IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

BILLY KEY,

Respondent.

CASE NO. 78,899

JURISDICTIONAL BRIEF OF RESPONDENT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

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JURISDICTIONAL BRIEF OF RESPONDENT

STATEMENT OF THE CASE AND FACTS

Respondent chooses to present a fuller account of the procedural history of this case than that given by petitioner.

This case comes to this Court following consolidation of two case below, First DCA Case Nos. 90-3496 and 90-3689. Case No. 90-3496 involves an appeal from a judgment and sentence for possession of more than 20 grams of cannabis and driving while license suspended. (R204-205)[1] After he was charged, respondent moved to suppress the cannabis as the product of an illegal search. (R238) The motion was denied. (R105-196) At trial, the jury returned guilty verdicts on both offenses after defense counsel preserved the suppression issue. (R9, 150-151, 246-247) The trial court found that respondent had committed five felonies within the past five years, and thus sentenced him as a habitual

[1]Herein, references to the record and supplemental record are designated (R__) and (SR__), while references to the record in case no. 90-3689 are designated (90-3689: R__).

offender to eight years in prison on the cannabis offense. (SR254, 258) Case No. 90-3689 stems from three prosecutions in which respondent was charged with one count of felony DUI in each case. (90-3689:R16-17, 45-46, 70-71) He pled no contest to all three charges. (R264; 90-3689:R119) The court sentenced him to 10 years as a habitual offender in each case, based on the same findings it had made in sentencing him on the marijuana charge. (R268-274; 90-3689:R123-124) All sentences are concurrent to one another.

Respondent raised the suppression issue on direct appeal, and it was rejected. Key v. State, 16 FLW 2831, 2832 (Fla. 1st DCA Nov. 6, 1991). However, the court did vacate the habitual offender sentences, concluding that "[f]rom the record before the court, it is impossible to determine whether appellant's five prior felony convictions were sequential." Id. Petitioner subsequently filed notice to invoke this Court's jurisdiction, asserting that the First DCA decision passes upon a question previously certified to be of great public importance. Respondent filed notice of intent to raise the suppression issue in the manner of a cross-appeal if this Court accepts jurisdiction. This brief follows petitioner's brief on jurisdiction.

SUMMARY OF THE ARGUMENT

Petitioner has failed to invoke this Court's jurisdiction. Its notice that asserts that the decision below passes upon a question previously certified to be of great public importance. Where, as here, a district court of appeal cites a decision pending for review in this Court, the basis for jurisdiction is conflict. Submission of a jurisdictional brief by petitioner confirms that this is a conflict case, for no jurisdictional briefs are allowed on certified question cases.

Respondent acknowledges that the DCA's citation to a case now before this Court creates conflict jurisdiction, and leaves to the Court the decision whether to exercise its power of discretionary review under these circumstances. Respondent also reasserts his intention to present the suppression issue raised and addressed below, should this Court grant review.

ARGUMENT

PETITIONER HAS ASSERTED NO CONSTITUTIONAL BASIS FOR DISCRETIONARY REVIEW; IF THIS COURT HAS JURISDICTION, IT ARISES FROM CONFLICT, A BASIS NOT INVOKED BY PETITIONER.

In its notice to invoke this Court's jurisdiction, appellee identified the First DCA opinion as "a decision that passes upon a question previously certified to be of great public importance." The notice fails to invoke this Court's jurisdiction, for it states no authorized basis of review. Article V, Section (3)(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) provide for supreme court review of any decision that passes upon a question certified to be of great public importance, i.e., a question which the court so certifies in the case in which review is sought. The First DCA did not certify a question in this case, nor did petitioner move for certification as authorized in Florida Rule of Appellate Procedure 9.330(a). Instead, it filed notice to invoke this Court's jurisdiction on the day the First DCA issued its opinion. Having thus forgone the opportunity to seek certification, petitioner should be foreclosed from asserting it as a jurisdictional basis.

When a party seeks review of a decision that cites the opinion in another case pending review at that time in the supreme court, the proper jurisdictional basis is conflict under Rule 9.030(a)(2)(A)(iv). Jollie v. State, 405 So.2d 418, 420 (Fla. 1981). Although not asserted by petitioner, conflict jurisdiction arises from citation by the panel below to Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), rev. pending, Fla. Sup.

Ct. No. 77,751. Evidently, petitioner also regards this as a conflict case, for it filed a jurisdictional brief. No brief on jurisdiction is allowed in certified question cases. Fla. R.App. P. 9.120(d).

Respondent will leave to the Court the determination whether to accept the case on the basis of conflict. This Court should consider general agreement of all the district courts of appeal with the result in Barnes, with which the panel decision below comports. See Walker v. State, 576 So.2d 546 (Fla. 2d DCA 1990); Hayes v. State, 16 FLW D1672 (Fla. 3d DCA June 25, 1991); Williams v. State, 573 So.2d 451 (Fla. 4th DCA 1991); and Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990). Respondent also reasserts his intention to seek consideration of the suppression issue raised and addressed below, if the Court accepts this case.

CONCLUSION

Respondent requests that this Honorable Court consider the observations made herein in deciding whether to accept this case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 3rd day of December, 1991.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. BILLY KEY, Respondent.	)	CASE NO. 78,899

APPENDIX TO JURISDICTIONAL BRIEF OF RESPONDENT

NANCY A. DANIELS
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(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-