IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 78,127

DONALD R. COHRON,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, DONALD R. COHRON, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

SUMMARY OF THE ARGUMENT

The plain language of Fla. Stat. §775.084(1)(a)(1) (Supp. 1988), which requires a defendant's "previous" conviction of any combination of two or more felonies for imposition of a habitual felony offender sentence, in no way requires the previous felonies to be sequential. Instead, this provision and section 775.0841 reflect clear legislative intent to habitualize a defendant convicted of two or more felonies, regardless of the order of conviction. The line of cases which requires an interim between convictions was based on a 1947 Florida Supreme Court case in which the Court construed the 1944 recidivist statutory scheme which is materially different from the 1988 habitual offender statute. The 1988 statute on its face mandates the result arrived at by the trial court in this case.

ARGUMENT

Issue II

WHETHER FLA. STAT. §775.084(1)(a)(1) (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PRIOR OFFENSE.

Respondent makes several erroneous observations about the state's argument on the issue at hand, the most notable of which are: (1) The state's argument "bypasses the history of [section 775.084]"; and (2) the state's "tunnel-visioned presentation looks only at the stark words of the law, without acknowledging historical precedent." Respondent's Brief on the Merits at 4. To the contrary, the state's entire argument rests on the history of section 775.084, and in so doing, acknowledges relevant case law.

Joyner v. State, 30 So.2d 304 (Fla. 1947), was predicated in the 1944 version of the habitual felony offender statute, which, by express terms, required the second felony to be committed after the first, the third after the second, and so on. Id. at 306. See Copeland v. Mayo, 65 So.2d 743, 744 (Fla. 1953) ("the offenses committed, as well as the convictions therefor, must have occurred on subsequent days to the last preceding offense or conviction in order to be counted under . . . 775.10 . . . ."). See also Johnson v. Cochran, 139 So.2d 673 (Fla. 1962); Guilford v. Mayo, 93 So.2d 110 (Fla. 1957); Mayo v.

State ex rel. Murray, 66 So.2d 256 (Fla. 1953); Rambo v. Mayo, 65 So.2d 754 (Fla. 1953); Scott v. Mayo, 32 So.2d 821 (Fla. 1948); Washington v. Mayo, 31 So.2d 870 (Fla. 1947); Ex parte Cantrell, 31 So.2d 540 (Fla. 1947); Mowery v. Mayo, 31 So.2d 249 (Fla. 1947).

"In 1971, however, the legislature enacted § 775.084 and, in the same act, expressly repealed §§ 775.09 and 775.10. Moreover, it is clear from such enactment that the new section was intended to be substituted in the stead of the repealed sections and that it was to be the sole recidivist statute in force." Wright v. State, 291 So.2d 118, 120 (Fla. 2d DCA 1974). Thus, after 1971 but before 1988, Florida's habitual felony offender statute required only that a defendant be convicted of "a" felony in Florida or other qualified offense, and the felony for which a defendant is to be sentenced to be committed within five years of the date of the last prior felony. Whereas, in 1941, sections 775.09 and 775.10 expressly required sequential convictions, section 775.084 simply required that a defendant commit a "previous" felony. See Smith v. State, 461 So.2d 995, 996 (Fla. 5th DCA 1984).

Respondent's "opportunity to reform" argument must fail in light of the 1988 amendments to section 775.084. In a different context, the Second District discussed the purpose of sections 775.09 and 775.10 in Karz v. State, 279 So.2d 383, 384 (Fla. 2d DCA 1973): "The reason for enhancing a sentence for a

subsequent offense is to serve as a warning to first offenders and to afford them an opportunity to reform. The reformatory object of the statute, namely to deter future crime, would be frustrated if the offender were given no opportunity to reform."

Respondent asserts that the legislature did nothing to definitively signal that this purpose had been overridden in subsequent amendments to the habitual offender statute. Apparently, respondent has overlooked section 775.0841, in which the legislature made clear that, due to "a substantial and disproportionate number of serious crimes" being committed by "a relatively small number of multiple and repeat felony offenders," its intent is to "investigate, apprehend, and prosecute career criminals and to incarcerate them for extended terms," not to afford first time offenders a chance to "wise up." See also Fla. R. Crim. P. 3.701(b)(2) ("[t]he primary purpose of sentencing is to punish the offender. Rehabilitation . . . must assume a subordinate role.").

Further, Joyner's sequentiality requirement is no longer functional in light of this Court's requirement that all pending offenses be consolidated for the purpose of sentencing. Clark v. State, 16 F.L.W. S43 (Fla. Jan. 3, 1991). If the sequentiality requirement survives, its application could result in the following ludicrous situation. A defendant commits 25 felonies, and based on Clark, all 25 cases are consolidated, and convictions and sentences for all 25 are entered on the same

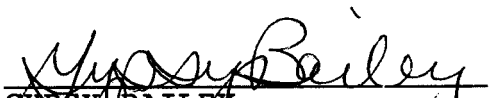
date. Thus, despite the fact that such a defendant is clearly a repeat offender and clearly qualifies for habitualization, the trial court will be precluded from incarcerating the defendant for an extended time because his convictions are not sequential. Such a scenario is untenable in light of express legislative intent in section 775.0841 and the reiteration in section 775.084(4)(c) that trial courts have discretion in sentencing.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the habitual felony sentence imposed in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to KATHLEEN STOVER, Deputy Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of July, 1991.

GYPSY BAILEY
Assistant Attorney General