IN THE SUPREME COURT OF FLORIDA

EDDIE MACK LOCK, :

Petitioner, :

vs. : Case No. 78,472

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE

In the Circuit Court for Lee County, the state filed an information charging Petitioner, EDDIE MACK LOCK, with two counts of robbery with a firearm, first degree felonies punishable by life. [R267-68] These offenses allegedly occurred on December 24, 1989. On June 28, 1990, Petitioner appeared for a jury trial before the Honorable Jay B. Rosman, circuit court judge. [R4] The jury returned verdicts of guilty of the charged offenses. [R262,-313]

The trial court adjudicated Petitioner guilty and declared him a violent habitual offender. [Vol.IV,42,395] The court sentenced Petitioner on each count to life imprisonment, to run consecutively. [Vol.IV,44,396-98] The court also imposed a three-year minimum mandatory term for each count. [Vol.IV,44] A filed sentencing guidelines scoresheet indicates a point total of 463. [R392] However, the court made corrections during the sentencing hearing that indicate a point total of 344. [Vol.IV,36] The corrected total results in a guideline sentence of seventeen to twenty-two years imprisonment. Petitioner filed a timely notice of appeal. [R401]

In an opinion filed on July 24, 1991, the Second District Court of Appeal affirmed Petitioner's sentences. Lock v. State, case no. 90-02990 (Fla. 2d DCA, July 24, 1991). The court noted conflict with the First District Court of Appeal in Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990). This court accepted jurisdiction of the instant case on October 22, 1991.

STATEMENT OF THE FACTS

On December 24, 1989 at about 6:45 a.m., Rose Lang was working at a convenience store when Michael Lumpkin entered the store. [R18,22,37,72] A black male entered the store and pulled a shotgun from beneath a brown trench coat. [R23-24,38,75] Pointing the gun at Lumpkin's head, the man demanded money. [R25,77] Lumpkin gave him a small amount of money. [R26,77] The man then pointed the gun at Lang and demand money from her. [R26,77] Lang complied, giving him money from the register. [R26-27,77-78]

Petitioner denied having gone into the convenience store where Lang worked. [R173-74] Petitioner also denied owning a shotgun or a trench coat. [R175-76] Petitioner testified that he did not commit the robberies. [R177]

SUMMARY OF THE ARGUMENT

Issue One

In the Second District Court of Appeal, Petitioner argued that his consecutive life sentences were erroneous because Section 775.084, Florida Statutes (1989), makes no provision for enhancing penalties for first degree felonies punishable by life. The court rejected this argument. Lock v. State, case no. 90-02990 (Fla. 2d DCA, July 24, 1991). The lower court's ruling is in error because the habitual offender statute's language, its purpose to enhance sentences, and its legislative history indicate that the statute does not apply to first degree felonies punishable by life.

Issue Two

The imposition of a life sentence is permissive rather than mandatory when a defendant is sentenced as a violent habitual offender upon his conviction of a first degree felony. That a life sentence is discretionary is indicated by the statute's use of the word "may" rather than "shall." This result is also mandated by this court's prior ruling in Brown v. State, 530 So.2d 51 (Fla. 1988).

Issue Three

By requiring a mandatory life sentence for a first degree felony punishable by life, subsection 775.084(4)(b) violates the equal protection clause because no reasonable relationship exists

between a mandatory life sentence for a simple first degree felony and the legislature's intent that those convicted of more serious and numerous offenses be sentenced more severely.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN SENTENCING PETITIONER UNDER SECTION 775.084, THE HABITUAL OFFENDER STATUTE, FOR FIRST DEGREE FELONIES PUNISHABLE BY LIFE?

The trial court sentenced Petitioner as a violent habitual offender to two terms of life imprisonment, to run consecutively. [Vol.IV,42,44,396-98] These sentences were for Petitioner's two convictions of robbery with a firearm, first degree felonies punishable by life. The trial court erred in sentencing Petitioner under the habitual offender statute because this section makes no provision for enhancing penalties for first degree felonies punishable by life. The trial court's classification of Petitioner as a habitual offender is contrary to the wording of the habitual offender statute and to the legislative intent that the statute serve as means of enhancing sentences. The lower court's misapplication of the habitual offender statute requires that this court reverse Petitioner's sentences and remand this case for resentencing.

When interpreting the meaning of a statute, courts should first turn to the language of the statute. U.S. v. Rush, 874 F.2d 1513 (11th Cir. 1989). Section 775.084(4)(b), Florida Statutes (1989), does not list first degree felonies punishable by life

among the felonies subject to enhancement.[1] The legislature's decision to not list these felonies should be given affect. Under the statutory construction rule of expressio unius est exclusio alterius, a court will usually construe a statute so as to exclude all things not expressly mentioned where the statute also enumerates others. PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). Accordingly, the legislature's enumeration of all felonies except capital felonies, life felonies, and first degree felonies punishable by life is a clear indication that the statute does not apply to those offenses. Furthermore, any ambiguity in interpreting this language must be resolved in Petitioner's favor under the rule of lenity. Section 775.021(1), Fla.Stat. (1989). Courts should strictly construe criminal statutes, and any ambiguity should be construed in favor of the accused. State v. Jackson, 526 So.2d 58, 59 (Fla. 1988); Bell v. United States, 349 U.S. 81, 83 (1985).

The nonavailability of habitualization for first degree felonies punishable by life is also consistent with the purpose of Section 775.084, which is to provide enhanced sentences for habitual offenders. The habitual offender statute is a penalty enhancement statute that prescribes longer sentences. Dominguez v. State, 461 So.2d 277 (Fla. 5th DCA 1985). A habitual offender is

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[1]Section 775.084(4)(a) allows habitualization of a first degree felony; however, a first degree felony is not akin to a first degree felony punishable by life. First degree felonies have a ceiling on the potential term of imprisonment that excludes a life sentence. Section 775.082(3)(b), Fla.Stat. (1989). First degree felonies punishable by life, on the other hand, have no such ceiling. Dunn v. State, 522 So.2d 41 (Fla. 5th DCA 1988).

defined as ". . . a defendant for whom the Court may impose an extended term of imprisonment. . ." Section 775.084(1)(a), Fla.Stat. (1989). Under Section 775.082(3)(b), Florida Statutes (1989), a first degree felony punishable by life is already subject to a life sentence. Therefore, a sentence of life imprisonment as a violent habitual offender is not an enhancement of this penalty. Because the habitual offender statute does not provide any enhancement of first degree felonies punishable by life, these felonies are not within the purview of the statute.

The above conclusion was reached by the courts in Gholston v. State, 16 F.L.W. 46 (Fla. 1st DCA Dec. 17, 1990), and Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991).[2] The Second District Court of Appeal reached a contrary result in this case. The court in Walker concluded the defendant was not subject to habitualization because his second degree murder conviction was already enhanced to a life felony for use of a firearm. The court stated, "Under the plain language of the Statute, only first degree felonies--not those which are already made life felonies--can be enhanced under Section 775.084(4)(b)." Id. at 1318.

In Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991), the First District Court of Appeal receded from Gholston, holding that a first degree felony punishable by life is subject to habitual offender treatment. Judge Ervin dissented and stated,

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[2]Contra, Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990); Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1990); Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991); Newton v. State, 16 F.L.W. D1499 (Fla. 4th DCA June 5, 1991).

> In my judgment it is illogical to assume that the legislature intended for a trial judge to have the authority to impose an enhanced sentence of life upon one who was already subject to a maximum sentence of life imprisonment

Id. at 1965.

Judge Ervin based his argument on the legislative history of Section 775.084, noting the legislature had never amended the section to expressly include life felonies or first degree felonies punishable by life. Id.

That Section 812.13(2)(a), Florida Statutes (1989), refers to the habitual offender statute is not a clear indication that the legislature intended to make defendants convicted of armed robbery eligible for habitual offender treatment. As noted by Judge Ervin in his dissent, the legislature has made many suspect references to the habitual offender statute throughout the Florida Statutes. Judge Ervin concluded,

> Considering the legislature's wholesale indiscriminate reference to the Habitual Offender Statute throughout the Florida Statues, 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.

Petitioner submits that Judge Ervin's dissent is well-reasoned and should be adopted by this court. First degree felonies punishable by life should not be subject to habitualization. This conclusion is mandated by both the language of the habitual offender statute and the intent of the statute to enhance punish-

ments. This court must overturn Petitioner's sentences and remand his case for resentencing.

ISSUE II

IS A LIFE SENTENCE UNDER THE HABITUAL OFFENDER STATUTE MANDATORY FOLLOWING A CONVICTION OF A FIRST DEGREE FELONY PUNISHABLE BY LIFE?

The trial court sentenced Petitioner as a violent habitual offender to two terms of life imprisonment, to run consecutively. [42,44,396-98] Petitioner contends that the court may have misinterpreted Section 775.084, Florida Statutes (1989), as requiring a mandatory life sentence for a violent habitual felony offender convicted of a first degree felony. Such an interpreted would be erroneous because imposition of a life sentence is discretionary under Section 775.084(4)(b).

Section 775.084(4)(b), Florida Statutes (1989), provides that a court, upon declaring a defendant a violent habitual offender, "may sentence the habitual violent felony offender as follows: 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years. [emphasis added]" The plain meaning of "may" dictates that a sentence of life imprisonment is discretionary. Words should be given their plain meaning, absent direct legislative intent. State v. Cormier, 375 So.2d 852 (Fla. 1979); Tatzel v. State, 356 So.2d 787 (Fla. 1978). In addition, strict scrutiny requires that all doubts about the meaning of a criminal statute be resolved in favor of the defendant. State v. Waters, 436 So.2d 66 (Fla. 1983).

Consistent with the unambiguous language of Section 775.084-(4)(b), the court in Smith v. State, 574 So.2d 1195, 1197 (Fla. 3d

DCA 1991), held that the language of Section 775.084(4)(b) did not require a life sentence. Accord, Cotton v. State, 16 F.L.W. D2573 (Fla. 3d DCA 1991). Moreover, the state in Smith conceded this point in its brief and at oral argument. Id.

This court's decision in State v. Brown, also supports the conclusion that the "may" in Section 775.084(4)(b) means permissible rather than mandatory. In Brown this court held that a life sentence under subsection (4)(a) is permissive. Subsection (4)(a) uses the word "shall," a more restrictive word than the "may" present in subsection (4)(b). Nevertheless, this court ruled that the legislature intended the "shall" to mean "may." This court noted that "may" was used in Chapter 75-116 and 75-298, Laws of Florida, which were amendments to the habitual offender statute. The use of the word "may" in these amendments, this court concluded, evidenced "an unequivocal legislative intent that the life sentence should be permissive, not mandatory."

Petitioner acknowledges that the court in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1991) has held to the contrary. In Donald, the defendant was convicted of a first degree felony and was sentenced as a violent habitual offender. The court in Donald determined that a court does not have discretion to impose less than a life sentence following a defendant's classification as a violent habitual offender. This determination is in error. First, the court ignored the "shall"/"may" analysis of Brown and the legislative history of the section. Second, the court in Donald used a "may means shall" doctrine that is applicable only to civil

cases. The Donald court cited several civil cases as authority for its belief that the "may" of subsection (4)(b) was mandatory. However, no criminal cases support this position.

The civil cases cited by Donald involved property or monetary interests that were protected in one part of a statute by mandatory directions (by use of the word "shall") but ostensibly unprotected by another section by permissive language (by use of the word "may"). These civil cases held that "may" could mean "shall" if a statute directs the doing of a thing for the sake of justice. To achieve the sake of justice which the statute required, the above-described courts construed "may" to mean "shall."

The court in Donald did not properly analyze Section 775.084(4)(b) in light of these precedents. A general reading of Section 774.084 does not direct that all habitual offenders "shall" be sentenced in a certain way. The general provisions of the act give discretion to the trial judge on whether to habitualize a defendant and this discretion should be further expressed in the discretion inherent in Section 775.084(4)(b). The Court in Donald also did not consider the appropriate "sake of justice." As the intent of the legislature was not clearly expressed in Section 775.084, the court should not have assumed that the sake of justice meant the state's definition of justice.

In conclusion, Section 775.084(4)(b) permits the trial court to retain discretion in whether to impose a life sentence on a violent habitual offender following a conviction of a first degree felony. This result is required based on the plain meaning of the

word "may" in this subsection and the legislative intent prompting the section.

ISSUE III

TO REQUIRE A MANDATORY LIFE SENTENCE FOR THE CONVICTION OF A FIRST DEGREE FELONY VIOLATES PETITIONERS' CONSTITUTIONALLY PROTECTED RIGHTS OF EQUAL PROTECTION.

In attacking the constitutionality of a statute, Petitioner acknowledges that he bears the burden of demonstrating its invalidity. Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), rev. denied, 511 So.2d 299 (1986), Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). Furthermore, a court will not declare a statute unconstitutional unless it is shown to be invalid beyond a reasonable doubt. Bunnell v. State, 453 So.2d 808 (Fla. 1984). Despite Petitioner's burden, section 775.084(4)(b), Florida Statutes (1988), fails to pass constitutional muster if interpreted as requiring a mandatory life sentence.

The Equal Protection Clause of the United States Constitution and Article I, Section 2 of the Florida Constitution, allow for the creation, through legislative action, of various statutory classifications. However, if those classifications impinge on fundamental rights guaranteed by the Constitution or are applied to suspect classes, strict scrutiny is used to determine the constitutionality of the classification. If there is no fundamental right involved, the rational basis test is then used in order to determine if the statute bears a reasonable relationship to a legitimate state purpose. See Rollins v. State, 354 So.2d 61 (Fla. 1978). In reference to this appeal, the rational basis test

applies because there is no suspect class or fundamental right infringed on.

Petitioner concedes the state has a legitimate purpose in wishing to incarcerate for longer periods of time those who are deemed to be dangerous; accordingly, there are four main degree of felonies--capital, first degree, second degree, and third degree. However, the legislature has further differentiated first degree felonies into three groups--those punishable by a maximum of 30 years incarceration, (simple first degree felonies), those punishable by a minimum of 40 years incarceration or life (first degree life), and those punishable by life. See Section 775.081, Florida Statutes (1988). Those offenses deemed more serious are given more serious penalties.

Given this classification of offenses, a mandatory life sentence under Section 775.084(4)(a) or (4)(b) for a simple or straight first degree felony bears no rational relationship to the legislature's desire to punish more serious offenses more severely. No rational relationship exists because other offenses that are more egregious would result in much less severe sentences if the defendant were not habitualized. For example, a person convicted of a first degree life felony, such as sexual battery with a deadly weapon is not subject to habitualization. See Johnson v. State, 15 F.L.W. D2631 (Fla. 1st DCA 1990). Therefore, he will be sentenced under the guidelines for as little as 4 1/2 years under the permitted range. If the same defendant had two prior convictions for third degree felonies, the sentencing range would be from 7 to

17 years. Likewise, an individual convicted of second degree murder with a firearm would be subject to a sentencing range of 7 to 22 years. If that individual had two prior third degree felonies, this sentencing range would not change.

Under this sentencing scheme, the more dangerous felons who are convicted of life felonies face less severe punishment than the habitualized felons who are convicted of less severe first degree felonies. A person who has two prior third degree felonies and who is convicted of a first degree felony such as purchase of cocaine within 1,000 feet of a school (a less egregious offense than sexual battery with a deadly weapon or second degree murder with a firearm) would receive a life sentence if habitualized. Thus, a drug user would spend his life in prison, but a violent rapist or armed murderer could receive as low as 4 1/2 years and only as great as 22 years. This result wholly fails to meet the rational basis test given that the stated purpose is to protect the public from more violent offenders. The public receives no protection under this potentially absurd result nor is the legislative goal of more severe sentences for more severe crimes being met.

A requirement of a mandatory life sentence for Petitioner's offenses serves to destroy the legislative intent behind the habitual offender statute and to render the statute unconstitutional under the doctrine of equal protection. Such a result is clearly erroneous. This court must reverse Petitioner's sentences to allow the lower court to sentence him to a term of years less than life imprisonment.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this honorable court to reverse the sentence of the lower court.

APPENDIX

PAGE NO.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EDDIE MACK LOCK, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 90-02990

Opinion filed July 24, 1991.

Appeal from the Circuit Court for Lee County; Jay B. Rosman, Acting Circuit Judge.

James Marion Moorman, Public Defender, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Peggy A. Quince, Assistant Attorney General, Tampa, for Appellee.

LEHAN, Judge.

We affirm the sentencing of defendant as an habitual violent felony offender upon his conviction for a first-degree felony punishable by life and fulfillment of the other requisites of section 775.084, Florida Statutes (1989). We adopt the reasoning of Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990). See also Newton v. State, 16 F.L.W. D1499 (Fla. 4th DCA June 5, 1991); Tucker v. State, 576 So.2d 931, 932 (Fla. 5th DCA 1991); Westbrook v. State, 574 So.2d 1187, 1188 (Fla. 3d DCA 1991).

We note conflict with Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990), as did Newton and Tucker.

SCHEB, A.C.J., and ALTENBERND, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to opposing counsel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of November, 1991.

Respectfully submitted,

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