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IN THE SUPREME COURT OF FLORIDA

KING ANTHONY GREEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,569

INITIAL MERIT BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record proper will be referred to by the letter "R" followed by the appropriate page number. The transcripts will be referred to by the letter "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

By an information dated July 28, 1989, Petitioner was charged with attempted burglary, grand theft, and multiple counts of burglary. (R-8-9). The only count with which this case is concerned is Count IV, which charged Petitioner with the burglary of Jannie Macon's dwelling on July 10, 1989. (R-8). However, this record does not contain the amended information under which the Petitioner was actually tried [which may be found at R-84-85 of the record in a companion Florida First District Court of Appeal case, Number 90-2016]. Count IV under which Petitioner was actually tried charged him with burglary of a dwelling with the intent to commit grand theft, and during the course of which Petitioner armed himself with a dangerous weapon, to wit: a pistol. (R-410).

After a number of pre-trial motions, Petitioner proceeded to trial and was convicted by jury on July 18, 1990, of burgrlary of a dwelling during the course of which he armed himself with a dangerous weapon (to wit: a pistol). (R-31).

On August 2nd and 3rd, 1990, after a lecture by the court on how Petitioner had burdened the taxpayers by siring "a number of illegitimate children", the court sentenced Petitioner as an habitual offender to 60 years of imprisonment, with this sentence to run concurrently with the sentence imposed for Petitioner's conviction on Count VIII of the information (R-450-451).

Notice of appeal was timely filed on August 16, 1990. (R-86).

On August 9, 1991, the Florida First District Court of Appeal issued its opinion affirming Petitioner's conviction and sentence. The court certified this 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 OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE THE HABITUAL FELONY OFFENDER STATUTE?

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 burglary 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.

ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED:

IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL 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, 16 FLW D1963 (Fla. 1st DCA July 25, 1991), 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]

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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.

Finally, in West v. State, case no. 90-2208 (Fla. 1st DCA August 7, 1991), review pending, case no. 78,570, the court reaffirmed its Johnson position and held that life felonies are not subject to the habitual 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)

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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.

> (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 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.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should answer the certified question in the negative, reverse the decision of the Florida First District Court of Appeal, and remand for resentencing under the sentencing guidelines.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida and a copy has been mailed to Appellant, King Anthony Green, DC #291488, Baker Correctional Institution, Post Office Box 500, Olustee, FL 32072 this 7th day of October, 1991.

Respectfully submitted,

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COUNSEL FOR APPELLANT

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KING ANTHONY GREEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 78,569
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

KING ANTHONY GREEN,	*	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND
Appellant,	*	DISPOSITION THEREOF IF FILED.
V.	*	CASE NO. 90-2555
STATE OF FLORIDA,	*	
Appellee.	*	

Opinion filed August 9, 1991.

An Appeal from the Circuit Court for Duval County.
R. Hudson Olliff, Judge.

Nancy A. Daniels, Public Defender; David P. Gauldin, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Suzanne G. Printy, Assistant Attorney General, Tallahassee, for appellee.

WIGGINTON, J.

Raising several issues, Green seeks review of his conviction and sentence for burglary of a dwelling while armed with a dangerous weapon pursuant to section 810.02(2), Florida Statutes (1989). He urges that there was insufficient evidence to convict him of that first-degree felony, that the trial court

erred in admitting into evidence similar fact evidence, and that he was improperly sentenced as an habitual felony offender. Finding his first two points to be without merit, we affirm without further elaboration.

We also affirm appellant's sentence imposed pursuant to section 775.084(4)(a)1., Florida Statutes (1989). Appellant argues that because he was convicted of a first-degree felony punishable by a term of years not to exceed life, the habitual felony offender statute does not apply. He cites this court's recent decision in Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA 1990). However, since Gholston, we have considered the issue en banc, and have receded from Gholston in Burdick v. State, Case No. 90-619, slip op. filed July 25, 1991. Nonetheless, as we did 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 OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

AFFIRMED.

CAWTHON, S.J., CONCURS; ERVIN, J., CONCURS AND DISSENTS WITH OPINION.

ERVIN, J., concurring and dissenting.

I concur in all aspects of the majority's opinion except that relating to the life sentence imposed upon appellant as a habitual felony offender. As to that issue, I dissent for the same reasons expressed in my dissent in Burdick v. State, No. 90-619 (Fla. 1st DCA July 25, 1991) (en banc). I concur, however, with the majority in the certified question.