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IN THE SUPREME COURT OF FLORIDA

JERRY D. NEWTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,185

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

OTHER AUTHORITIES

FLORIDA STATUTES

PRELIMINARY STATEMENT

Petitioner, Jerry D. Newton, was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal and transcripts of sentencing hearing held on May 31, 1990.

SR1 will denote supplemental transcript portion of trial transcript of Petitioner's trial in the cause, March 12, 1990.

SR2 will denote second supplemental transcript, additional portions of Petitioner's trial transcripts, March 8, 1990.

STATEMENT OF THE CASE

Petitioner, Jerry D. Newton, was charged by way of an information filed in the Seventeenth Judicial Circuit with Count I, armed kidnapping (Joan Cimber) with a firearm; Count II armed kidnapping (Carl Pruetz); Count III armed kidnapping (Rosemary Conway); Count IV armed Kidnapping (Jeffrey Perelman); Count V armed robbery (Joan Cimber); Count VI armed robbery (Carl Pruetz); Count VII armed robbery (Rosemary Conway), and Count VIII armed robbery (Jeffrey Perelman) (R 25-26).

Appellant's trial counsel filed a written motion to suppress Petitioner's confession (R 30-32). The trial court denied Petitioner's motion to suppress the confession (R 60).

Petitioner was convicted of all eight (8) offenses as charged in the information (R 34-41, 43).

On March 13, 1990, the Respondent-State filed a Notice to Declare Appellant a Habitual Offender under Section 775.084, Fla. Stat. (1989)[1]. The State also filed a motion to aggravate or depart from Petitioner's presumptive guidelines sentence range (R 45-46). Petitioner's Fla.R.Crim.P. 3.701 presumptive guideline sentence range was LIFE in prison (R 52).

A hearing was held on the State's motion on May 31, 1990 to declare Petitioner an habitual offender (R 1-23). At the

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[1] Petitioner's offenses were alleged to have occurred on September 3, 1988, prior to the effective date of the 1988 revision of the habitual felony offender statute. See Ch. 88-131, section 6, Laws of Florida. This amended habitual offender statute applies only to crimes committed after its effective date. Smith v. State, 561 So.2d 1881, 1882 (Fla. 1st DCA 1990).

conclusion of the hearing, the trial judge found and declared Petitioner an habitual offender (R 11, 47-48). The trial court also departed from Petitioner's presumptive guidelines sentence range (R 17-20, 49-51).

The trial judge sentenced Petitioner to LIFE in prison under Count I with the three (3) year mandatory minimum required by section 775.087(2), Fla. Stat. (1987), consecutive to LIFE under Count II, consecutive to LIFE under Count III, consecutive to LIFE under Count IV, consecutive to LIFE under Count V, consecutive to LIFE under Count VI, consecutive to LIFE under Count VII, consecutive to LIFE under Count VIII all with credit for time previously served (R 53-60).

Timely Notice of Appeal was filed by Petitioner/Appellant to the Fourth District Court of Appeal (R 61).

The Fourth District in a written opinion Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991), affirmed Petitioner's convictions and sentences. The Court held that the trial court erred in classifying Petitioner an habitual offender for Counts I-IV (LIFE felonies) because the "habitual felony offender statute, section 775.084, Florida Statutes, does not apply to life felonies. Id. at 213. However the Court afirmed Petitioner's habitual offender sentence as to Counts V-VIII (first degree felonies punishable by life). The Newton Court held "that the habitual felony offender statutes does permit the enhancement of first-degree felonies punishable by a term of years not exceeding Life." Id. at 213.

Petitioner filed a timely Notice of Review with this Court.

STATEMENT OF THE FACTS

Rosemary Conway testified that she was employed as a receptionist at the Minor Emergency Medical Center located at 639 N. Federal Highway in Pompano Beach, Florida. At approximately 4:00 p.m., on September 3, 1988, a black male entered the medical center and questioned her about their services (SR2 33-35). This person was identified as Petitioner (SR2 4-41). He left and returned around 6:00 p.m. (SR2 35-38). The telephone rang. Conway went back to Dr. Perelman's office to have him answer the telephone call (SR2 41). As she did, Petitioner pointed a gun at her and Joan Cimber, a nurse, and ordered them into a back office where Dr. Perelman and Carl Pruetz were located (SR2 42).

Carl Pruetz testified that while at the medical center that day a man entered the lab, put a gun to his head and ordered him to turn over his money (SR2 57). This person was Petitioner (SR2 58). Pruetz turned over the money. He was then ordered into a back office where Rosemary Conway, Joan Cimber, and Dr. Perelman were located (SR2 59-60).

Dr. Perelman testified that while situated in his office he looked up and saw a black man with a gun (SR1 9). He ordered R. Perelman to the floor (SR1 10). This man took some cash from him (SR1 10). The other people located in the office were then ordered into Dr. Perelman's office (SR1 10-11).

Joan Cimber testified that she was confronted by a black male identified as Petitioner at the medical center (SR2 13-15). She was ordered into the back office where the other people were located (SR2 15). Petitioner then wanted to know where the office

kept its cash receipts (SR2 15). Joan Cimber was taken at gunpoint out to a front desk where she handed him the office cash box (SR2 16). He took the money out of the box (SR2 16).

Petitioner took money out of the purse belonging to Rosemary Conway (SR2 16). He took cash out of Joan Cimber's purse and her car keys (SR1 17-23). Cimber was then returned to the small back office with the others (SR2 18). Petitioner took a ring from Rosemary Conway's finger (SR2 18).

Petitioner pointed his gun at Dr. Perelman and Carl Pruetz's head demanding the location of additional money (SR2 19). They finally persuaded Petitioner that no more money was to be found (SR2 19).

At this time, Petitioner, at gunpoint, ordered the four (4) people into a small bathroom directly across from the doctor's office (SR2 18). All four of the people went into the bathroom against their will (SR2 20). He ordered them to be quiet and not to leave the bathroom (SR2 20). Then the people heard a lot of ransacking of the office and opening of doors (SR2 21). A short period of time thereafter, Petitioner with the gun in hand, opened the bathroom door and told the people not to come out (SR2 21). He again shut the door (SR2 21). The place became very quiet (SR2 21). The people emerged from the bathroom and contacted the police (SR2 21-22). Petitioner had taken Joan Cimber's car keys from her purse (SR2 23, 27). When she looked outside, her car was missing from the parking lot (SR2 21).

A few weeks later, Joan Cimber reviewed a photographic array prepared by Detective Cobb of the Pompano Beach Police Department (SR2 25-26, SR1 23). She reviewed six (6) photographs of black

males of similar age and characteristics (SR2 26). She selected photograph number four (4) from the array (SR2 27).

Detective Cobb testified that he showed this array to the four victims in this case (SR1 23-24). Each person was shown the array alone (SR1 24). According to Detective Cobb, all four (4) persons selected the same male from the photographic array, Petitioner (SR1 26).

Detective Smith of the Hollywood Police Department testified that on September 30, 1988, at approximately 2:45 p.m., he observed Petitioner driving a vehicle (R 61). Petitioner was stopped (R 62). This vehicle was a stolen 1987 Ford Tempo (R 63). A search of the vehicle revealed a dark colored .22 caliber revolver under the driver's seat (R 63, 66). This revolver was operational (R 66-67).

After Petitioner was arrested, he was informed of his "Miranda" rights pursuant to a "Rights Waiver Form." (R 68-70). Petitioner acknowledges his rights. According to Detective Smith, he was willing to speak to the officer without an attorney present (R 70). A tape recording was made of Petitioner's statement to Detective Smith (R 71). Petitioner admitted to the officer that he went to the medical center and took some money. Detective Smith further testified that Petitioner's taped statement to him was a fair account of what he told the officer "about this incident that occurred on September 30, 1988, in Pompano Beach, Florida." (R 74).

Deputy Sheriff Calbrese was called as a State witness over Petitioner's objection (SR1 29). He testified that on September 18, 1989, he was transporting Petitioner to Judge Tyson's courtroom for a hearing (SR1 33-34). As he was transporting Petitioner and

another prisoner back to the holding cell, Petitioner grabbed him about the neck and demanded the keys (SR1 38). Calbrese became dizzy and fell to the floor (SR1 38). When he awoke, he found himself on the floor with the other prisoner (SR1 38). The deputy's keys were missing (SR1 39). Petitioner was gone (SR1 39). Approximately two (2) weeks later, Petitioner was arrested (SR1 39).

SUMMARY OF ARGUMENT

Penal statutes must be strictly construed in favor of the accused. Nowhere in the habitual offender statute does the category of crime at issue here, armed robbery, a first degree felony punishable by life appear. Thus the Legislature's omission of this degree of crime from the habitual offender statute evinces its clear legislative intent to exclude this category offenses, especially since such crimes are already punishable by life in Section 775.082(3)(b), Florida Statutes.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN CLASSIFYING OR SENTENCING APPELLANT AS A HABITUAL FELONY OFFENDER BECAUSE SAID STATUTE DOES NOT PROVIDE FOR ENHANCEMENT OF PENALTIES FOR FIRST-DEGREE FELONIES PUNISHABLE BY LIFE.

Petitioner was convicted of four (4) LIFE felonies in Counts I-IV, armed kidnaping, Section 787.01(1)(a) and 775.087(1)(a), Fla. Stat. (1987). Petitioner was also convicted of four (4) first degree felonies punishable by LIFE in Counts V-VII, armed robbery. Section 812.13(2)(a), Fla. Stat. (1987).

The prosecutor filed a notice to declare Petitioner an habitual offender (R 43). A hearing was held on the State's motion on May 31, 1990 (R 1-23). At the conclusion of the hearing, the trial judge found and declared Petitioner an habitual offender (R 11). The trial judge also issued a written order so classifying Petitioner (R 47-48).

Petitioner contends that the trial court reversible erred in classifying, declaring, or adjudicating Petitioner as an habitual felony offender for the crimes for which he was convicted. Section 775.084, Fla. Stat. (1989) makes no provision for enhancing penalties for first-degree felonies punishable by LIFE, LIFE felonies, or capital felonies. The Fourth District correctly held that the trial court erred in classifying Petitioner as an habitual offender for the four (4) LIFE felonies in Counts I-IV, armed kidnapping. Newton v. State, 581 So.2d 212, 213 (Fla. 4th DCA 1991). See also Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Walker v. State, 568 So.2d 519 (Fla. 1st DCA 1990).

The issue in the instant appeal is whether the habitual felony offender statute, Section 775.084(4)(a)1, Fla. Stat. (1989), applies to armed robbery, a first degree felony, punishable by life.

Section 775.082(3)(a), Fla. Stat., defines the punishment for a life felony as "by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years." Section 775.082(3)(b) defines the punishment for a first degree felony: "by a term of imprisonment not exceeding 30 years or, when specifically provided by statutes, by imprisonment for a term of years not exceeding life imprisonment." [Emphasis added].

The law in Florida is well-settled that penal statutes must be strictly construed according to the letter thereof and in favor of the accused. Section 775.021(1), Fla. Stat. (1989); State v. Jackson, 526 So.2d 58 (Fla. 1988); Negron v. State, 306 So.2d 104 (Fla. 1974); State v. Llopis, 257 So.2d 17 (Fla. 1971). Recently this Court re-applied these principles in Perkins v. State, 576 So.2d 1310, 1312-1313 (Fla. 1991), to find that cocaine trafficking is not a "forcible felony" because it was not defined as such by the Florida Legislature. "This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited." Perkins, 576 So.2d at 1312.

Turning to the habitual offender statute, section 775.084(4)(a)1. states:

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual offender as follows:

1. In the case of a felony of the first degree, for life.

Therefore, this Court must decide whether the Legislature intended to include armed robbery within the ambit of Section 775.084(4)(a)1. The language of Section 775.084(4)(a)1. does not exactly describe the crime of armed robbery. While armed robbery is a first degree felony, it is punishable by a term of years not exceeding life. It is clearly not a "first degree felony". Although such a crime and its attendant punishment may not be a separate offense, the punishment for armed robbery is tantamount to the punishment for a life felony. See Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989) (there is no distinct felony classification of first degree felony punishable by life, but only a first degree felony punishable by two ways); Ringel v. State, 352 So.2d 88, 89 (Fla. 4th DCA 1977), opinion adopted, 366 So.2d 758 (Fla. 1978) (Maximum penalty under armed robbery statute is life imprisonment, not a term of years).

Whether Armed Robbery is a separate offense or not from a first degree felony, the issue in this cause is whether the Legislature intended crimes which are punishable by life or by a term of years not exceeding life to be included within Section 775.084. The inclusion of Section 775.084 within the possible penalties of Section 812.13(2)(a) does not answer this question. First, Section 812.13(2)(a) simply provides that armed robbery may be a predicate offense for an Habitual Violent Felony Offender classification. See Section 775.084(1)(b)1.

Second, this Court should adopt Judge Ervin's detailed and insightful analysis of this issue in Burdick v. State, 584 So.2d

1035, 1040-1041 (Fla. 1st DCA 1991) (Ervin J. concurring and dissenting). Judge Ervin recounted, step-by-step, the legislative history of the Habitual Offender Statute and its attendant penalties for life felonies. The history of the statute led Judge Ervin to conclude that the legislature never directly intended to or provided for an application of the Habitual Offender Statute to offenses which are punishable by up to life in prison. As Judge Ervin concluded:

> Considering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are inapplicable, I do not consider that the state can take any comfort in the reference made in section 810.02(2) to section 775.084.

Id. at 1041.

Thus this Court should reject the argument that because the statute defining crimes as first degree felonies punishable by life refer to the habitual offender statute as a possible penalty it is thereby possible to so classify an offender. The Legislature never intended for that enhanced punishment to apply to offenses punishable by life.

In Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), review denied, 576 So.2d 284 (Fla. 1991), the defendant had argued that the habitual offender statute does not bear a reasonable relationship to a legitimate state interest because the most dangerous offenders are excluded from enhanced sentencing by virtue of the fact that "[a] person cannot be sentenced as a habitual felony offender if his offense is classified as a first degree felony punishable by life, a life felony, or a capital offense." The First District responded to the argument by stating that

"[a]lthough subsection (4) makes no provisions for enhancing sentences if the original sentence falls into one of the above categories," this was not a violation of the equal protection clause because the "legislature may have determined that these punishments are already sufficiently severe to keep the felon in prison for an extended period of time." Id. at 1173.

The correct statutory analysis is to strictly construe Section 775.084. Nowhere in the habitual offender statute itself does the category of crime at issue here, first degree felony punishable by life appear. Thus the Legislature's omission of this degree of crime from the statute evinces a clear legislative intent to exclude this category, especially since such crimes are already punishable by life in Section 775.082(3)(b), Florida Statutes. This Court should adopt Judge Ervin's well-reasoned dissenting opinion in Burdick on this issue. Hence the trial court reversibly erred in classifying and sentencing Petitioner in Counts V-VIII (first degree felonies punishable by life) as an habitual felony offender. The order classifying Petitioner as an habitual offender for those offenses should be vacated.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court reverse the decision of the Fourth District Court of Appeal on the issue of habitual offender classification for first degree felonies punishable by life and vacate his habitual offender classification for those offenses.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 8TH day of November, 1991.

Counsel for Petitioner