IN THE SUPREME COURT OF FLORIDA

CALVIN LEE WEEMS,

Petitioner,

v. CASE NO. 78,543

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLORIDA BAR #197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner seeks review from the decision of the First District Court of Appeal in Weems v. State, 582 So.2d 830 (Fla. 1st DCA 1991) (copy attached as an appendix). The lead case on this issue is Burdick v. State, 16 FLW D1963 (Fla. 1st DCA July 25, 1991) (en banc), review pending, case no. 78,466, oral argument set for January 7, 1992, in which the district court held that defendants convicted of a first degree felony punishable by life could be sentenced as habitual offenders.

A one volume record on appeal will be referred to as "R," followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T."

II STATEMENT OF THE CASE AND FACTS

By amended information filed April 1, 1991, petitioner was charged with armed robbery (count 2) and aggravated assault (count 3) (R 21). The cause proceeded to jury trial on April 11, 1991, and at the conclusion thereof petitioner was found guilty as charged (R 37-38). Petitioner's timely motion for new trial was denied in writing on the bottom of the motion (R 39).

The state filed notice seeking to have appellant sentenced as an habitual violent offender (R 25). At sentencing, the state proved that appellant had a prior robbery conviction from Volusia County (R 41-46; T 187). Appellant's counsel argued that appellant could not be sentenced as an habitual violent offender on the robbery (T 193-94). The court disagreed and imposed an habitual violent offender sentence of 40 years in prison on the robbery, with a 15 year mandatory, and 10 years on the aggravated assault, with a 5 year mandatory, to run concurrently, with credit for 135 days time served on each (R 47-51). The sentencing guidelines scoresheet called for a 7-9 year sentence (R 54).

On April 25, 1991, a timely notice of appeal was filed (R 57). On May 22, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner. On appeal, petitioner argued that he could not be classified as an habitual offender on the armed robbery charge. The lower tribunal disagreed, on authority of Burdick v. State, supra, and certified the question. Appendix.

On August 30, 1991, an untimely notice of discretionary review was filed. On October 8, 1991, this Court granted belated discretionary review.

III SUMMARY OF ARGUMENT

The habitual offender statute does not permit that sanction for one convicted of a first degree felony punishable by life. That category of crime was specifically excluded from the statute by the Legislature. Penal statutes must be strictly construed in favor of the defendant.

Although the robbery statute cites to the habitual offender statute as a possible penalty, that citation is of no effect where first degree felonies punishable by life were expressly omitted from the habitual offender statute.

This Court should reverse the decision of the First District Court of Appeal below, answer the certified question in the negative, and remand for resentencing under the guidelines.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

WHETHER A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT IS SUBJECT TO AN ENHANCED SENTENCE PURSUANT TO THE PROVISIONS OF THE HABITUAL VIOLENT FELONY OFFENDER STATUTE?

The history of this issue in the First District is interesting, but confusing. In Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), the court held that the 1988 revised habitual offender statute did not apply to life felonies because life felonies were not included within the statute. In Gholston v. State, 16 FLW D46 (Fla. 1st DCA December 17, 1990), the court held that it did not apply to first degree felonies punishable by life because they too were not included in the statute.[1]

In Burdick v. State, supra, the court, in an en banc decision, receded from Gholston and held that the habitual offender statute did apply to first degree felonies punishable by life, even though they were not included in the statute.[2]

Finally, in West v. State, case no. 90-2208 (Fla. 1st DCA August 7, 1991), the court reaffirmed its Johnson position and held that life felonies are not subject to the habitual

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[1]In another context, the court held that a first degree felony punishable by life was properly scored as a life felony on a sentencing guidelines scoresheet. Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989).

[2]Judge Ervin dissented, and petitioner will rely heavily upon his views in this brief.

offender sentencing because they are not included within the statute, and because a life sentence is already available as a penalty.

Petitioner makes the following observations about this confusing historical picture: usually referees should stick with the first call they make, because it is most likely the correct one; and the same statute cannot be read two different ways.

The starting point in any statutory construction question is the statute itself. The habitual offender statute provides that once a defendant is found to be an habitual offender or a violent habitual offender, the following penalties apply:

> (4)(a) The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:
> 1. In the case of a felony of the first degree, for life.
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30.
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10.
>
> (b) The court, in conformity with the procedure established in subsection (3), 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.
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

Section 775.084(4),(5), Florida Statutes (emphasis added).

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 its clear intent to exclude this category, especially since such crimes are already punishable by life in Section 775.082(3)(b), Florida Statutes.

In addition, it must be remembered that in construing penal statutes, the most favorable construction to the accused must be used. 49 Fla. Jur. 2d Statutes §195; Section 775.021(1), Florida Statutes:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This Court recently applied these principles in Perkins v. State, 576 So.2d 1310 (Fla. 1991) to find that cocaine trafficking is not a "forcible felony" because it was not defined as such by the Legislature.

The lower tribunal's response to this argument in Burdick was both predictable and superficial. The court found that a first degree felony punishable by life is really a first degree felony, and so subject to the habitual offender penalty. The court did not mention its contradictory holding in Jones, supra, note 1, but merely cited to Section 775.081(1), Florida Statutes, for the proposition that first degree felonies punishable by life do not exist as a separate degree of crime.

Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> Turning to the second point, that the lower court erred in imposing an enhanced life sentence upon appellant because the substantive underlying offense for which he was convicted is punishable by a maximum penalty of life imprisonment, I agree and would reverse. 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 for the offense for which he or she was convicted. My conclusion is supported by the legislative history of both sections 775.082 and 775.084, Florida Statutes.
>
> Section 775.082(3)(b), Florida Statutes (1987), provides two methods of punishing persons convicted of felonies of the first degree: "[B]y a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment of a term of years not exceeding life imprisonment[.]" See also Jones v. State, 546 So.2d 1134, 1135 (Fla. 1st DCA 1989). When the 1971 legislative session enacted in the same legislative act section 775.082, establishing penalties for various categories of crimes, as well as section 775.084, creating the habitual offender classifications, the trial court's discretion to impose a maximum sentence within the range specified for all noncapital felonies was left unimpaired and remained so until October 1, 1983, the effective date of guideline sentencing.
>
> Additionally, during the special session of November 1972, the legislature amended section 775.081 by designating "life felony" as an additional category to the list of felonies, and amended section 775.082 by adding subsection (4)(a), establishing as the penalty for a life felony "a term of imprisonment in the state prison for life, or for a term of years not less than thirty." Ch. 72-724, Sections 1,2, Laws of Fla. In 1983, the penalty for

a life felony was amended, providing for life felonies committed before October 1, 1983, a term of imprisonment for life or a term of years not less than thirty, and for life felonies committed on or after October 1, 1983, a term of imprisonment for life or a term of imprisonment not exceeding forty years. Ch. 83-87, Section 1, Laws of Fla. The obvious intent of such amendment was to make Section 775.082((3)(a), Florida Statutes (1983), consistent with the newly created guideline sentencing, providing at Section 921.001(4)(a), Florida Statutes (1983), that the guidelines were to be applied to all felonies committed on or after October 1, 1983, except capital felonies, and to all felonies committed prior to October 1, 1983, except capital felonies and life felonies, when sentencing occurred subsequent to such date and the defendant chose to be sentenced under the guidelines. Ch. 83-87, Section 2, Laws of Fla.

Even though the legislature as early as 1972 created the classification of life felonies, it never amended the habitual felony offender statute to include enhanced sentencing for life felonies. As previously stated in this dissent, the legislature was no doubt aware that the trial courts' discretion to impose sentence for the substantive offense within the maximum range remained unaffected until the creation of guideline sentencing. Consequently, the result reached by the majority is that persons who commit severe felony offenses categorized as life felonies after October 1, 1983 are eligible for guideline sentencing, whereas persons such as appellant who commit first degree felonies punishable for a term of years not exceeding life imprisonment are denied such consideration upon being classified as habitual felons, because section 775.084(4)(e) excludes habitual felony sentences from guideline sentencing and other benefits. My thesis is, of course, not that the legislature could not validly make this kind of distinction -- only that it did not intend to make it.

Burdick, 16 FLW at D1965 (Ervin, J., dissenting) (footnotes omitted).

The state also argued below that because the statutes defining crimes as first degree felonies punishable by life refer to the habitual offender statute as a possible penalty,[3] the Legislature intended for that enhanced punishment to apply. Again, Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> The reference in section 810.02(2) to section 775.084 appears in all noncapital felony and misdemeanor statutes listed under Title XLVI of the Florida Statutes. Thus, even though offenses which are designated life felonies were never made subject to enhanced sentencing under the habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty for life felonies. See, e.g., Section 787.01(3)(a)5., Fla.Stat. (1980) (kidnapping); Section 794.011(3), Fla. Stat. (1989) (sexual battery). Additionally, although section 775.084 had formerly provided enhanced sentencing for habitual misdemeanants, the legislature, effective October 1, 1988, deleted the provisions relating to habitual misdemeanants. See Ch. 88-131, Sections 6,9, Laws of Fla. In the 1989 Florida Statutes, however the legislature failed to delete references to section 775.084 in providing punishments for specified misdemeanors. See, e.g., Section 784.011(2), Fla.Stat. (1989) (assault), Section 784.03(2), Fla.Stat. (1989)(battery). Considering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are

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[3] e.g., the statute defining armed robbery, Section 812.13(2)(a), Florida Statutes, and the one defining armed burglary, Section 810.02(2), Florida Statutes.

> 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.

Burdick, 16 FLW at D1965 (Ervin, J., dissenting).

This Court should adopt Judge Ervin's well-reasoned dissenting opinion and hold that first degree felonies punishable by life were not intended by the Legislature to be subject to habitual offender classification.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, reverse the decision of the First District Court of Appeal below, and remand for resentencing under the sentencing guidelines.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Fla. Bar No. 197890
Assistant Public Defender
Leon County Courthouse
301 S. Monroe - 4th Floor North
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #118652, P.O. Box 279, East Palatka, Florida 32031, this 14th day of October, 1991.

P. DOUGLAS BRINKMEYER

Calvin Lee WEEMS, Appellant,

v.

STATE of Florida, Appellee.

No. 91–1434.

District Court of Appeal of Florida, First District.

July 30, 1991.

An Appeal from the Circuit Court for Duval County; John D. Southwood, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Charlie McCoy, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

The only issue raised in this appeal is whether appellant, who was convicted of a first degree felony punishable by life, section 812.13(2)(a), Florida Statutes, could be sentenced as a habitual violent felony offender. Appellant admits in his brief that our decision in *Burdick v. State*, No. 90–619, — So.2d — (Fla.1st DCA July 25, 1991) (en banc) controls the outcome of this case. We agree and affirm. As in *Burdick* we certify the following question as one of great public importance:

IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT SUBJECT TO AN ENHANCED SENTENCE PURSUANT TO THE PROVISIONS OF THE HABITUAL VIOLENT FELONY OFFENDER STATUTE?

JOANOS, C.J., and WIGGINTON and NIMMONS, JJ., concur.

Eric PRICE, Appellant,

v.

STATE of Florida, Appellee.

No. 90–01218.

District Court of Appeal of Florida, First District.

July 31, 1991.

An Appeal from the Circuit Court for Alachua County; Robert Cates, Judge.

Nancy A. Daniels, Public Defender, and Gail Anderson, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

REVERSED AND REMANDED for resentencing under the authority of *Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991). We certify the following question as one of great public importance:

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (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 PREVIOUS OFFENSE?

BOOTH, BARFIELD and MINER, JJ., concur.

Milton THOMAS, A

v.

STATE of Florida,

No. 90–2789.

District Court of Appea
First District

July 31, 1991

An Appeal from the Cir
Gadsden County; L. Ralph

Nancy A. Daniels, Public
Carl S. McGinnes, Asst. P
Tallahassee, for appellant.

Robert A. Butterworth,
Carolyn J. Mosley, Asst. A
hassee, for appellee.

PER CURIAM.

Milton Thomas has appeal
imposed following his con
counts of possession of c
county detention facility.
remand for correction of th
tion order to conform to
nouncement of the trial co

Thomas first challenges t
tions placed on his probat
court, to wit: that he live in
ty, Florida for the term o
and that he not return to G
Florida. Thomas agreed
tions, and did not object to
We therefore affirm. *S*
State, 350 So.2d 810 (Fla.
cert. denied 358 So.2d 128
Larson v. State, 572 So.2d

Thomas also points out
probation order does not
trial court's oral pronoun
the written order indicates
to spend the probationary
den County, rather than I
The state concedes this e
fore remand so that the w
order can be corrected to c
oral pronouncement in th
e.g., Sellers v. State, 578 S