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IN THE SUPREME COURT OF FLORIDA

TIMOTHY E. TUCKER,

Petitioner,

v. CASE NO. 77,854

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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TOPICAL INDEX

PAGES:

AUTHORITIES CITED

CASES: PAGES:

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

Point One: Each of Florida's district courts of appeal has held that the habitual offender statute applies to first degree felonies punishable by life. The petitioner has offered no convincing argument to the contrary: it is not rational to assume that the Legialature intended enhanced penalties for "a felony of the first degree" to exclude the most culpable first-degree felonies.

Point Two: The word "shall," where it appears in the habitual felony offender statute, should be given its ordinary mandatory meaning. Earlier caselaw holding to the contrary, relied on by the petitioner, has been superseded by legislative enactment. Moreover, the petitioner has no standing to raise the issue he now argues on this point: the transcript of Mr. Tucker's sentencing does not indicate that he received a life sentence because the trial judge thought he was compelled to give such a sentence.

ARGUMENT

POINT ONE

THE DISTRICT COURTS OF APPEAL HAVE CORRECTLY HELD THE HABITUAL OFFENDER STATUTE APPLICABLE TO FIRST DEGREE FELONIES PUNISHABLE BY LIFE IMPRISONMENT.

As the petitioner correctly notes, all of Florida's district courts of appeal have held that Section 775.084, Florida Statutes, applies to first degree felonies punishable by life imprisonment.[1] See Burdick v State, 16 FLW 1963 (Fla. 1st DCA July 25, 1991) (en banc); Lock v. State, 582 So.2d 819 (Fla. 2d DCA 1991); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991); Westbrook v. State, 574 So.2d 1187 (Fla. 3rd DCA 1991), juris. accepted no. 77,788 (Fla. September 10, 1991); Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990). Mr. Tucker contends that the district courts *en masse* have misunderstood the intention of the Florida Legislature. The state contends that the district courts are correct on this point.

Section 775.084, Florida Statutes (1988 supp.)[2], provides that

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[1] The state acknowledges this court's denial of its motion to dismiss filed in this action, but respectfully submits that jurisdiction was improvidently granted in this matter, as the conflict among the district courts which was the sole basis relied on by the petitioner in his jurisdictional brief has dissipated. See Wainwright v. Taylor, 476 So.2d 669 (Fla. 1985); Bailey v. Hough, 441 So.2d 614 (Fla. 1983); Wackenhut Corp. v. Judges of District Court of Appeal, 297 So.2d 300 (Fla. 1974).

[2] The district court of appeal, in its opinion in this case, referred to the 1989 version of the habitual offender statute. Mr. Tucker was sentenced pursuant to the 1988 habitual offender statute, as his offense took place on July 25, 1989. (Appendix to this brief at A 1) See Ch. 89-280, ss. 1, 12, Laws of Florida.

> (4)(a) The court...shall sentence the habitual felony offender...
>
> 1. In the case of a felony of the first degree, for life.

Section 775.081, Florida Statutes (1987) provides that

> (1) [f]elonies are classified, for the purpose of sentence...into the following categories:
>
> (a) Capital felony;
> (b) Life felony;
> (c) Felony of the first degree;
> (d) Felony of the second degree;
> (e) Felony of the third degree.

The First District Court of Appeal, responding en banc to the same argument the petitioner now makes on this point, stated

> [i]n essence, appellant here asks us to judicially amend Section 775.081, Florida Statutes to add another classification of felonious crime, that of "first degree felony punishable by life." We decline appellant's invitation and, in doing so, observe 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 by Section 775.084 (4)(a)(1), Florida Statutes.

Burdick v. State, supra, 16 FLW at 1964.

Mr. Tucker pleaded nolo contendere to robbery with a firearm in this case. (Appendix at B 1, hereinafter e.g. "B 1") That offense is proscribed by section 812.13, Florida Statutes (1987), which provides that

> robbery [with a firearm] is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment *or as provided in* s. 775.082, s. 775.083, or *s. 775.084.*

(emphasis added) As the Third District Court of Appeal has noted, "the robbery statute on its face permits sentencing under the habitual offender statute." Westbrook v. State, supra, 574 So.2d at 1184.

The state submits that the reasoning of the Burdick and Westbrook courts is correct. The petitioner offers, in opposition to the district courts' reasoning, the observation that the sentencing guidelines score first degree felonies punishable by life more heavily than other first degree felonies. See Rule 3.988(a)-(i), Fla.R.Crim.P. That the Legislature approved this refinement to the sentencing guidelines does not, the state submits, have any bearing on its intent in drafting the habitual offender statute.

The petitioner also argues that since the habitual offender statute, by its terms, does not apply to capital felonies or life felonies, it logically must not--despite its terms--apply to first degree felonies punishable by life. The enhancement provisions of section 775.084 are, of course, irrelevant in the context of punishment for capital felonies. The Legislature could, if it chose to do so, give the trial courts discretion to habitualize defendants convicted of life felonies. See generally State v. Bailey, 360 So.2d 772 (Fla. 1978). The fact that it has not done so simply does not lead to the conclusion that section 775.084(4)(a)(1) applies to all first-degree felonies *except* those the Legislature considers most culpable. See also Williams v. State, 492 So.2d 1051 (Fla. 1986) (statutes may not be interpreted so as to yield absurd results).

Finally, section 775.084(4)(a)(1) is not, as the petitioner asserts, ambiguous for failing to state that "felony of the first degree" includes all first-degree felonies. Rules of statutory construction, such as the rule of lenity suggested by the petitioner, need not and should not be resorted to by the courts when a statute's meaning is plain on its face. Moskal v. United States, ___ U.S. ___, 111 S. Ct. 461, 465, 112 L.Ed.2d 449 (1990) ("[a] court should rely on lenity only if, after seizing every thing from which aid can be derived, it is left with an ambiguous statute") (citations and internal punctuation omitted); State v. Egan, 287 So.2d 1, 4 (Fla. 1973) (rules of construction "useful only in case of doubt and should never be used in order to create doubt, only to remove it.")

The district court's decision should be approved on this point.

POINT TWO

THE TRIAL COURT CORRECTLY SENTENCED THE PETITIONER TO LIFE IMPRISONMENT PURSUANT TO THE MANDATORY PROVISION OF SECTION 775.084(4)(a), FLORIDA STATUTES.

The petitioner argues, on this point, that the word "shall," where it appears in §775.084(4)(a), should be construed by the courts to mean "may."[3] He relies on the decisions in State v. Brown, 530 So.2d 51 (Fla. 1988) and in Henry v. State, 581 So.2d 928 (Fla. 3rd DCA 1991). The state submits, first, that the appellant has no standing to raise the issue he argues on this point, and second, that the rule of Brown has been superseded by legislative enactment.

The petitioner has no standing to raise this issue because he has not shown that the trial judge imposed a life sentence because he believed he was bound by the mandatory language Mr. Tucker now complains of. There is no indication in the sentencing transcript that Judge Sprinkel wished to sentence Mr. Tucker to a shorter prison term but felt constrained by the mandatory wording of section 775.084(4)(a).[4] On the contrary, the judge expressed his concern for the public's safety at Mr. Tucker's hands, noting that his prior record was "indefensible."

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[3] As the petitioner correctly states in his merits brief, the issue raised on this point was briefed by the parties in the district court. (C 5-6, D 5-10, E 2-3)

[4] In fact, it does not appear from the sentencing transcript that Judge Sprinkel knew he was imposing a sentence of natural life: despite defense counsel's correct assertion to the contrary, the judge evidently believed that the sentence he was imposing on Mr. Tucker would make him eligible for parole. (F 8-12, 29-30) See §775.084(4)(e), Fla.Stat. (1988 supp.) (habitual offenders not eligible for parole).

(F 22) See Section 924.33, Florida Statutes (1987) ("no judgment shall be reversed unless...error was committed that injuriously affected the substantial rights of the appellant"); see also Tribune Co. v. Huffstetler, 489 So.2d 722, 724 (Fla. 1986) (public law may only be challenged by those directly affected).

On the merits, the state contends that this court's decision in State v. Brown, supra, was superseded in relevant part by Chapter 88-131, ss. 6, 9, Laws of Florida. Marcus Brown was sentenced to life imprisonment, as a first-degree felon, pursuant to the 1985 habitual offender statute. 531 So.2d at 52. That sentence was reversed by the First District Court of Appeal as an improper departure from the sentencing guidelines, since prior to 1988 the guidelines applied to habitual offenders and habitual offender status alone was not a sufficient reason for departure. Id. This court approved the district court's conclusion, observing that

> any conflict between the habitual offender statute and the sentencing guidelines must be resolved in favor of the guidelines and their policies ....The mandatory word "shall" contained in section 775.084(4)(a)(1) clearly is at odds with the central policy of the guidelines....

Id. (citations omitted). This court went on to hold that

> section 775.084(4)(a)(1) has been implicitly repealed by the enactment of section 921.001, Florida Statutes (1985), to the extent that the former may be construed as requiring a *mandatory* life penalty....[s]ection 775.084(4)(a)(1) nevertheless may be accorded a field of operation in harmony with the guidelines. We thus hold that section 775.084(4)(a)(1),

> Florida Statutes, must be read only as authorizing a permissive maximum penalty of life in prison.

531 So.2d at 53 (emphasis in original; citations omitted). As dictum, this court also noted in Brown that

> [w]e are further persuaded that the legislature never intended section 775.084(4)(a)(1) to be mandatory. The word "shall" as used in section 775.084(4)(a)(1) first appeared in the 1975 edition of Florida Statutes ...the legislature itself never inserted the word in the statute... the word "shall" either was an editorial error or a misapprehension of actual legislative intent by the editors. Both chapters 75-116 and 75-298, Laws of Florida, the only two laws amending section 775.084 during the 1975 session, clearly use the word "may." ... *No prior or subsequent legislation contained in the Laws of Florida has purported to change the word "may" to "shall."*

Brown at 53 (emphasis added). Chapter 88-131, which made substantial changes to section 775.084, contains the word "shall" rather than "may."[5] The 1988 amendment also removed habitual offenders from the operation of the sentencing guidelines. See Chapter 88-131, s.6. The 1988 law has superseded both rationales for the rule of Brown; "shall," as used in the 1988 statute, should be given its usual meaning. Burdick v. State, 16 FLW 1963 (Fla. 1st DCA July 25, 1991) (en banc). See also State v Allen, 573 So.2d 170 (Fla. 2d DCA 1991). "Shall" is normally meant to be mandatory in nature. S.R. v. State, 346 So.2d 1018 (Fla. 1977); Holloway v. State, 342 So.2d 966 (Fla.

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[5] Chapter 88-131 post-dates Brown; it was signed into law June 24, 1988 and went into effect October 1, 1988. See Chapter 88-131, s. 9.

1977). See also 2A Sutherland, Statutory Construction, §§57.01, 57.03 (caselaw establishes presumption that "shall" has mandatory meaning). The legislature should be presumed to have used the word "shall" with full awareness of its common, ordinary meaning. In re Forfeiture of One 1984 Ford Van, 521 So.2d 244 (Fla. 1st DCA 1988).

The petitioner submits that the Legislature's use of the word "shall" in Chapter 88-131 does not clearly indicate an intention to provide for mandatory sentences, arguing that "[o]bviously, if the legislature wanted to affect the mandatory/ permissive nature of subsection (4)(a), it would have done so specifically." (Merits brief at 11) The state submits that on the contrary, after Brown, if the Legislature had intended the life sentences provided for in section 775.084(4)(a)to be permissive, it would have changed "shall" back to "may" when it excluded habitual felons from the operation of the sentencing guidelines. Neither the 1988 nor the 1989 revisions of section 775.084 has done so: the Legislature has made its intentions clear. See Burdick v. State, supra; State v. Allen, supra. Cf. Henry v. State, 581 So.2d 928 (Fla. 3rd DCA 1991).

The petitioner also asserts that the penalty provisions of section 775.084 are ambiguous, and that this court should apply the rule of lenity, construing "shall" to mean "may." The contested provision is not ambiguous, and should be given its plain meaning. Moskal v. United States, supra; State v. Egan, supra. Petitioner makes much of the fact that the penalties provided in section 775.084(4)(b) for habitual *violent* felony

offenders are permissive. It does not follow that the penalties provided for habitual felony offenders in subsection (4)(a) should be held to be permissive as well. The Legislature has created six classes of recidivists whose sentences may be enhanced:

1) first degree felons who have previously committed two felonies, with consecutive opportunities to reform after conviction for each,[6] in §775.084(4)(a)(1);

2) second degree felons who have previously committed two felonies, with consecutive opportunities to reform after conviction for each, in §775.084(4)(a)(2);

3) third degree felons who have previously committed two felonies, with consecutive opportunities to reform after conviction for each, in §775.084(4)(a)(3);

4) first degree felons who have previously committed an enumerated violent offense, in §775.084(4)(b)(1);

5) second degree felons who have previously committed an enumerated violent offense, in §775.084(4)(b)(2); and

6) third degree felons who have previously committed an enumerated violent offense, in §775.084(4)(b)(3).

The Legislature has provided the trial courts with a range of enhanced penalties they may impose on offenders in the last five classes, and with a single, severe enhanced penalty they may impose on offenders in the first class. That choice by the Legislature does not, as the Petitioner asserts, create a conflict between sections of the statute. The petitioner also

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[6] See Joyner v. State, 30 So.2d 304 (Fla. 1947).

suggests that the potential penalties for offenders in the last five classes are so wildly different from the potential penalties for offenders in the first class that no rational governing body could have intended such a result. The state disagrees: the Legislature is acting well within the bounds of reasonable conduct when it seeks to protect the public from recidivists who commit highly culpable crimes. See Cross v. State, 119 So. 380, 386 (Fla. 1927). Moreover, "[a] 'striking change in expression' in two different parts of the same statute indicates 'a deliberate difference of intent.'" 1 LaFave, Substantive Criminal Law §2.2(g) (1986), quoting S.E.C. v. Robert Collier & Co., 76 F.2d 939 (2d Cir. 1935) (L. Hand, J.). Accord Myers v. Hawkins, 362 So.2d 926, 929 (Fla. 1978); Department of Professional Regulation v. Durrani, 455 So.2d 515, 518 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751, 753 (Fla. 3rd DCA 1982).

The petitioner has not shown that he is entitled to relief on this point.

CONCLUSION

The state requests this Court to approve the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by hand delivery to Daniel J. Schafer, of 112 Orange Ave., Suite A, Daytona Beach, Florida 32114, at the Public Defender's in-basket at the Fifth District Court of Appeal, this 3rd day of October, 1991.

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