although Respondent and Petitioner disagree slightly on what this Court held in its cases on consecutive minimum, mandatory terms, both parties agree that the controlling factor in this case is legislative intent. Respondent's attempt to distinguish Palmer v. State, 438 So.2d 1 (Fla. 1983) from this Court's other decisions in this area is unpersuasive. Each case in this field has turned upon the applicable legislative intent. This Court has consistently held that the applicable statutes must expressly authorize consecutive mandatory terms. If the express intent is in the Section which defines the crime, then consecutive terms are permissible. See State v. Enmund, 476 So.2d 165 (Fla. 1985). However, if the mandatory terms derive from a penalty enhancement (such as the use of the firearm), then the enhancement provision must explicitly allow consecutive terms. The other controlling factor is the single episode circumstance. See Murray v. State, 491 So.2d 1120 (Fla. 1986) (consecutive mandatory terms were proper due to separate incidents).

D. The basis of the First District's decision that the consecutive minimum, mandatory terms were proper in this cause.

1. The legislative intent in Chapter 88-131 and Section 775.084.

Respondent essentially argues that Sections 775.021(4)(b); 775.084, 775.0841 and 775.0842, Florida Statutes, provide the express legislative intent to permit three consecutive

15 year minimum, mandatory terms in this case. Consequently, Petitioner will address each of these Sections separately.

Respondent argues that Section 775.084 expressly provides for the stacking of minimum, mandatory terms. Petitioner agrees that Section 775.084 evinces an intent to increase the punishment for Habitual Offenders. Section 775.084 increases the statutory maximum penalties and in the case of Habitual Violent Felony Offenders, permits minimum, mandatory terms. However, Section 775.084 does not expressly provide for consecutive minimum, mandatory terms. This Court in State v. Enmund, 476 So.2d 165 (Fla. 1985) decided that consecutive mandatory terms were permissible if the statutory definition of the crime itself contained the minimum, mandatory term. The statutory definition of Appellant's offenses (Sexual Battery, Armed Burglary and Armed Robbery) do not contain a minimum, mandatory term. Consequently, there is no express legislative intent on this issue.

Section 775.084 provides for a sentence enhancement outside the sentencing guidelines. The Habitual Offender scheme also permits sentences which are above the usual statutory maximum for a crime. (For example, a 15 year second degree felony is increased to 30 years). However, Section 775.084 itself does not provide for consecutive sentences. If consecutive sentences are permissible in this case, the statutory authorization must come from Sections 775.021(4)(b), 775.0841 and 775.0842.

2. Section 775.021(4)(a)(b)1.2., Florida Statutes.

Respondent argues that Section 775.021(4)(b) contains the express legislative intent to authorize consecutive minimum terms in this case. Respondent contends the following language expresses that legislative intent: The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in Subsection (1) to determine legislative intent. Petitioner initially notes that Subsection (4)(a) of Section 775.021 existed when this Court decided the cases dealing with consecutive minimum, mandatory terms. See Palmer v. State, 438 So.2d 1 (Fla. 1983); State v. Enmund, 476 So.2d 165 (Fla. 1985); Murray v. State, 491 So.2d 1120 (Fla. 1986); State v. Boatwright, 559 So.2d 210 (Fla. 1990). This Section has remained essentially the same throughout this Court's decisions in this area. This Court in Palmer v. State, supra, directly held that Subsection (4)(a) did not authorize consecutive minimum, mandatory terms. This point is important because Respondent argues that a in pari materia reading of Section (4)(1) and (4)(b) leads to the conclusion that consecutive mandatory terms are permissible.

Subsection (4)(b) of Section 775.021 was created by the Legislature after this Court's decisions in this field (except for State v. Boatwright, supra). Subsection (4)(b) was obviously passed by the Legislature to overrule this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987). Subsection (4)(b), inter alia, simply reiterates the legislative intent that separate sentences are appropriate for separate offenses committed during a

single criminal episode. Subsection (4)(a) abrogated the "single transaction rule" and Subsection (4)(b) intended to abrogate the legislative intent - double jeopardy rule enunciated in Carawan, supra. Subsection (4)(b) also abolished the rule of lenity in such circumstances. However, Subsection (4)(b) does not address the issue before this Court: whether consecutive minimum, mandatory sentences are appropriate for offenses committed during a single criminal episode.

Respondent also argues that Sections 775.0841 and 775.0842 authorize consecutive, minimum terms in this case. Section 775.0841 simply finds that a disproportionate number of serious crimes are committed by repeat offenders. Section 775.0841 further finds that priority should be given to the investigation, apprehension and the prosecution of such criminals; Section 775.0841 also gives support to law enforcement and State Attorneys' efforts to investigate, apprehend and prosecute career criminals and to incarcerate them for extended terms.

The only arguably relevant portion of Section 775.0841 is the expression of the intent to incarcerate career criminals for extended terms. The increased statutory terms in Section 775.084 are the manifestation of this intent. The increased statutory terms obviously evince the intent to incarcerate career criminals for extended terms. However, Sections 775.0841 and 775.084 do not expressly provide for consecutive minimum terms. In State v. Boatwright, 559 So.2d 210 (Fla. 1990), this Court upheld consecutive mandatory terms because the statute defining the crime (sexual battery upon a child less than 12) included a

minimum, mandatory term within the definition of the crime itself. Consequently, this Court concluded each offense required a minimum, mandatory term. Nothing in Section 775.0841 or 775.084 contains such an express authorization of consecutive mandatory terms.

Section 775.0842 simply provides that a person shall be subject to career criminal prosecution efforts if the person qualifies as a habitual felony or habitual violent felony offender. Section 775.0842 appears to be an exhortation by the Legislature to prosecutors: prosecute career criminals. However, nothing in Section 775.0842 even remotely discusses the issue of consecutive minimum, mandatory terms.

3. The conviction for Armed Sexual Battery, Section 794.011(3), Florida Statutes: Section 775.084(4)(b) does not apply to life felonies: Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990).

Respondent initially argues that this question cannot be raised before this Court because it was not raised below. In his Initial Brief, Petitioner conceded he did not raise the issue below. However, a fair and complete disposition of this case requires this Court to consider this issue. Respondent argues that Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990) and Gholston v. State, 16 FLW D46, (Fla. 1st DCA, December 12, 1990) were wrongly decided because the substantive crimes in this case provide for punishment under the habitual offender statute.

However, these substantive crimes have included habitual offender punishment since or after 1972, the year the first habitual offender statute became effective. See Section 775.084, Florida Statutes (1971); Section 810.01(1), Florida Statutes (1971) (Armed Burglary); Section 812.13(2)(a), Florida Statutes (1975) (Armed Robbery); Section 794.011(3), Florida Statutes (1975) (Armed Sexual Battery). Petitioner's substantive offenses have included the possibility of habitual offender punishment since 1975. However, the prior habitual offender statutes did not include minimum, mandatory terms. Consequently, the fact that the present versions of Armed Burglary, Armed Robbery and Armed Sexual Battery contain a reference to the habitual offender statute does not mean that the Legislature intended to require consecutive minimum, mandatory terms. Respondent's argument simply proves that Petitioner could be sentenced as a habitual violent felony offender. Petitioner does not dispute this contention. However, the fact that the substantive offenses refer to the habitual offender statute does not establish an intent for consecutive minimum, mandatory sentences.

The First District Court of Appeal correctly decided Johnson and Gholston because Section 775.084 does not expressly provide for habitual offender punishment for life felonies or crimes punishable by life. The more specific statute (Section 775.084) should prevail over the more general reference to habitual offenders in the substantive offenders in this case. See Rowe v. Pinellas Sports Authority, 461 So.2d 72 (Fla. 1984). The First District correctly found that the habitual offender statute

did not apply to crimes where the maximum penalty was already life. The habitual offender statute increases the statutory maximum penalty for third and second degree felonies. Petitioner's offenses already had a maximum penalty of life. Therefore, the habitual offender statute could not increase the punishment. Therefore, the Court should decide that the habitual offender life sentences in this cause were illegal; if the Court makes this decision, then it need not address the issue of the consecutive minimum, mandatory terms. Consequently, the three life terms should be set aside and this cause should be remanded for sentencing under the guidelines.

4. The convictions for Armed Burglary and Armed Robbery: Section 775.084(4)(b), Florida Statutes does not apply to first degree felonies punishable by a term of years not exceeding life, Gholston v. State, 16 FLW D46 (Fla. 1st DCA, December 12, 1990).

As discussed above, Gholston v. State, supra, was correctly decided.

ISSUE II

PETITIONER DID NOT COMMIT ATTEMPTED SEXUAL BATTERY, BY MERELY ASKING THE VICTIM TO PERFORM ORAL SEX ON HIM, WHEN PETITIONER ABANDONED HIS INTENT TO COMMIT THE OFFENSE WHEN THE VICTIM STATED SHE WOULD NOT PERFORM THE ACT .

Respondent argues that Petitioner committed Attempted Sexual Battery by unzipping his pants, taking his penis out and saying "Come here. Take this and put it in your mouth" (T. 184-185). Respondent further argues that Respondent did this while he was armed with a butcher knife. The record does not support this contention. Although Petitioner did have a butcher knife at one point, the record does not establish that he had it at the exact time of this act. Respondent further contends that Petitioner's apparent preparation for the act was an overt act of Sexual Battery. None of Petitioner's acts were an Attempted Battery (a touching) of a sexual nature. An Attempted Battery is an attempt to touch or strike someone which misses the mark.

Petitioner undoubtedly asked/commanded the victim to perform oral sex. However, Respondent has not cited a case which has held that a mere solicitation is an attempt. Respondent has completely ignored the case of State v. Coker, 452 So.2d 1135 (Fla. 2d DCA 1984). In Coker, supra, the Court held that the overt act for attempt must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime and some appreciable fragment of the crime must be committed and it must proceed to the point that the crime would be

consummated unless interrupted. In this case, no appreciable fragment of the actual crime was committed. Petitioner requested the victim to commit oral sex, but he committed no other physical act towards its completion.

Respondent's reliance upon Pye v. State, 15 So.2d 255 (Fla. 1943) is misplaced because Pye involved the issue of whether an indecent assault became an assault to commit rape. In that case, the defendant committed an indecent assault. However, this Court reversed the assault with intent to commit rape because Pye attempted to obtain consent to the act and when it became apparent that the prosecutrix was unwilling, he desisted, without any outside interference or unusual resistance by the victim. Respondent claims that there was outside interference in this case. This simply is not true. No one interrupted Petitioner and prevented his crime.

Respondent also claims "unusual resistance" by the victim. Under the Pye decision, the victim's simple verbal refusal was not unusual resistance. The controlling precedent for this case is Dixon v. State, 559 So.2d 354 (Fla. 1st DCA 1990). In Dixon, supra, the First District concluded that Section 777.04(5), Florida Statutes, authorized the defense of abandonment for an attempted offense if there was a complete and voluntary renunciation of the criminal purpose. Therefore, even if Petitioner did attempt the crime of Sexual Battery, once the victim refused his request, he completely renunciated his criminal purpose.

ISSUE III

THE PROSECUTOR AND THE TRIAL COURT DEPRIVED PETITIONER OF A FAIR TRIAL AND HIS RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE BY INDICATING TO THE JURY THAT APPELLANT HAD THE BURDEN OF PROOF ON THE ISSUE OF INSANITY.

Respondent and Petitioner agree upon the applicable law in this case. Respondent argues that no error occurred because the trial court correctly instructed the jury. Petitioner agrees that the correct instruction was given. However, Petitioner maintains his position that the comment by the prosecutor and the trial court's ruling on it could have confused the jury, notwithstanding the jury instruction. Prosecutorial comments that the defendant has the burden of proof have been found to be reversible error, even where there were apparently proper standard instructions which indicated the State had the burden of proof. See Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983); Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983).

CONCLUSION

The three consecutive life sentences should be set aside with directions that Petitioner be sentenced under the guidelines or, in the alternative, the three consecutive minimum, mandatory terms of 15 years should be reduced to one 15 year minimum term. This cause should be remanded for a new trial based upon Issue III and the conviction for Attempted Sexual Battery should be set aside based upon Issue II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050 this 2nd day of July, A.D. 1991.

James T. Miller
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