IN THE SUPREME COURT OF FLORIDA

FILED
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STATE OF FLORIDA

PETITIONER,

vs. Case No. 78,899

BILLY KEY

RESPONDENT.

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to herein as either the "Petitioner." Respondent, Billy Key, will be referred to as either "Respondent."

STATEMENT OF THE CASE AND FACTS

In a written opinion, the First District Court of Appeal reversed Respondent's habitual felony offender sentence based on Barnes v. State, *infra*. The opinion below is reported at 16 F.L.W. D2831 (Fla. 1st DCA Nov. 6, 1991).

SUMMARY OF THE ARGUMENT

Due to the brevity of the argument, a formal summary of the argument will be omitted.

ARGUMENT

Petitioner, the State of Florida, urges this Honorable Court to accept jurisdiction in this case based on the fact that the habitual offender issue which was the basis of the reversal of Respondent's sentence is the same issue upon which the First District Court of Appeal has certified the question as one of great public importance in at least fourteen cases presently before this Court. That question is:

> Whether §775.084(1)(a)1, Florida Statutes (1988 Supp.), which defines habitual felony offenders as those who have "previously been convicted of two or more felonies in this state or other qualified offenses," requires that each of the felonies be committed after conviction for the immediately previous offense?

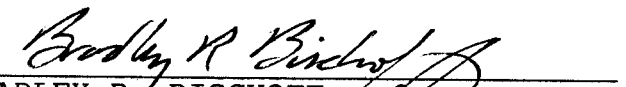
See, e.g., Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), *review pending*, case no. 77,751.

CONCLUSION

Petitioner respectfully urges this Honorable Court to accept jurisdiction in the instant case.

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 **MR. GLENN GIFFORD**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of November, 1991.

Bradley R Bischoff

BRADLEY R. BISCHOFF

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

PETITIONER,

vs. Case No. 78,899

BILLY KEY

RESPONDENT.

APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER

Key v. State, 16 F.L.W. D2831 (Fla. 1st DCA Nov. 6, 1991)

(McCoy Trust) challenges the authority of the appellee Department of Health and Rehabilitative Services (HRS) to enter a final order after a petition for administrative review was voluntarily dismissed. We find that HRS' review jurisdiction was terminated by the voluntary dismissal, so as to preclude the subsequent entry of the appealed order.

The McCoy Trust applied for a certificate of need (CON) for the construction of a nursing home. South Florida Baptist Hospital (SFBH) was one of several competing applicants. After a comparative review of the various applications HRS issued a State Agency Action Report and Notice of Intent to grant a CON on the McCoy Trust application, and to deny the competing applications. SFBH petitioned under section 381.709(5)(a), Florida Statutes, for an administrative hearing to contest this decision. A section 120.57(1), Florida Statutes, formal hearing was held, and the hearing officer entered a recommended order which concluded that the SFBH application and the McCoy Trust application should both be denied. SFBH then voluntarily dismissed its petition for an administrative hearing. HRS thereafter entered a final order adopting the recommended findings and conclusions, by which the CON applications of SFBH and the McCoy Trust were both denied.

In other cases this court has established that a voluntary dismissal of the petition for an administrative hearing divests HRS of jurisdiction to further review a CON application. *See RHPC, Inc. v. Department of Health and Rehabilitative Services*, 509 So.2d 1267 (Fla. 1st DCA 1987); *Humana of Florida, Inc. v. Department of Health and Rehabilitative Services*, 500 So.2d 186 (Fla. 1st DCA 1986), *rev. denied*, 506 So.2d 1041 (Fla. 1987). This jurisdictional principle has also been applied to administrative proceedings before other agencies. *See Rudloe v. Department of Environmental Regulation*, 517 So.2d 731 (Fla. 1st DCA 1987); *see also, Orange County v. Debra, Inc.*, 451 So.2d 868 (Fla. 1st DCA 1983). Although HRS argues that the cases are factually distinguishable, such distinctions do not affect the extent of HRS' jurisdiction. As an administrative agency, HRS is limited to such jurisdiction as is conferred by legislative enactment. *See Debra; Swebilius v. Florida Construction Industry Licensing Board*, 365 So.2d 1069 (Fla. 1st DCA 1979).

HRS asserts that it was compelled to enter a final order by section 120.59(1)(b), Florida Statutes. This statute imposes a time standard within which a final order "shall be" rendered after a recommended order is submitted. But neither this provision, nor the time standard contained in section 381.709(5)(c), Florida Statutes, confer any continuing jurisdiction when the petitioner has abandoned the dispute by filing a voluntary dismissal. Unlike the agency in *Middlebrooks v. St. Johns River Water Management District*, 529 So.2d 1167 (Fla. 5th DCA 1988), HRS has not adopted a rule which serves to restrict a petitioner's ability to voluntarily dismiss a proceeding.

HRS suggests that it would be contrary to public policy to approve a CON application which does not fully comply with the criteria in chapter 381, Florida Statutes. But in addition to imposing substantive criteria, chapter 381 indicates that HRS' preliminary action, as identified in the State Agency Action Report and Notice of Intent, shall become final unless challenged by an affected party. *See* §381.709(4)(d), Fla. Stat. When such a challenge is abandoned by a voluntary dismissal, HRS' preliminary action becomes effective as final agency action. *See RHPC*. This is consistent with the policy of finality reflected in section 381.709(4)(d), and the termination of further review jurisdiction precludes HRS from entering the appealed order denying the McCoy Trust CON application.

The order is reversed and the cause remanded. (BOOTH and MINER, JJ., CONCUR.)

* * *

Criminal law—Search and seizure—Impoundment and inventory search of defendant's vehicle subsequent to defendant's arrest for driving without valid driver's license complied with sheriff's department standardized criteria—Deputy acted in accordance with department's standardized criteria in determining it would be inappropriate to leave defendant's vehicle containing an unsecured motorcycle in truck bed parked on road and that it would be unreasonable to require an officer to remain with vehicle until defendant's stepfather could arrive at scene—No error in denying defendant's motion to suppress marijuana seized during inventory search of vehicle—Sentencing—Habitual offender sentence improper where it is impossible to determine from record whether defendant's prior convictions were sequential—Remand for clarification of whether prior convictions were sequential

BILLY KEY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case Nos. 90-3496 and 90-3689 (consolidated). Opinion filed November 6, 1991. An Appeal from the Circuit Court for Walton County, Laura Melvin, Judge. Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

(JOANOS, Chief Judge.) These consolidated cases comprise an appeal from the denial of a motion to suppress evidence obtained in the course of a vehicle inventory, and the imposition of sentences as an habitual felony offender. Appellant contends the inventory search was invalid, because it was conducted in violation of official department policy, and the imposition of habitual felony offender sentences was improper, because appellant's prior convictions were not sequential. We affirm in part, and reverse in part.

The record reflects that on October 4, 1989, a deputy sheriff stopped appellant on suspicion of driving without a valid driver's license. In response to the deputy's signal, appellant pulled his vehicle into an old cable television site road, stopping at a point where a chain barred the road. When the deputy confirmed that appellant did not have a driver's license, he placed appellant under arrest. The vehicle appellant was driving combined the characteristics of an automobile and pick-up truck. The open truck bed contained an unsecured motorcycle and a gas can. Although the parked vehicle did not pose a traffic hazard of any kind, the deputy refused to leave it parked at the cable road until appellant's stepfather arrived to drive it home. Instead, the deputy informed appellant that the vehicle could be towed, one of the officers at the scene could drive it to the department substation, or someone designated by appellant could pick it up within a reasonable time. The deputy determined that the thirty to forty-five minutes it would take appellant's stepfather to arrive at the scene was an unreasonable period of time.

The deputy drove appellant's vehicle to the department substation, and conducted a vehicle inventory, in the course of which he discovered 110 grams of marijuana. Appellant was charged by information with possession of more than twenty grams of cannabis, in violation of section 893.13(1)(e), Florida Statutes, and of driving without a license. Subsequently, the trial court denied appellant's motion to suppress the marijuana seized during the vehicle inventory, finding the initial stop proper because based on the officer's probable cause to believe appellant was driving without a license, and finding the vehicle inventory justified under Walton County Sheriff's Department General Order No. 23, pertaining to vehicle impoundment and inventory, or as a search incident to a lawful arrest. A jury found appellant guilty as charged of possession of twenty grams or more of cannabis, and of driving with a revoked license.

After an examination of the pre-sentence investigation report, the trial court determined that appellant had five prior felony convictions, beginning in November 1986, not including the instant offenses for which appellant was before the court for sentencing. The pre-sentence investigation report indicates that appellant was sentenced on August 12, 1987, for all five prior felony convictions. In Case No. 89-367, appellant was sentenced to eight years incarceration as an habitual felony offender for pos-

session of cannabis, and fifteen days concurrent for driving with a suspended license. Appellant then pled nolo contendere in Case No. 90-222-CF, which had been scheduled for jury trial the following week. Based upon the habitual offender findings in Case No. 89-367, appellant was sentenced to ten years incarceration as an habitual felony offender, the sentence to run concurrently with the eight-year habitual offender sentence.

Turning to the issues presented in this case, we find no error with respect to the trial court's denial of appellant's motion to suppress evidence discovered during the vehicle inventory. In *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), the Court held that the exercise of law enforcement discretion in determining whether to impound a vehicle or leave it lawfully parked after an arrest of the driver is not prohibited, "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." 107 S.Ct. at 743. The Court emphasized that the validity of such inventory searches requires: (1) the inventory search be undertaken in good faith, that is, on the basis of something other than suspicion of evidence of criminal activity; and (2) the inventory be conducted according to standardized criteria. 107 S.Ct. at 742-743. *See also State v. Wells*, 539 So.2d 464, 469 (Fla. 1989), *judgment affirmed*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990); *State v. S.P.*, 580 So.2d 216 (Fla. 4th DCA 1991).

The underlying rationale of *Bertine*, and of *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), and *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), upon which *Bertine* relies, was that there had been no showing that the police acted in bad faith or for the sole purpose of investigation, and the governmental interests justifying the search involved potential police responsibility for property in police custody. The Supreme Court focused on three needs served by an inventory search which gives police knowledge of the precise nature of the property in their custody: (1) protection of the owner's property; (2) protection of the police against claims of lost or stolen property; and (3) protection of police against potential danger from such things as explosives. *Bertine*, 107 S.Ct. at 741; *Opperman*, 96 S.Ct. at 3097.

In this case, the Sheriff's Department General Order No. 23, relating to vehicle impoundment and inventory, provides that an arresting officer does not become responsible for a vehicle unless the vehicle is "towed ..., abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner." Under Section III.B of the general order, if the owner of a vehicle is arrested and can provide no suitable alternative for impoundment, the officer (a) must establish a necessity for impounding, (b) must advise the owner or possessor of the intent to impound, and (c) must give the arrested person a reasonable amount of time to provide an alternative to impoundment. The arrested person may request a wrecker of his choice, may designate another responsible person to take custody of the vehicle, or if legally parked, the vehicle may be left at the location of the arrest.

We conclude that the deputy acted in accordance with the department's standardized criteria in determining that it would be inappropriate to leave appellant's vehicle containing an unsecured motorcycle, and that it would be unreasonable to require an officer to remain with the vehicle for the period of time it would take appellant's stepfather to arrive at the scene. We further conclude that the subsequent vehicle impoundment and inventory were conducted in compliance with the department's General Order No. 23. Therefore, we affirm the trial court's denial of appellant's motion to suppress.

We reach a different conclusion with respect to the imposition of habitual felony offender sentencing in this case. It is well established that enhanced sentencing under the habitual felony offender statute requires that the prior convictions be sequential. *See Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991), and cases cited therein. *See also Fuller v. State*, 578 So.2d 887 (Fla. 1st DCA 1991).

The record in this case reflects that appellant has five prior felony convictions, and that not all of the underlying offenses were committed on the same date. However, the record also reflects that sentence was imposed as to all five felonies on August 12, 1987. The pre-sentence investigation report indicates that appellant was placed on three years probation for aggravated assault and battery committed on May 26, 1987. Probation was revoked on August 12, 1987, and sentence was imposed on both counts on that date. If adjudication was withheld with regard to the May 1987 offenses, they do not constitute prior felonies for habitual offender purposes until August 1987, when sentence was imposed for the other prior felonies. *See* § 775.084(2), Fla.Stat. (1989). From the record before the court, it is impossible to determine whether appellant's five prior felony convictions were sequential. Therefore, we vacate the habitual felony offender sentences and remand for clarification and reconsideration. *See Lawley v. State*, 556 So.2d 431, 432 (Fla. 1st DCA 1989).

Accordingly, the denial of the motion to suppress is affirmed; the habitual felony offender sentences are vacated, and the cause is remanded for a determination whether any one of the five prior felony convictions occurred on a date sequential to August 12, 1987. If it is determined that none of the prior felony convictions was sequential, appellant must be re-sentenced without reference to the habitual offender statute. (SHIVERS and MINER, JJ., CONCUR.)

* * *

Criminal law—Discovery—Trial court conducted sufficient inquiry into state's failure to disclose report by Florida Department of Law Enforcement analyst stating that pistol defendant possessed was inoperable because it was missing its firing mechanism—Any discovery violation insubstantial in view of defendant's counsel's knowledge that pistol was inoperable, lack of prejudice to defendant in preparation of defense, and fact that jury acquitted defendant of every offense involving use or possession of firearm

JULIO R. GUILLEN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-02507. Opinion filed November 6, 1991. An Appeal from the Circuit Court for Duval County. R. Hudson Olliff, Judge. Barbara M. Linthicum, Public Defender, and Lawrence M. Korn, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(BOOTH, J.) This cause is before us on appeal from a judgment and sentence for sale of cocaine while armed and possession of cocaine while armed. Appellant argues, inter alia, that the trial court committed per se reversible error in failing to conduct a hearing pursuant to Florida Rule of Criminal Procedure 3.220 and *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), as to the State's failure to disclose a report from an expert in the Florida Department of Law Enforcement revealing that the firearm used in the commission of the charged offenses was inoperable.

On April 15, 1989, Detectives Johnson and Webster drove in an unmarked vehicle to the Havana Club in Jacksonville to make undercover purchases of cocaine and arrests. After they stopped in front of the club, a black male approached Webster on the driver's side and began negotiating a sale of cocaine. As Webster made a purchase, appellant approached Johnson, who was seated on the passenger side, and asked whether he wanted to purchase cocaine. Before this transaction could be completed, other officers arrived in backup vehicles to arrest both men. As the officers apprehended appellant, appellant flicked to the ground a matchbox he had in his hand and reached into the waistband of his pants and pulled out a pistol. Appellant momentarily pointed the pistol at an officer and then dropped it. The matchbox was later determined to contain cocaine.

By a five-count information filed April 27, 1989, appellant was charged with sale of cocaine while armed with a firearm, possession of cocaine while armed with a firearm, use of a fire-