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FILED
SID J. WHITE
APR 8 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DENNIS BUCKHALTER,

Petitioner,

versus

CASE NO. 78,983
5DCA NO. 91-479

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with sexual battery and kidnapping. (R 284) He was tried by a jury on January 23 and 24, 1991, and found guilty of kidnapping. (R 169-170, 170-187, 310, 311) He was sentenced as an habitual offender on January 25, 1991, to spend his life in prison. (R 270, 336-337) On February 22, 1991, his motion to correct an illegal sentence was denied. (R 277-278, 341-342, 343)

Petitioner appealed to the Fifth District Court of Appeal which affirmed his conviction and sentence on October 31, 1991. Buckhalter v. State, 587 So.2d 1186 (Fla. 5th DCA 1991). This Honorable Court accepted jurisdiction of this cause on March 10, 1992.

STATEMENT OF THE FACTS

R[redacted] B[redacted], a student attending Southeastern Academy in Orlando, Florida, testified that she had met Petitioner through mutual friends and had gone out with him in groups of people and visited his apartment during the two weeks that she knew him. (R 27-29, 83, 98) She had a boy friend in her home town of San Antonio, Texas, whom she was going to visit on the occasion that Petitioner had given her a ride to the Orlando airport. (R 27-30, 40, 118) On August 4, 1990, she and Petitioner were going to go to a movie but instead ate dinner and went to his apartment by way of short visits to other residences. (R 30, 31-34, 87) At one stop, she said, she tried to call her boy friend but there was no answer. (R 34, 86-87)

At Petitioner's apartment, Ms. B[redacted] said, he told her that someone would pick her up and drive her back to the dormitory but that person never arrived. (R 35-36, 38) When Petitioner fell asleep, she telephoned her boy friend but hung up both telephones in the apartment when she heard Petitioner pick up the extension. (R 38, 39, 90-92, 94) She testified that Petitioner became angry and said she had been disrespectful to call another man on his telephone. (R 40) She then left the apartment, looking for a telephone. (R 40, 41, 95) When Petitioner drove up and said he would take her home, she got in his car. (R 41, 42, 95-96)

Ms. B[redacted] said Petitioner drove around a while, until he stopped his car on a dark street and told her she had two choices, to either have sex with him or be shot. (R 43-48) She

said they had sex in the back seat of his car, and he said they would do it a second time at his apartment. (R 49-55, 59) They returned to his apartment, stopping en route at a convenience store and a Waffle House, with Ms. B[redacted] driving Petitioner's car part of the trip. (R 55, 57-59, 103, 105-109) Ms. B[redacted] said she did not leave because she was not familiar with Orlando and had no idea how to get to her dormitory either from the dark area where they had parked or from the store and restaurant, and because she thought he had a gun. (R 27, 46, 48, 56, 58, 59, 82-84, 168) She never saw a weapon. (R 50, 82, 98, 99, 113; 165)

At Petitioner's apartment, Ms. B[redacted] got into his bed wearing Petitioner's T-shirt and socks. (R 60, 61, 110, 111) She said Petitioner fell asleep and she lay in bed until about six-thirty in the morning when she left the apartment and went to a nearby apartment from where she called her boy friend and her mother and the resident of the apartment called the police. (R 63, 64, 67-70, 111-113, 116, 123, 124, 126, 127, 132)

Petitioner gave an account to a sheriff's detective that agreed in many respects with Ms. B[redacted]' except that he said he had made no weapons threats, and that he had only told her that if she did not want to have sex with him he would put her out of the car. He said after they had had sex, she did not want to go back to her dormitory because they would "write her up" because she had missed curfew. (R 84, 148-161)

Ms. B[redacted] had no physical injuries. (R 101, 165) Petitioner never told her she could not leave but she said she did not feel free to leave. (R 95, 113, 117)

SUMMARY OF ARGUMENT

This Honorable Court is urged to recede from its decision in Burdick v. State, 17 F.L.W. S88 (Fla. February 6, 1992), and hold that the habitual offender does not apply to first-degree felonies punishable by life. The statute, whose amendments were enacted subsequently to this Honorable Court's approval of sentencing guidelines scoresheets' inclusion of first-degree felonies punishable by life as a discrete degree of felony, does not specifically include this degree of felony in its operation and, because this exclusion at the least creates an ambiguity, it must be interpreted in favor of the accused. The fact that the exclusion of first-degree felonies punishable by life from operation of the habitual offender may allow defendants convicted of similar offenses but sentenced under the sentencing guidelines to be treated more harshly than defendants sentenced as habitual offenders is not a valid basis for declaring first-degree felonies punishable by life to be included in the habitual offender statute when they clearly are not.

ARGUMENT

THE HABITUAL OFFENDER STATUTE DOES NOT APPLY TO OFFENSES WHICH ARE PUNISHABLE BY UP TO LIFE IN PRISON.

Petitioner was convicted of kidnapping in order to facilitate the commission of a sexual battery, a first-degree felony punishable by life. ss. 787.01(1)(a), 787.01(2), Fla.Stat. (1989). This Honorable Court has held in Burdick v. State, 17 F.L.W. S88 (Fla. February 6, 1992)[1], that first-degree felonies punishable by life are subject to enhancement under the habitual offender statute. s. 775.084(4)(a)(1), Fla.Stat. (1989). Nevertheless, Petitioner contends that the issue should be resolved otherwise.

Section 775.084(4)(a) provides:

> 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.

Life felonies and capital felonies are excluded from the operation of the habitual offender statute. See, e. g., Power v.

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[1] See also, e. g., Westbrook v. State, 17 F.L.W. S204 (Fla. March 26, 1992); Tucker v. State, 17 F.L.W. S204 (Fla. March 26, 1992); Henry v. State, 17 F.L.W. S204 (Fla. March 26, 1992); Lock v. State, 17 F.L.W. S205 (Fla. March 26, 1992); Green v. State, 17 F.L.W. S95 (Fla. February 6, 1992); Weems v. State, 17 F.L.W. S95 (Fla. February 6, 1992); Mixon v. State, 17 F.L.W. S96 (Fla. February 6, 1992).

State, 468 So.2d 511 (Fla. 5th DCA 1990); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). Likewise, first-degree felonies punishable by life are **not included** in the habitual offender statute. A criminal statute must be construed strictly and, where the meaning is unclear, most favorable to the accused. State v. Jackson, 526 So.2d 58 (Fla. 1988); s. 775.021(1), Fla.Stat. (1989). The exclusion of first-degree felonies punishable by life from Section 775.084(4)(a)'s provisions, at the least, creates an ambiguity about the Legislature's intent regarding its application or not to these crimes.

In Burdick, this Honorable Court also held that although Section 775.084(4)(a) states that the sentences for three degrees of felonies shall be for terms specified in that section, the use of the term "shall" does not render these punishments mandatory. Among the reasons for this conclusion is that:

> It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment. . . .

Id., 17 F.L.W. at S89. Similarly, the fact that the Legislature adopted the 1988 and 1989 habitual offender amendments subsequent to this Honorable Court's approval of Rule 3.988, which lists "1st pbl" as a separate degree of felony, yet did not provide for its application to first-degree felonies punishable by life, should render the habitual offender statute inoperable in cases involving this degree of felony. See, e. g., Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 &

3.988), 522 So.2d 374 (Fla. 1988); and The Florida Bar: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla. 1985).

In Burdick, this Honorable Court wrote that:

> . . . However, if first-degree felonies punishable by life imprisonment were not subject to enhancement under the habitual offender statute, then defendants convicted of first-degree felonies who were sentenced under the habitual offender statute would potentially receive harsher sentences than defendants convicted of first-degree felonies punishable by life who received guidelines sentences. . . .

Id., 17 F.L.W. at S88. In holding that the 1988 habitual offender statute is constitutional, however, the Fifth District Court of Appeal specifically addressed and rejected claims that the new statute was inequitable because it was under-inclusive and that it denied equal protection:

> . . . In Bell v. State, 369 So.2d 932 (Fla. 1979), the supreme court addressed an equal protection challenge to a criminal statute:
>
> > In order to constitute a denial of equal protection, the selective enforcement must be deliberately based on an unjustifiable or arbitrary classification. Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446, 453 (1962). The mere failure to prosecute all offenders is no ground for a claim of denial of equal protection. Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963).
>
> Id. at 934. . . . Equal protection does not require a state to choose between attacking every aspect of a problem or not attacking it at all. In re Estate of

Greenberg, 390 So.2d 40, 46 (Fla. 1980), appeal dismissed, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981).

King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990), review denied, 564 So.2d 1086 (Fla. 1990).

In addition, it has been recognized that the habitual offender statute may operate to treat those sentenced thereunder more leniently than defendants who are sentenced pursuant to the sentencing guidelines for identical crimes, yet this does not invalidate the statute. See, e. g., King v. State, 17 F.L.W. D662 (Fla. 2nd DCA March 4, 1992) (en banc opinion).

The reenactment of the habitual offender subsequent to the approval by this Honorable Court of the separate degree of first-degree felonies punishable by life with no provision for the statute's application to these felonies creates, at the least, an ambiguity which must be construed in Petitioner's favor. The possibility of disparity among sentences is not a valid basis for revising the habitual offender statute by applying it to a degree of felony which was omitted from the statute by the Legislature. Petitioner's sentence must be corrected.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court recede from its decision in Burdick v. State, 17 F.L.W. S88 (Fla. February 6, 1992), hold that the habitual offender statute does not apply to first-degree felonies punishable by life, and remand this cause for resentencing within the sentencing guidelines.

Respectfully submitted,
JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Dennis Buckhalter, P. O. Box 699, Sneads, Florida 32460, this 6th day of April, 1992.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

DENNIS BUCKHALTER,

Petitioner,

versus

CASE NO. 78,983
5DCA NO. 91-479

STATE OF FLORIDA,

Respondent.

A P P E N D I X

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
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ATTORNEY FOR PETITIONER

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED.

DAUKSCH, GRIFFIN and DIAMANTIS, JJ., concur.

William Henry GILLIAM, Appellant,

v.

STATE of Florida, Appellee.

No. 91–84.

District Court of Appeal of Florida, Fifth District.

Oct. 31, 1991.

Appeal from the Circuit Court for Orange County; Charles N. Prather, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David G. Mersch, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

AFFIRMED. *See Thomas v. State*, 583 So.2d 336 (Fla. 5th DCA 1991).

W. SHARP and COWART, JJ., concur.

DAUKSCH, J., concurs specially with opinion.

DAUKSCH, Judge, concurring specially.

I concur because I am bound by the *Thomas v. State*, 583 So.2d 336 (Fla. 5th DCA 1991) decision. However, I am moved to say that a reading of the transcript clearly shows this appellant was arrested and jailed for riding his bell-less bicycle merely in order to permit a search incident to arrest. Had appellant been given a summons ("ticket") no search would have been lawful. Thus it appears appellant's arrest was pretextual. That is, the arrest was made for a most trivial municipal ordinance violation in order to see if anything incriminating could be found. Pretextual searches cannot be allowed and had this been raised and established below and on appeal our decision might be different. *State v. McCrery*, 429 So.2d 394 (Fla. 1st DCA), *rev. den.*, 438 So.2d 834 (Fla.1983); *Thomas v. State*, 424 So.2d 193 (Fla. 5th DCA 1983); *Alvarez v. State*, 403 So.2d 1005 (Fla. 3d DCA 1981).

Dennis BUCKHALTER, Appellant,

v.

STATE of Florida, Appellee.

No. 91–479.

District Court of Appeal of Florida, Fifth District.

Oct. 31, 1991.

Appeal from the Circuit Court for Orange County; Richard F. Conrad, Judge.

James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James N. Charles, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

We recognize conflict with *Johnson v. State*, 568 So.2d 519 (Fla. 1st DCA 1990).

AFFIRMED.

COBB, W. SHARP and HARRIS, JJ., concur.