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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,193

STATE OF FLORIDA,

Petitioner,

vs.

DONALD WALKER,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Fourth District Court of Appeal, and the prosecuting authority in the trial court. Respondent, Donald Walker, was the defendant in the Criminal Division of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and the Appellant in the appellate court. In this brief, the parties will be referred to as they appear before this Court, except that Petitioner may also be referred to as "the State."

The following symbol will be used:

"R" Record on Appeal

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

Respondent was informed against for second degree murder in the shooting death of Daniel Rusignolo (R. 552). He was tried by jury, and found guilty as charged (R. 571).

The trial court adjudged Respondent guilty of Second Degree Murder, with a firearm. The State having noticed its intent to seek sentencing as an habitual felony offender (R. 566), the trial court found Respondent to be an habitual violent felony offender, on the basis of his prior convictions for possession of cocaine, uttering a forgery, and armed robbery (R. 598-599). The trial court sentenced Respondent to serve life in prison as an habitual violent offender, with the three year mandatory minimum term applicable for the use of a firearm under §775.087(2)(a), Fla. Stats.

On direct appeal, the Fourth District Court of Appeal, affirmed the conviction for second degree murder with a firearm, but reversed the sentence as a habitual violent offender under section 775.084 (4) (b)1, Fla. Stat. (1989). The District Court concluded that since the second degree murder conviction had already been enhanced to a life felony under section 775.087(1)(a) for the use of a firearm, the sentence could not be additionally enhanced under section 775.084(4)(b)1, because the habitual felony offender statute does not apply to life felonies. Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991).

Upon petition by the State, in an order dated October 30, 1991, this Court accepted jurisdiction over this cause to review the District Court's conclusion that the habitual felony offender statute does not apply to life felony convictions.

SUMMARY OF ARGUMENT

Section 782.04(2), Fla. Stat. (1989), classifies second degree murder as a "felony of the first degree". Section 775.084(4)(b)(1) requires that an habitual violent felony offender receive a sentence of life after being found guilty of a felony in the first degree. Since Respondent was convicted of second degree murder, and second degree murder is a felony of the first degree, the trial court did not err in imposing an enhanced sentence upon Respondent pursuant to §775.084. Thus, the opinion of the District Court should be quashed and the sentence affirmed.

ISSUE

IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT, WHICH HAS BEEN ENHANCED TO A LIFE FELONY BY OPERATION OF §775.087 (1)(a), SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

On direct appeal, the District Court concluded that since the second degree murder conviction had already been enhanced to a life felony under section 775.087(1)(a), Fla. Stat. (1989) for use of a firearm, the habitual felony offender statute, §775.084(4)(b)1 was no longer applicable, because §775.084(4)(b)1 does not apply to enhance the sentence of a life felony. For the reasons that follow, the State submits that this interpretation of §775.084(4)(b)1 is erroneous, in general, and specifically as applied to the facts of this case.

First and foremost the State would point out that Respondent was convicted of second degree murder, which §782.04(2), Fla. Stat., classifies as a **felony of the first degree**. Thus, since the jury found Respondent guilty of second degree murder, and second degree murder is a first-degree felony, the trial court was correct in sentencing him pursuant to the habitual violent felony offender statute, §775.084(1)(b), and (4)(b)(1). See, Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990).

The District Court however concluded that because the "felony of the first degree" was enhanced to a life felony under

the operation of §775.087(1), Fla. Stat., due to Respondent's use of a firearm to commit the murder, the habitual violent offender statute no longer applied in that particular situation. The State maintains that since Respondent was convicted of a "**first degree felony,**" and under the circumstances of this case, the crime need not have been enhanced to a "**life felony**" under of §775.087 (1)(a), Fla. Stat., the District Court's conclusions are erroneous.

The only purpose of reclassifying the crime under §775.087(1)(a) would be to achieve a higher score for a harsher sentence under the sentencing guidelines (R. 585). However, since in the case at bar, the trial court sentenced Respondent as an habitual violent felony offender (R. 587-590), the guidelines score was no longer of importance or applicable. See, §775.084 (e). Thus, the crime need not have been reclassified under §775.087 (1)(a), and the only applicable subsection of §775.087 in this case would be §775.087 (2)(a) imposing the three year minimum mandatory sentence for use of the firearm. Therefore, since the two statutes [§775.084 (4)(b)1 and §775.087 (2)(a)] have mutually consistent fields of operation, and are not mutually exclusive, §775.084 and §775.087 can and must be construed in pari materia with each other and the other subsections therein, thereby allowing the purpose of both sections to be given effect at sentencing. Thus, the trial court did not err in sentencing Respondent as a habitual violent felony offender under §775.084 (4)(b)1, and imposing the three year minimum mandatory sentence required by §775.087 (2)(a).

See, Williams v. State, 517 So.2d 681 (Fla. 1988); State v. Smith, 470 So.2d 764 (Fla. 5th DCA 1985), approved, 485 So.2d 1284 (Fla. 1986); Haywood v. State, 466 So.2d 424 (Fla. 4th DCA 1985), approved, 482 So.2d 1377 (Fla. 1986); Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983), approved, 449 So.2d 818 (Fla. 1984).

Assuming arguendo that this Court accepts that the first degree felony was reclassified to a life felony, the District Court's conclusions must still be quashed. The District Court found that Respondent could not be sentenced as an habitual violent felony offender because §775.084 (4)(b)1 does not provide for further enhancement of the sentence of a life felony. Petitioner, however, maintains that merely because a life felony allegedly cannot be enhanced, the trial court should not be precluded from habitualizing the defendant to punish the recidivism by depriving the defendant of gain-time as authorized under §775.084(4)(e), Fla. Stat. (Supp. 1988).

This is especially true since "the Florida habitual offender statute is predicated on the essential notion that the enhanced sentence is imposed for a subsequent offense on the theory that the prior convictions considered in connection with the subsequent offense demonstrate the incorrigible and dangerous character of the accused and establish the necessity for enhanced restraint." Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990). Why should a defendant sentenced to life not be subject to the punitive restrictions of the habitual offender statute, and therefore receive a less severe sentence

than other recidivist defendants who, in fact, received less severe sentences for less severe crimes? Such a result is totally illogical and clearly not the intent of the legislature.

The District Court's conclusions also overlooks the fact that although a life felony is to be punished by a maximum sentence of life imprisonment under the statutory scheme of §775.082 (3)(a), all felonies, including life felonies, are now subject to the sentencing guidelines. Indeed, unless a defendant has a serious prior record or unless he or she receives a departure sentence, it is highly unlikely that a defendant convicted of a life felony will receive life imprisonment under the guidelines. In fact, in the case at bar, although Respondent's crime should be punished by life imprisonment, under the sentencing guidelines he would receive only 22 years imprisonment (R. 585), with all the regularly allowed statutory gain time. Accordingly, the District Court's conclusion that Respondent cannot be sentenced under §775.084 merely because the crime of which he was convicted carries a possible maximum penalty of life imprisonment is unavailing.

Moreover, it is settled that the legislature intended that habitual offender classification apply to all felony offenses. Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). Once the notice is filed, the court must find the defendant to be an habitual offender if he meets the statutory criteria. The court then has discretion to impose an habitual offender sentence, or not. As part of this sentencing process, the legislature determined that the

degree of some offenses committed by the habitual offender should be enhanced. Life felonies are not included in this enhancement because they could only be elevated to capital offenses. Only this interpretation of the statute can save it from rendering the absurd result that habitual felons convicted of the most serious crimes (i.e., life felonies and first degree felonies punishable by life) retain the diminished penalties of the sentencing guidelines and the benefit of the extensive gain-time, while those convicted of lesser crimes do not if sentenced as habitual offenders. Moreover, this interpretation of §775.084(4) explains why the legislature omitted life felonies from the subsection: Because life felonies already carry a maximum possible penalty of life imprisonment, the maximum penalties for those crimes cannot be "enhanced," and there was no need for the legislature to list them in subsection (4).

It must be noted that the homicide statute, § 783.04(2), Fla. Stat. (1989), provides that murder in the second degree is **felony of the first degree**, "punishable by imprisonment for a term of years not exceeding life **or as provided in s. 775.082, s. 775.083, or s. 775.084**." Thus, the substantive statute indicates that the legislature expressly intended for homicides to be punished pursuant to the habitual felony offender statute, despite the fact that §775.084 does not itself specifically provide for enhancement of the maximum penalty for life felonies. The State maintains that to give credence to the District Court's interpretation of the statute would deprive the trial court of the sentencing discretion otherwise built into

the habitual offender process and specifically authorized for under the substantive (homicide) statute. It is absurd to suggest that the legislature included a statement in the substantive statute allowing for habitual offender classification and then specifically excluded it from the sentencing provisions.

The First District squarely addressed the issue presented in the instant case in Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). There, the defendant presented the argument that because §775.084, Fla. Stat. (1983) only provided for enhancement of first, second and third degree felonies, it was inapplicable to a defendant convicted of a life felony. The First District rejected Watson's contention, holding that

> the statute under which Watson was sentenced, Section 794.011(3), provides that the crime of sexual battery with great force is a life felony punishable as provided in Sections 775.082, 775.083 or 775.084, Florida Statutes. Section 775.084 is the habitual offender statute. Hence, this argument is without merit. **While the legislature did not directly set out how a life felony is to be enhanced in Section 775.084, presumably it was their intent that it be enhanced in the same manner as a first degree felony,** the highest offense covered.
> [Emphasis added.]

Id., 504 So.2d at 1269-1270. See also, Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (defendant convicted of kidnapping, a first degree felony punishable by life imprisonment, was properly sentenced as a habitual felony offender where kidnapping statute provided for punishment under Section 775.084).

As was the case in Watson, Respondent was convicted under a substantive statute which provides for punishment under §775.084, the habitual felony offender statute. Thus, even though §775.084 does not list life felonies in the enhancement provisions of subsection (4), the legislature clearly intended to make habitual felons convicted of that crime subject to the gain-time restrictions and, more importantly, the exemption for the sentencing guidelines provided by §775.084(4)(e), Fla. Stat. (1989). Again, a holding by this Court to the contrary would lead to the absurd result, never intended by the legislature, that habitual felons convicted of the most serious crimes receive greater protections than those convicted of lesser crimes. This Court must avoid such a result. Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1983) (In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results); State v. Webb, 398 So.2d 820, 824 (Fla. 1981).

To summarize, the State would request this Court to quash the opinion of the District Court, and interpret §775.084 as providing that "life felonies" are subject to the habitual offender statute under the arguments expounded herein; i.e., the trial court may still declare the felon convicted of a life felony an habitual violent felony offender in order that the no gain-time provision of the statute can be applied to that felon's sentence. The State submits this is necessary because an interpretation of §775.084 which excludes defendants convicted of life felonies and first degree felonies punishable by life from sentencing under the habitual offender statute

would lead to the absurd result that habitual felons convicted of the most serious crimes would retain the protection of the sentencing guidelines and gain-time provisions, while those convicted of lesser crimes would not.

As stated earlier, as part of the sentencing process, the legislature determined that the degree of some offenses committed by the habitual offender should be enhanced. Life felonies, of course, by their own definition could not be enhanced any further, because the next level is a capital offense. To accept the District Court's interpretation of the statute would deprive the trial court of applying the habitual offender statute in the most serious crimes, as in the case at bar, or under the kidnapping statute, §787.01(3)(a), Fla. Stat., sexual battery statute, §797.011(2)(3), or armed robbery, §812.13(2)(a), Fla. Stat. Viewed this way, the argument that the habitual offender statute does not apply to life felonies loses credibility. As shown in Watson, this provision was unchanged from the prior law and should be interpreted in the same fashion as the prior habitual offender statute. Accordingly, this Court should quash the opinion of the District Court, and reinstate the habitual offender sentence imposed on Respondent by the trial court.

CONCLUSION

WHEREFORE, the State of Florida respectfully submits that this Court should **QUASH** the opinion of the Fourth District Court of Appeal in the case at bar, and reinstate the habitual offender sentence imposed on Respondent by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by Courier to: TANJA OSTAPOFF, Assistant Public Defender, Counsel for Respondent, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 19th day of December, 1991.

Of Counsel