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IN THE SUPREME COURT OF FLORIDA

LARRY D. FORD,

Petitioner,

vs. CASE NO. 78,810

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is another in a lengthening series of cases which address one of the certified questions in Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991), review pending, no. 78,466.

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement and supplements as follows.

The district court initially affirmed the judgment and sentence without opinion on 19 July 1991 and issued its Mandate on 6 August 1991 after the fifteen day period for rehearing had expired. Appellate counsel filed a motion to recall mandate on 8 August 1991 alleging that he had not received notice of the 19 July decision until the mandate issued. Counsel Gifford urged recalling the mandate for rehearing because, otherwise, "appellant will have been denied the 15 days from decision provided in Florida Rule of Appellate Procedure 9.330." Without objection from the state, the motion to recall mandate was granted and the court subsequently granted appellant's rehearing motion to certify the following question previously certified in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991), review pending, no. 78,466:

> 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 district court also declined to address a new issue raised in the belated petition for rehearing which had not been raised in the trial court or in the briefs submitted in the district court.

SUMMARY OF ARGUMENT

The lead case addressing the certified question is Burdick v. State, review pending, no. 78,466. The question is also addressed in numerous other pending cases, including Weems v. State, 582 So.2d 830 (Fla. 1st DCA 1991), review pending, case no. 78,543. Consistent with its arguments in these previous cases, the state argues as follows.

The habitual felony offender statute (violent and nonviolent) expressly applies to first degree felonies. Merely because the more serious first degree felonies may be punishable by life in prison does not change their classification as first degree felonies. Section 775.081, Florida Statutes, does not specify a separate category or type of offense for first degree felonies punishable by life. No such classification of felony exists in Florida. Robbery with a firearm is still a felony of the first degree. Punishment under the habitual felon statute is expressly authorized by cross-reference in the armed robbery statute. Therefore, petitioner was properly sentenced as an habitual violent felon.

All of the district courts have concluded that the habitual felon statute applies to first degree felonies punishable by life. The consistency of those decisions weighs in favor of the opinion below.

Having addressed the certified question, the state will then argue two additional points.

There was no constitutional or statutory right to appeal from this no contest plea.

Appellate counsel's untimely claim that the sentence and plea are illegal should not be addressed by any court until the petitioner himself has initiated a motion to withdraw.

ARGUMENT

ISSUE I

WHETHER FIRST DEGREE FELONIES PUNISHABLE BY LIFE ARE SUBJECT TO THE HABITUAL FELON STATUTE (RESTATED).

The certified question should be answered yes.

Petitioner was charged with robbery with a deadly weapon, kidnapping, and battery. He pled no contest without reservation to robbery with a deadly weapon and false imprisonment. Pursuant to the recommendations of the parties, he received a sentence of ten years imprisonment as a habitual violent felony offender. Had he been sentenced under the guidelines, the range was, at minimum, twenty-two years to life. (Defense counsel advised the trial court that this was well below what Ford actually scored but that it did not matter in view of the favorable plea bargain.) R 6, R 101.

There is no motion to withdraw the plea in the record. Nevertheless, appellate counsel now argues that the plea bargain and sentence of ten years are invalid because, he asserts, (1) a first degree felony punishable by life is not subject to the habitual felony statute and (2) a life sentence is mandatory for this offense. Thus, counsel reasons, the ten-year sentence is illegal and the plea must be withdrawn.

Felonies are classified pursuant to section 775.081(1), Florida Statutes, as Capital, Life, and felonies of the first,

second and third degree. There is no separate category of first degree felony punishable by life. However, case law logically holds that a first degree felony punishable by life is simply a variety of a first degree felony. See Jones v. State, 546 So.2d 1134, 1135 (Fla. 1st DCA 1989) ("[T]here is no distinct felony classification of 'first degree felony which may be punishable by life,' but only a first degree felony which may be punishable in one of two ways."). This sensible reading of the statute would appear to be sufficient, without more, to defeat petitioner's argument that a first degree felony punishable by life is not a first degree felony subject to the habitual felon statute. There is more, however.

The Legislature, in §812.13(2)(a), could have declared armed robbery a life felony instead of a first degree felony punishable by life. It did not do so. The only remaining possibility is that the Legislature simply authorized a more severe penalty for armed robbery, while still classifying the offense as a first degree felony. This logic is consistent with §775.087, Florida Statutes, which reclassifies first degree felonies to life felonies when a firearm is used, and use of a firearm is not an essential element of the offense. Here, use of a firearm is an essential element, therefore Appellant's offense could not be reclassified. To compensate, and for consistency, the legislature authorized a life sentence.

The habitual felon statute, section 775.084, is expressly made applicable to the offense here. Section 812.13(2)(a), Florida Statutes, under which Appellant was convicted, provides:

> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment, or as provided in §775.082, §775.083, or §775.084. [e.s.]

Given the explicit statutory language making the substantive offense subject to habitual felon sentencing, petitioner's argument that the offense is not subject to such sentencing is simply implausible. All five of the district courts of appeal have independently examined and rejected petitioner's position. See, Burdick v. State, 584 So.2d 1085 (Fla. 1st DCA 1991) (en banc), review pending, no. 78,446 (habitual felon statute applies to burglary with a firearm); Lock v. State, 582 So.2d 819 (Fla. 2d DCA 1991) review pending, no. 78,472 (violent habitual felon statute applies to a first degree felony punishable by life); Westbrook v. State, 574 So.2d 1187 (Fla. 3d DCA 1991), review pending, no. 77,788 (habitual felon statute applies to robbery with a deadly weapon); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991) (habitual felon statute applies to first degree felonies punishable by life, but not to life felonies); and Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (habitual felon statute applies to kidnapping).

It is clear from the above that the legislature has made all first degree felonies, including those punishable by life, subject to habitual felon sentencing. To read the statute otherwise would lead to the absurd result that the most serious first degree felonies, those punishable by life imprisonment,

would not be subject to habitual offender sentencing while less serious felonies would be. See, Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986) ("It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result."); State v. Webb, 398 So.2d 820, 824 (Fla. 1981) ("Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided.").

The certified question should be answered yes.

ISSUE II

DID THE DISTRICT COURT HAVE JURISDICTION TO ENTERTAIN THIS DIRECT APPEAL FROM A NO CONTEST PLEA AND A NEGOTIATED SENTENCE WHICH RESERVED NO ISSUE FOR APPEAL?

Jurisdiction, including that of a lower court, to hear a case may be raised at anytime. Roberts v. Seaboard Surety Co., 158 Fla. 686, 29 So.2d 743 (1947). The state argued below that there was no constitutional or statutory right to appeal from a no contest plea where no issues were reserved for appeal and where the defendant received a negotiated sentence which fell within the statutory maximum. The District Court rejected the state's position holding that Robinson v. State, 373 So.2d 898 (Fla. 1979) granted the right to appeal all sentences entered pursuant to a plea bargain for the purposes of determining whether the sentence was illegal. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), review denied, 581 So.2d 1318 (Fla. 1991).

The Ford court reasoned that such appellants were constitutionally entitled to the assistance of appellate counsel and that appellate courts were required to have a full record on appeal and the benefit of briefs on the merits from the parties before determining whether it had jurisdiction. This is contrary to the usual rule that jurisdiction is the threshold, not the residual issue, and the standard practice of courts, e.g., this Court, to first determine tentative jurisdiction before even permitting briefing on the merits.

Because of its sweep, Ford has created a large and growing number of appeals from no contest or guilty pleas even when the sentence imposed is consistent with the plea bargain, the sentencing guidelines, and the statutorily authorized penalty for the offense. As applied, Ford operates independently to create a right to appeal all sentences even when neither of the two grounds authorized by the Legislature in subsections 924.06(1)(d) and (e) is present: (1) illegal sentence or (2) departure from sentencing guidelines.

A corollary of the expansive Ford holding that all facially valid sentences are appealable on grounds of illegality is that it eviscerates the long-standing rule, so critical to the viability of the appellate process, that issues must be preserved and raised in the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). It would be difficult to conceive a ruling more destructive of the appellate system than the circular reasoning of Ford and its progeny: (1) Robinson permits appeals from illegal sentences following a plea bargain, (2) illegality of a sentence may be raised at anytime, therefore (3) sentencing issues couched in terms of illegality may be raised even though they were not raised below because (4) any sentence may be illegal and (5) illegality, and the jurisdictional right to appeal, cannot be determined without the assignment of appellate, not merely trial, counsel and full briefing and appellate review on the merits, therefore (6) Robinson permits appeals from all sentences and all sentencing issues, even those not preserved or reserved below. For a concise, current example of an ongoing

Ford appeal, see the attached state's response (appendix) to a request for a third thirty-day extension in Munn v. State, a case being handled by opposing counsel's office.

The idiosyncratic approach to jurisdiction of Ford requires a superfluity of judges and appellate lawyers to search for, and address if necessary, hypothetical issues on the merits which cannot be reached when it is discovered, eventually, that there was no jurisdiction to hear the case or the issues. See, Kearney v. State, 579 So.2d 410 (Fla. 1st DCA 1991) (State's motion to dismiss prior to briefing denied on authority of Ford; after briefing and review, appeal dismissed for lack of jurisdiction, as originally argued by state.). There cannot and should not be sufficient public funding for such a gross waste of judicial and executive branch resources, particularly in times such as the present when reductions or elimination of critical judicial system functions are either occurring or being considered. Consider for the moment what would happen to the capability of this Court and the lawyers practicing before it to handle their caseload if briefs on the merits were required prior to tentatively determining jurisdiction, as in, e.g., conflict cases. With that insight in mind, it is easy to understand why the Appellate Public Defender for the Second Judicial Circuit is currently unable to timely handle appeals and must routinely obtain four or more extensions of thirty days before initial briefs are filed. This condition, which can fairly be described as a breakdown of the system pursuant to In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit

Public Defender, 561 So.2d 1130 (Fla. 1990), exists despite substantial additional resources given to that office and the withdrawal from hundreds of appeals. Day v. State, 570 So.2d 1003 (Fla. 1st DCA 1990) and predecessor cases cited therein.

The case at hand is illustrative of the Ford fallacies. The parties themselves entered into a facially valid sentencing agreement which the trial court accepted on 9 October 1990. Despite the absence of any preserved issues or jurisdictional basis for the appeal, Ford, who voluntarily entered into the agreement in the trial court, has been permitted for well over a year to challenge the voluntary agreement in an appellate court without being required to seek the most basic legal remedy: a motion to withdraw the plea in the trial court where it was voluntarily entered. In the trial court, Ford urged the court to accept the plea he had negotiated and voluntarily entered. In the appellate court, he completely shifts his position and argues that the plea agreement he negotiated and pressed on the lower court is actually illegal. All of this, purportedly on the authority of Robinson, which specifically mandates that appellate courts cannot address the validity of a voluntary plea until a motion to withdraw the plea is filed in the trial court. Innumerable hours of appellate counsel, judges, and support personnel have been needlessly consumed in this senseless undertaking which has twice required the attention of the highest court in the state. This is particularly egregious because, as will be developed on Issue III below, the threshold question of whether Ford himself wishes to withdraw the plea can only be

properly answered by Ford raising the issue in the trial court by a motion to withdraw the plea. Ford not only permits unpreserved issues to be raised for the first time on appeal, it permits an appellant, such as Ford here, to take completely contradictory positions.

The state urges the court to hold, contrary to Ford, that the only appealable sentencing issues following a guilty or unreserved nolo plea are:

(1) those which depart from the sentencing guidelines (§924.06(1)(e)); or

(2) those which exceed or fall below the statutorily authorized sentence (924.06(1)(d)); or

(3) those which have been expressly reserved or preserved in the trial court and are legally dispositive of the legality of the sentence. Robinson, Brown v. State, 373 So.2d 382 (Fla. 1979).

The latter point (3) is addressed to those instances where the claim of illegality requires going behind the facial legality of the sentence. The state also suggests that it is not too demanding of the professional skills of members of The Florida Bar practicing as a defense or appellate counsel to require them to recognize sentences which are arguably illegal or depart from the sentencing guidelines and to require that such issues be presented in the trial court where, if error, they can be immediately corrected. Should negligence occur, as it sometimes will, there are adequate remedies under rules 3.800 or 3.850.

Ford should be expressly disapproved and this appeal dismissed for lack of jurisdiction in the district court without prejudice to petitioner's right to move to withdraw the plea in the trial court.

ISSUE III

DOES SECTION 775.084 MANDATE A LIFE SENTENCE FOR HABITUAL VIOLENT FELONY OFFENDERS AND, IF SO, DOES THIS RENDER THE SENTENCE AND PLEA BARGAIN ILLEGAL?

Appellate counsel first raised this issue in his belated petition for rehearing. The district court declined to address this untimely argument, noting not only that it was untimely but that no motion to withdraw the plea had been filed.

Addressing first the question of whether section 775.084 mandates a life sentence for habitual felons of the first degree, it is the state's position that once habitual offender sentencing is selected, that the statutory language in section 775.084(4) mandates a life sentence for first degree felonies. See Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991) and the state's brief in that case; Donald v. State, 562 So.2d 792, 795 (Fla. 1st DCA 1990).

The state is surprised that appellate counsel would attempt to raise this issue because it seems contrary to the interests of his client. A reading of the plea and sentencing hearing shows that Ford's trial counsel appeared to be very pleased at obtaining a reduction in the charges and a ten-year habitual violent offender sentence. She had good reason to be pleased given the reduction in the charges, the potential length of a guidelines sentence, and the fact that section 775.084(4)(b)1, under which Ford was sentenced, requires a life sentence with a fifteen-year minimum mandatory. Donald. Presumably, Ford was

also pleased, in that the trial court examined the plea and Ford pursuant to Florida Rule of Criminal Procedure 3.172 and determined that the plea was voluntary. Unless Ford personally wants to abrogate the plea bargain, appellate counsel's arguments are contrary to Ford's interest.

The state suggests it was wise of the district court below to decline to address this late-rising argument of appellant counsel. First, it was clearly untimely and attorneys should be discouraged from such practices. More significantly, however, petitioner Ford is personally entitled to enter into, or move to withdraw from, a plea bargain. It cannot be done on his behalf by counsel. The record shows that Ford personally entered into the plea bargain. The appropriate remedy if he wishes to withdraw is to file a motion in the trial court.

It may well be that appellate counsel has consulted with his client, advised Ford that he should attempt to challenge the legality of the plea, and obtained directions from the client to challenge the plea itself, as is being done here by appellate counsel. However, if this argument is to be addressed by the court, rather than requiring a motion to withdraw in the trial court, the state submits that the interests of both Ford and the state must be protected by requiring a certified communication from Ford that he has been advised of his legal rights by Counsel Gifford and has determined that it is in his best interest to challenge, and abrogate, the plea bargain. Such certification is necessary, in the absence of a motion to withdraw in the trial court, if Ford's legal rights are to be preserved.

This certified communication is also necessary to protect the interests of the state. If appellate counsel succeeds in abrogating the plea, with an unhappy result for Ford, we can expect the ubiquitous claim of ineffective assistance of counsel which would be difficult to refute if accurately grounded on appellate counsel overturning, without authority from the client, a favorable plea bargain personally entered into by the client and his trial counsel.

As a matter of professional principle, the state will not attempt to abrogate the plea bargain entered into in good faith by the state attorney and Ford and his defense counsel and accepted by the trial court. For purposes of responding to opposing counsel's untimely and improvident argument, the state agrees that a trial court which invokes section 775.084(4)(b)1 must sentence the habitual felon to life and cannot legally sentence him to a lesser sentence of, e.g., ten years. Should the plea bargain be abrogated by Ford, or his counsel, which will return the parties to their pre-bargain status, the state reserves its right to fully prosecute and sentence Ford without regard to the terms of the abrogated plea bargain. But see Bashlor v. State, 16 FLW D2533 (Fla. 1st DCA 1991) (Right of defendant to challenge plea bargain of "illegal" sentence is restricted).

The state urges the court to decline to address this argument without prejudice to the right of Ford to move to withdraw the plea in trial court after receiving consultation and advice of counsel.

CONCLUSION

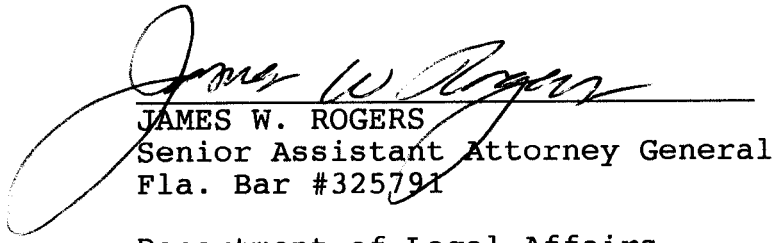
The court should hold that first degree felonies punishable by life are first degree felonies subject to habitual offender sentencing by answering the certified question yes.

The court should disapprove Ford, restrict its holding as argued herein, and dismiss the appeal for lack of jurisdiction in the district court..

The court should not address the untimely argument that the ten-year sentence is illegal because a life sentence was mandatory.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nancy Daniels, Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301 and Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 25th day of November, 1991.

James W. Rogers

JAMES W. ROGERS