IN THE SUPREME COURT OF THE STATE OF FLORIDA

TIMOTHY E. TUCKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,854

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On August 3, 1989, the State filed an information charging Petitioner with one count of grand theft of a motor vehicle in violation of Section 812.014(2)(c)4, Florida Statutes (1989), [Case Number 89-7581]. (R 33) On September 20, 1989, the State filed an information charging Petitioner with one count of robbery with a firearm in violation of Section 812.13(2)(a), Florida Statutes (1989), [Case Number 89-7590]. (R 48) On October 25, 1989, the State filed its notice of intention to seek enhanced punishment with regard to the armed robbery charge. (R 57)

On January 11, 1990, Petitioner appeared before the Honorable Volie Williams, Jr., Circuit Judge, and pursuant to written plea petitions, entered a plea of guilty to the grand theft charge and a plea of nolo contendere to the armed robbery charge. (R 59 - 64) On June 15, 1990, Petitioner appeared for

sentencing before the Honorable George A. Sprinkel, IV, Circuit Judge. (R 1 - 31) The State presented evidence with regard to Petitioner's prior convictions and the trial court found that he qualified under the habitual offender statute and adjudicated him to be one. (R 28 - 29, 67 - 68) At the sentencing hearing there was quite a bit of discussion regarding the possible sentence to be imposed for the armed robbery charge. The state attorney argued that if the court found Petitioner to be an habitual offender, he had to impose a mandatory life sentence. (R 8) The judge was concerned about the actual amount of time that Petitioner would serve as evidenced by his discussion with regard to eligibility for parole. (R 10 - 11) The court noted that every sentence that he imposes is done after he takes into consideration the actual amount of time that the defendant is going to serve. The trial court adjudicated Petitioner guilty and sentenced him to life imprisonment on the robbery charge and a concurrent ten year term on the grand theft charge. (R 29 - 30, 71 - 78) The court also noted that "It will be the determination as far as the state prison system as to when you will be released from prison." (R 29)

Petitioner filed a timely Notice of Appeal on July 13, 1990. (R 81 - 82) Petitioner was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 83) By order dated September 6, 1990 the Fifth District Court of Appeal consolidated the instant appeals.

In the district court Petitioner argued his life

sentence was improper for three reasons. First, Petitioner argued the habitual felony statute does not apply to felonies of the first degree punishable by life. Second, he argued the trial judge imposed the life sentence erroneously believing that he had no discretion and that the sentence was mandated by statute. Finally, Petitioner argued that if the statute was interpreted to mandate a life sentence for all first degree felonies it would be irrational and thus facially unconstitutional because a life sentence is apparently not mandatory for habitual violent felony offenders.

The district court's opinion addressed only the first of the issues noted above. Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1991). The court adhered to its earlier decision in Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990), in holding that the habitual offender statute does apply to first degree felonies punishable by life. The court acknowledged conflict with then existing case law from the First District Court of Appeal. This Court accepted jurisdiction in an order dated August 13, 1991. A State motion to dismiss dated September 3, 1991 was recently denied. Petitioner's brief follows.

SUMMARY OF ARGUMENT

In Point I herein Petitioner argues that the habitual offender statute does not apply to first degree felonies punishable by life (first PBLs). First PBLs are recognized as a discrete category of offenses in the Rules of Criminal Procedure. They are logically excluded from the habitual offender statute for the same reason that capital and life felonies are excluded -- that is that a punishment of up to life in prison is already available without enhancement. The court's duty to strictly construe criminal statutes in favor of the accused requires that this issue be determined in Petitioner's favor.

In Point II herein Petitioner argues in the alternative that his sentence must be reversed because the trial judge mistakenly believed he did not have the discretion to sentence Petitioner to less than life in prison. The language of the statute is permissive, not mandatory, as this Court has previously held in Brown v. State, 530 So.2d 51 (Fla. 1988).

ARGUMENT

POINT I: THE HABITUAL OFFENDER STATUTE DOES NOT APPLY TO OFFENSES WHICH ARE ALREADY PUNISHABLE BY UP TO LIFE IMPRISONMENT.

Case law from the district courts of appeals now uniformly holds that the habitual offender statute is applicable to first degree felonies punishable by up to life imprisonment. Nevertheless, Petitioner contends this Court should hold otherwise. The question was certified to be one of great public importance in Burdick v. State, 16 FLW D1963 (Fla. 1st DCA July 25, 1991).

Section 775.084, Florida Statutes (1989) creates two classes of offenders, a "habitual felony offender" and a "habitual violent felony offender". Petitioner was sentenced as a habitual felony offender pursuant to Section 775.084(4)(a) which states:

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life.
> 2. In the case of a felony in the second degree, for a term of years not exceeding thirty.
> 3. In the case of a felony of the third degree, for a term of years not exceeding ten.

Petitioner's offense, robbery with a firearm, is classified as a "felony of the first degree, punishable by imprisonment for a term of years not exceeding life ...". Section 812.13(2)(a), Fla.Stat. (1989). The robbery statute

refers to Section 775.082 which provides that an offender may be punished, "for a felony of the first degree, by a term of imprisonment not exceeding thirty years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment ...". Section 775.082(3)(b), Fla.Stat. (1989).

Life and capital felonies are clearly excluded from the operation of the habitual offender statute. Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). The enhancement statute has been held to be constitutional despite claims that it is irrational to exclude from its terms the most serious of all felonies. The rationale for this exclusion is suggested to be the fact that capital felonies and felonies punishable by life imprisonment already carry the most serious of sentences, thus there is no need for applying an enhancement statute. Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990). This is sound logic. But if the legislature is presumed to have acted rationally then any felony punishable by life imprisonment should also be excluded from the operation of the habitual offender statute. Simply put, the only rational explanation for excluding life and capital felonies from the statute also excludes any felony actually punishable by life imprisonment. See Burdick v. State, 16 FLW D1963, 1965 (Fla. 1st DCA July 25, 1991) (Ervin, J., dissenting).

The discrete nature of the category "first degree felony punishable by life" is now formally recognized in the

Rules of Criminal Procedure. Rule 3.988, Fla.R.Crim.P. The sentencing guidelines scoresheets assign higher point totals for "first PBLs" than for first degree felonies. There is no reason to assume that the legislature intended, without clearly stating its intention, to lump first PBLs back with first degree felonies for purposes of the habitual offender statute. This is especially true where, as is pointed out above, the more logical course of action is to exclude any felony punishable by life from the enhancement statute.

Finally, this Court is required to construe any criminal statute strictly and, where meaning is unclear, in favor of the accused. State v. Jackson, 526 So.2d 58 (Fla. 1988); Section 775.021(1), Fla.Stat. (1989). If the legislature intends the habitual offender statute to apply to any felony punishable by life imprisonment, it should say so clearly in an amendment to the statute. Unless and until this is done ambiguity must be construed in Petitioner's favor. The habitual offender statute as it now stands does not clearly apply to first PBLs therefore it does not apply at all. Petitioner's sentence should be reversed.

POINT II: THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO LIFE IN PRISON UNDER THE MISTAKEN BELIEF THAT SAID SENTENCE WAS MANDATORY PURSUANT TO THE HABITUAL OFFENDER STATUTE.

Assuming (without conceding of course) that the Court does not accept Petitioner's position in Point I herein, this case should still be remanded for resentencing. In the trial court the State argued that the judge had no discretion -- that is, if he found Petitioner to qualify for habitual offender treatment a life sentence was mandatory. Petitioner contends the applicable statutory language does not require a life sentence and that the trial court's misapprehension is a proper basis for reversal. Henry v. State, 16 FLW D1545 (Fla. 3d DCA June 11, 1991); McNair v. State, 563 So.2d 804 (Fla. 3d DCA 1990).

The issue raised in this point is already before this Court in the case of James Odell Allen, Case Number 77,321. The argument contained in this point was first presented by Mr. Allen in February, 1991.

Section 775.084, Florida Statutes (1988) permits the trial court, after specific preliminary criteria are satisfied, to impose an extended term of imprisonment by treating the defendant as an habitual offender. The relevant portion of that statute to the instant case, subsection (4)(a), provides that the "court ... shall sentence the habitual felony offender as follows: 1. In the case of a felony of the first degree, for life." On its face, this section appears to mandate a life sentence for a defendant convicted of a first degree felony and

classified as an habitual felony offender (H.F.O.). However, this Court must consider the complete wording of Section 775.084 to determine legislative intent, resolve any conflicts and give each section of the statute a field of operation.

The habitual offender statute, since its original enactment, has undergone two recent amendments, in 1988 and 1989. In neither amendment was the language of Section 775.084(4)(a), altered. In analyzing the question of whether the legislature intended that a life sentence was mandatory because of the appearance of the word "shall" in subsection (4)(a) of the 1987 version of the statute this Court in Brown v. State, 530 So.2d 51 (Fla. 1988), held that the legislature did not intend such a result. As this Court discussed in Brown, the word "shall" first appeared in 1975 and its insertion was either "an editorial error or a misapprehension of the legislative intent by the editors." Brown, at 53. Given the Brown decision, the question next must be, has any subsequent amendment to Section 775.084, Florida Statutes (1988), altered the holding of this Court? When established rules of statutory construction are applied, it is clear the answer is no, and the interpretation of Brown applies to the statute as amended in 1988 and 1989.

One tool of statutory construction used to discern legislative intent is that the legislature is presumed to know the law and how it is being interpreted by the courts of this state. The decision in Brown, supra, was issued on June 16, 1988. The legislature amended Section 775.084 in both 1988 and

1989. The amendment of 1988, although substantial, did not alter the sentencing language provision of subsection (4)(a), although it removed habitual offender sentences from the constrictions of the guidelines. Neither did the 1989 amendment alter the sentencing provisions of subsection (4)(a). Since the legislature is presumed to know that this Court held that the "shall" of subsection (4)(a) was permissive rather than mandatory, had the legislature wished a different construction which would require a mandatory life sentence, they could have included an amendment making that declaration. Obviously, the legislature's failure to include any such directive in the either of the last two amendments conclusively shows that it is content with the Brown holding.

Secondly, one can analyze what in particular in a statute is the subject of amendments in order to determine whether the amendment is designed to alter the entire statute or just portions of it. For example, in State v. Watts, 558 So.2d 994 (Fla. 1990), in addressing legislative amendments to be Youthful Offender Act, this Court held that what portion of a statute that is amended may shed light on whether the legislature intended to alter the entire statute. In looking at the 1988 and 1989 amendments, it is clear the legislature did not primarily focus its attention on the sentencing penalties, but instead significantly altered the definition of a habitual offender and the findings which are necessary in order to impose an extended term of incarceration. The only significant alternation dealing

with sentencing was the exemption of habitual offender sentences from the guidelines. Although this particular amendment seems to undercut that portion of the Brown decision requiring harmony between the guidelines and the habitual offender statute, it does not require a different interpretation be given to the "shall" contra "may" ruling of Brown. Obviously, if the legislature wanted to affect the mandatory/permissive nature of subsection (4)(a), it would have done so specifically, as it specifically addressed the applicability of the guidelines. The removal of the habitual offender from the guidelines clearly provides courts with broader discretion in sentencing. It would be an illogical result to on one hand give greater latitude to judicial discretion and then to severely curtail it on the sentencing of first degree felonies. Thus, the legislature intended that the courts need no longer comply with guidelines, and are still not required to impose any specific sentence such as a mandatory life term, when applying the habitual offender statute.

The legislature is clearly relying more heavily on judicial discretion in fashioning a sentence under the Habitual Offender Act. To require a mandatory sentence of life is an illogical reading of the statute's history, especially considering the timing and language of its amendments. The 1988 amendment should not be construed as altering the Brown decision in its analysis of the mandatory/permissive nature of subsection (4)(a), rather it should be looked upon as the desire of the legislature to afford greater discretion to the trial court when

sentencing habitual offenders.

Further supporting the interpretation of subsection (4)(a) as urged by Petitioner, is another tool of statutory construction which requires criminal statutes to be strictly construed and in favor of the accused. See State v. Jackson, 526 So.2d 58, 59 (Fla. 1988) and Section 775.021(1), Fla.Stat. (1989). This rule of lenity clearly mandates a permissive as opposed to a mandatory interpretation be given to the word "shall". If one examines each of the sentencing alternatives under both the habitual felony offender provisions and the violent habitual felony provisions found at Section 775.084(4)(b), Florida Statutes (1988), it is immediately clear that each one of other sentences utilizes permissive language, (may), in setting forth the allowed sentence. Even the sentencing of a violent felony offender upon a conviction for a first degree felony because of the word "may" clearly allows the court discretion in imposing a life sentence. It would be irrational for the legislature to require a more severe sentence for the "regular" habitual felon in only one instance, that being those with first degree felony convictions, than for the violent habitual felon, when it is clear the intent was for more severe sanctions to be applied against the violent offender. Consequently, this Court must remove this irrationality and resolve this conflict between these sections by deciding that the term "shall" in Section 775.084(4)(a) means "may". See Debolt v. Department of Health and Rehabilitative Services, 427 So.2d 221

(Fla. 1st DCA 1983), (court must try to resolve conflicts between conflicting statutes or sections of statutes).

Section 775.0841, Florida Statutes (1989), expresses the legislative intent concerning the prosecution of career criminals (habitual offenders). Section 775.0841 states that priority should be given to certain career criminals given the constraints or the use of available prison space. This expression of intent reflects the understanding that the limited available prison space requires discretion and priority-setting so that certain career criminals are properly sentenced. This intent is expressed in the discretion give to the trial judge in sentencing an habitual offender.

Another rule of statutory construction is that a reviewing court must give effect to legislative intent, notwithstanding contrary statutory language. See Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982); Parker v. State, 406 So.2d 1089 (Fla. 1981). The legislative intent will prevail, even if it contradicts the literal language of a statute. See State v. Webb, 398 So.2d 820 (Fla. 1981). The legislature surely intended to give a trial judge the same discretion for sentencing habitual offenders as when sentencing more dangerous violent habitual felony offenders. This intent is also reflected in Section 775.084(4)(c) which grants the trial court discretion to not classify a defendant as an H.F.O or H.V.F.O. Otherwise, the sentencing scheme in Section 775.084(4)(a) is irrational and contrary to common sense.

The above discussion demonstrates that there is considerable doubt about whether the term "shall" in Section 775.084(4)(a) means "shall" or "may", in light of the language used in Section 775.084(4)(b) and the legislative intent expressed in Sections 775.084(4)(c) and 775.0841, Florida Statutes. This Court should apply the strict scrutiny standard to Section 775.084(4)(a). Any doubt about the meaning of Section 775.084(a) should be resolved in favor of Petitioner.

Petitioner acknowledges that the First District Court of Appeal has expressed a view contrary to that advanced here in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). However, more recently in Henry v. State, 16 FLW D1545 (Fla. 3d DCA June 11, 1991), the court agreed with Petitioner's view stating "... the Donald court nowhere mentions Brown [State v. Brown, 530 So.2d 51 (Fla. 1988)] with which, in our view, Donald is in conflict." The court explained its decision as follows:

> While we are bound by Brown, the Brown interpretation is also the most logical one. It results in a harmonious reading of the sentencing provisions of paragraphs (4)(a) (habitual felony offender) and (4)(b) (habitual violent felony offender). It is illogical to assume that the legislature intended to confer sentencing discretion is subparagraphs 775.084(4)(a)(2) and (3) ("a term of years not exceeding 30" and "a term of years not exceeding 10") and throughout paragraph 775.084(4)(b) ("may sentence the habitual violent felony offender as follows") (emphasis added), while eliminating sentencing discretion solely for habitual felony offenders convicted of first degree felonies. There is no reasonable or discernible basis for such a distinction. See S.R.

> v. State, 346 So.2d 1018, 1019 (Fla. 1977) (interpretation of the word "shall" as mandatory or discretionary "depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute.").
>
> The interpretation advanced by the State would lead to one other anomaly which should be mentioned. A trial court can opt out of the habitual offender statute "[i]f the court decides that imposition of sentence under this section is not necessary for the protection of the public ...." §775.084(4)(c) (emphasis added). There will undoubtedly be cases in which the trial court concludes that an extended sentence is necessary for protection of the public -- but not a life sentence. Under the interpretation advanced by the State, in such a circumstance the sentencing judge would only be able to impose a guidelines sentence. We do not think the legislature intended to create an all or nothing, life or guidelines choice in that situation.

Henry v. State, supra, (footnotes omitted).

As did the court in Henry, this Court should hold that a life sentence is not mandatory for habitual felony offenders convicted of first degree felonies. Resentencing is required in Petitioner's case because it is not certain that the trial judge understood that he could decline to impose a life sentence. As the court wrote in Henry, "We therefore believe that the interests of justice require us to vacate the sentence so that the trial judge may consider the matter as one within his discretion."

CONCLUSION

BASED UPON the foregoing arguments and the authorities cited herein, Appellant respectfully requests that this Court reverse his sentence and remand the cause for a new sentencing hearing with directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Timothy E. Tucker, #114897, P.O. Box 333, Raiford, FL 32083, this 12th day of September, 1991.

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ASSISTANT PUBLIC DEFENDER