IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,015

THE STATE OF FLORIDA,
Petitioner,
vs.
LARRY COTTON,
Respondent.

MOTION TO ADOPT

COMES NOW, the Petitioner, the State of Florida, by and through undersigned counsel, and files this Motion to Adopt and as grounds therefore states:

1. The issue in the instant case is whether the sentencing portion of the habitual offender statute is permissive or mandatory. A copy of the opinion is attached hereto as Exhibit "A".

2. This exact issue is presently pending before this Court in State v. Washington, Case No. 77,626, which case has been briefed and was argued on November 4, 1991.

3. The State's postion is fully set forth in its brief in State v. Washington, and no useful purpose would be served to require another brief on the issue. A copy of the brief is attached hereto as Exhibit "B".

4. In the interest of judicial economy the State wishes to adopt its brief in State v. Washington as its brief herein.

WHEREFORE, the State respectfully requests that this Court grant the instant motion and permit the State to adopt its brief in State v. Washington, as its brief herein.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **MOTION TO ADOPT** was furnished by mail to **CYNTHIA A. GREENFIELD**, Attorney for Respondent, 241 Sevilla Avenue, Sevilla Center, Suite 805, Coral Gables, Florida 33134, on this 10th day of December, 1991.

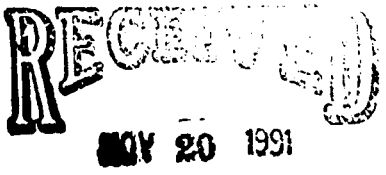
Marc E. Brandes

MARC E. BRANDES
Assistant Attorney General

ss/

90-133302-V

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.



IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1991

LARRY COTTON, **

Appellant, **

vs. ** CASE NO. 90-2620

THE STATE OF FLORIDA, ** #90-7117-B

Appellee. **

Opinion filed November 19, 1991.

An Appeal from the Circuit Court of Dade County, David Tobin, Judge.

Bennett H. Brummer, Public Defender and Cynthia A. Greenfield, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Marc E. Brandes, Assistant Attorney General, for appellee.

Before BASKIN, JORGENSON and GODERICH, JJ.

CORRECTED OPINION

PER CURIAM.

The defendant, Larry Cotton, appeals his conviction for armed robbery and the sentence imposed pursuant to the habitual

EXHIBIT A

violent felony offender statute. We affirm the conviction,[1] but reverse the sentence and remand for a new sentencing hearing.

The trial court found the defendant to be a habitual violent felony offender. Thereafter, the State represented to the trial court that pursuant to Section 775.084(4)(b), Florida Statutes (1989),[2] it had no alternative but to sentence the defendant to a life sentence with a minimum of fifteen years.[3] The record is not clear as to whether the trial court accepted the State's argument that it did not have discretion in sentencing the defendant. The trial court sentenced the defendant to a life sentence with a minimum of fifteen years.

---

[1] The defendant's conviction is affirmed based on the authority of Richardson v. State, ____ So.2d ____, (Fla. 3d DCA, Case no. 90-2374, opinion filed August 13, 1991) [16 FLW D2154].

[2] Section 775.084(4)(b), Florida Statutes (1989), reads in pertinent part as follows:

> 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.

[3] The State argued to the trial court as follows:

> That being the case, since the jury found him guilty of first degree felony punishable by life, under statute 775.084 subsection four A, excuse me, four B, the Court in the case of a felony in the first degree, the Defendant is to be sentenced for life and such offender should not be eligible for release for 15 years.
>
> That is the sentence for violent felony, habitual offender, life with a minimum of 15. No discretion to give him anything other that [sic]. (emphasis added).

The defendant contends that the State incorrectly argued to the trial court that it had no choice but to sentence the defendant to life with a minimum of fifteen years. We agree.

The language in section 775.084(4)(b), which states that "[t]he court . . . may sentence the habitual violent felony offender as follows: . . . ." (emphasis added), is permissive. Therefore, the trial court has discretion when sentencing a defendant pursuant to this statute. See generally, Henry v. State, ____ So.2d ____, (Fla. 3d DCA, Case No. 89-2783, opinion filed June 11, 1991) [16 FLW D1545]. Thus, the defendant's sentence is vacated and remanded for a new sentencing hearing. On remand, the trial court may, within its discretion, reimpose the present sentence or impose a lesser sentence.

We certify conflict with State v. Allen, 573 So. 2d 170 (Fla. 2d DCA 1991); Pittman v. State, 570 So. 2d 1045 (Fla. 1st DCA 1990), rev. denied, 581 So. 2d 166 (Fla. 1991); and Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 291 (Fla. 1991).

Conviction affirmed; sentence reversed and remanded for a new sentencing hearing.

Supreme Court of Florida

FRIDAY, JANUARY 24, 1992

STATE OF FLORIDA

Petitioner,

vs. Case No.79,015

LARRY COTTON

Respondent.

* * * * * * * * * * * *

Petitioner's Motion To Adopt its brief in State v. Washington, as its brief herein is granted.

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court

bdm
c: Marc E. Brandes, Esq.
Cynthia Greenfield, Esq.

91-130872-Hatter

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,626

THE STATE OF FLORIDA,

Petitioner,

vs.

LEM ADAM WASHINGTON,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON THE MERITS

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EXHIBIT B

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INTRODUCTION

The Petitioner the State of Florida, was the Appellee in the District Court of Florida, Third District. The Respondent Lem Adam Washington, was the Appellant below. The parties will be referred to as they stand before this court. The symbol "A" will designate the appendix brief; the symbol "R" will designate the record on appeal and the symbol "T" will designate the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with armed robbery, and after a jury trial he was convicted as charged (A-1). After appropriately finding that Respondent was a habitual violent felony offender, the trial court sentenced him to an extended term of life imprisonment without eligibility for release for fifteen years (A.3). The Third District held that sentencing under section 775.084(4)(b)(i) is not mandatory and that a trial court is free to fashion a sentence in excess of the guidelines but below the level enumerated in the statute. This sentence does not have to be justified, with reasons, as a departure from the guidelines. (A-3). The Third District then remanded for resentencing because certain comments of the trial court indicated that it thought sentencing was mandatory.

SUMMARY OF THE ARGUMENT

A trial court initially has the discretion to determine whether to sentence a defendant under the habitual offender statute, section 775.084, Florida Statute (Supp. 1988). If the trial court decides that such a sentence is proper, regardless of whether a defendant is a habitual felony offender or a habitual violent felony offender, the trial court is required to impose the sentence in conformity with sections 775.084(4)(a) and 775.084(4)(b). In the context of the entire amended statute, the "shall" of (4)(a) and the "may" of (4)(b) must be given an obligatory meaning.

POINT INVOLVED ON APPEAL

WHETHER THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(a) FOR HABITUAL FELONY OFFENDERS AND THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(b) FOR HABITUAL VIOLENT FELONY OFFENDERS ARE MANDATORY WHEN THE TRIAL COURT HAS FOUND THE DEFENDANT TO BE EITHER A HABITUAL FELONY OFFENDER OR A HABITUAL VIOLENT FELONY OFFENDER AND WHEN THE TRIAL COURT HAS DETERMINED THAT IMPOSITION OF SENTENCE UNDER THE HABITUAL OFFENDER STATUTE, AND NOT PURSUANT TO THE SENTENCING GUIDELINES, IS NECESSARY FOR THE PROTECTION OF THE PUBLIC.

ARGUMENT

THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(a) FOR HABITUAL FELONY OFFENDERS AND THE SENTENCES ENUMERATED UNDER SECTION 775.084(4)(b) FOR HABITUAL VIOLENT FELONY OFFENDERS ARE MANDATORY WHEN THE TRIAL COURT HAS FOUND THE DEFENDANT TO BE EITHER A HABITUAL FELONY OFFENDER OR A HABITUAL VIOLENT FELONY OFFENDER AND WHEN THE TRIAL COURT HAS DETERMINED THAT IMPOSITION OF SENTENCE UNDER THE HABITUAL OFFENDER STATUTES, AND NOT PURSUANT TO THE SENTENCING GUIDELINES, IS NECESSARY FOR THE PROTECTION OF THE PUBLIC.

This Court in Whitehead v. State, 498 So.2d 863 (Fla. 1986) and Winters v. State, 522 So.2d 816 (Fla. 1988), held that the enactment of section 921.001, Florida Statutes (1985) implicitly repealed section 775.084, Florida Statutes (1985). Accordingly, a habitual offender sentence could only be imposed if there were valid reasons to depart from the sentencing guidelines and the fact that the defendant was a habitual offender was not a valid reason for departure. In State v. Brown, 530 So.2d 51 (Fla. 1988) this Court applied the foregoing holdings to section 775.084(4)(a)(1), Florida Statutes (1985). This Court held the said section, which states that the court shall sentence a habitual offender in the case of a felony of the first degree to life, was "implicity repealed by the enactment of section 921.001, Florida Statutes (1985), to the extent that the former may be construed as requiring a mandatory life penalty."

Id. at 53. (Emphasis in original.) This Court held that section 775.84(4)(a)(1) still was viable within the gambit of the guidelines. Said section could be used by the trial court as the maximum sentence authorized by law and a departure sentence could be entered anywhere about the recommended range to the maximum, as long as valid reasons were given. Once again it was disclared that habitual offender status itself was not a valid reason.

In response to and to overrule the foregoing decisions, the legislature amended the habitual offender statute, section 775.084, Florida Statute (Supp. 1988). The relevant portion of the amended statute section 775.084(4) states:

> (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.
>
> (c) If the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3).
>
> (d) A sentence imposed under this section shall not be increased after such impositon.
>
> (e) A sentence imposed under this section shall not be subject to the provisions of s.921.001. The provisions of chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in s.944.275(4)(b).

The statute continues the practice, pursuant to (4)(1) that upon proper notice and sufficient proof, the trial court must determine that the defendant is a habitual offender. This is a non-discretionary determination and only after it is made does the actual sentencing aspects of the statute become operable. Upon finding a defendant to be a habitual offender, section (4)(1) requires the trial court to exercise its discretion by determining if a habitual sentence will be imposed. The trial court after finding that the protection of the public

would not be served by a habitual offender sentence, can sentence without regard to this section. This finding then allows the trial court, in the exercise of its discretion, to sentence the defendant under the sentencing guidelines and to depart from the guidelines, either upward or downward, as long as a valid reasons are given. Upon exercising its discretion and finding that the protection of the public would be served by a habitual offender sentence, the trial court, pursuant to (4)(e) is not longer bound by the sentencing guidelines. The trial court is then bound by the mandatory sentence contained in sections (4)(a) and (4)(b).

The foregoing interpretation was first recognized and accepted in Donald v. State, 562 So.2d 792 (Fla. 1 DCA 1990), review denied, 576 So.2d 291 (Fla. 1991). In Donald, the court found that the "shall" of section (4)(a) and the "may" of section (4)(b) were both obligatory. These findings were based on the proper statutory construction by examining the context which the words were used and the legislative intent. See S.R. v. State, 346 So.2d 1018 (Fla. 1977). The court found both "shall" and "may" to be obligatory and held that "[o]nce the court decides, however, to sentence a defendant as a habitual felony offender or habitual violent felony offender, then the court is required to impose a sentence in conformity with sections 775.084(4)(a) or 775.084(4)(b), Id. at 795. The Second District has also accepted this interpretation State v. Allen, 573 So.2d 170 (Fla. 1 DCA 1991).

This is the most reasonable interpretation of the amended statute. The trial court, simply by finding that the protection of the public does not warrant a habitual offender sentence, may fashion any sentence it wishes, as long as said sentence does not violate the sentencing guidelines. Such sentences may include sentences below the guidelines; sentences within the recommended range; sentences within the permitted range; guideline sentences with periods of probations as long as the total sentence does not exceed the statutory maximum; and sentence above the guidelines as long as they are supported by valid reasons. The trial court, by finding that the protection of the public warrants a habitual offender statute, then submits to the will of the legislature and must impose without deviation, the sentences listed in (4)(a) and (4)(b).

The Third District, in the instant case, disagreed with the foregoing legal analysis. Without giving any thought to the fact that the amended statute can operate outside of the guidelines, the Third District relied on this Court's preamendment decision of State v. Brown, supra for sole support that the sentences in (4)(a) and (4)(b) are not mandatory. The court acknowledged conflict with State v. Donald, supra, and also noted that Donald did not cite to Brown. Smith v. State, 574 So.2d 1195 (Fla. 3 DCA 1991).

In Henry v. State, 16 FLW D1545 (Fla. 3 DCA June 11, 1991), the Third District finally gave analytical support to its holding in Smith.

> The State argues that the 1988 and 1989 amendments to the habitual offender statute undercut *Brown* on the point at issue here. *See* ch. 89-280, §1, Laws of Fla.; ch. 88-131 §6, Laws of Fla. We disagree. *Brown* was announced after adjournment of the 1988 legislature. See 1988 Laws of Fla., at i. While the 1988 legislation made several substantive changes in the habitual offender statute, the legislation did not address the "shall sentence" provision of the habitual offender statute. In 1989, after *Brown* had been announced, the legislature amended another part of the habitual offender statute but reenacted paragraph 775.084(4)(a)-the "shall sentence" provision-without change. Under ordinary principles of statutory construction, that is at least some indication that the legislature approved of the *Brown* court's construction of the unchanged part of the statute. *See Davies v. Bossert*, 449 So.2d 418, 420 (Fla. 3d DCA 1984).
>
> While we are bound by *Brown* the *Brown* interpretation is also the most logical one. It results in harmonious reading of the sentencing provisions of the paragraphs (4)(a) (habitual felony offender) and (4)(b) (habitual violent felony offender). It is illogical to assume that the legislature intended to confer sentencing discretion in subparagraphs 775.084(4)(a)(2) and (3) ("a term of years not exceeding 30" and "a term of years not exceeding 10") and throughout paragraph 775.084(4)(b) ("*may* sentence the habitual violent felony offender as follows") (emphasis added), while eliminating sentencing discretion solely for habitual felony offenders convicted of first degree felonies. There is no reasonable or discernible basis for

> such a distinction. *See S.R. v. State*, 346 So.2d 1018, 1019 (Fla. 1977)(interpretation of the word "shall" as a mandatory or discretionary "depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute.").
>
> The interpretation advanced by the State would lead to one other anomaly which should be mentioned. A trialcourt can opt out of the habitual offender statute "[i]f the court decides that imposition of *sentence* under this section is not necessary for the protection of the public ...." §775.084(4)(c) (emphasis added. There will undoubtedly be cases in which the trial court concludes that an extended sentence is necessary for protection of the public-but not a life sentence. Under the interpretation advanced by the State, in such a circumstance the sentencing judge would not only be able to impose a guidelines sentence. We do not think the legislature intended to create an all or nothing, life or guidelines choice in the situation.

Id. at 1545 (Footnote omitted).

Upon close scrutiny, the State submits that the Third District's interpretation is not the most logical one and therefore should be rejected by this Court. The Third District erroneously rejected the State's contention that the 1988 and 1989 amendment overruled Brown. It did so simply because the amendments did not address the "shall sentences" of (4)(a). However, this analysis completely misses the point since Brown held that sentences under (4)(a) were not mandatory since the section was implicitly repealed by the sentencing guidelines and

therefore such a sentence could only be imposed under a valid departure from the guidelines. With the 1988 Amendments, habitual offender sentences were no longer controlled by the guidelines and therefore the mandatory sentences of (4)(a) and the new section of (4)(b) could be imposed regardless of the guidelines. Therefore, the fact that the Amendments did not deal with the "shall" sentence is irrelevant to the analysis of the problem.

The Third District rejection of "shall" in (4)(a) as obligatory because it would create an anamolous situation because the "may" in (4)(b) would be permissive, once again lacks a solid foundation. This supposed anamoly disappears quickly once the proper statutory construction for "may" is applied. As stated hereinbefore, "may" is obligatory when viewed in the entire context of the statute and the legislative intent of the amended statute. Therefore when both "shall" of (4)(a) and "may" of (4)(b) are interpreted as obligatory, both sections of the statute are consistent with each other and with the legislative intent of the amendments.

Finally, the Third District rejected the mandatory requirement of (4)(a), by finding that the legislature did not intend to give trial judges varying degrees of discretion under the statute. This position lacks clarity of thought since the legislature clearly meant to give trial judges the discretion to

fashion nonhabitual offender sentences even when the defendant was determined to be a habitual offender. The legislature also sought to divest trial judges of sentencing discretion only after a determination that a habitual offender sentence was to be imposed.

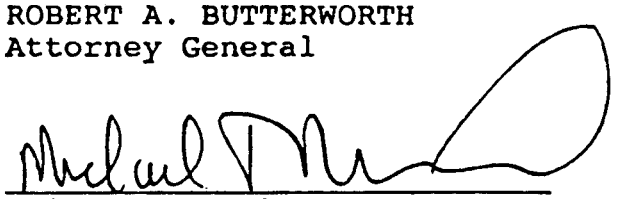
The State submits that to accept the Third District's interpretation of section 775.084, Florida Statutes (Supp. 1988) would violate well established principles of statutory construction. First, the Legislatue is presumed to be cognizant of judicial construction of a statute when contemplating making changes in the statute. State ex rel. Quigley v. Quigley, 463 So.2d 224 (Fla. 1985). Second, it is presumed that when the legislature amends a statute, it intends to accord the statute a meaning different from that accorded it before the amendment Seddon v. Harpster, 403 So.2d 409 (Fla. 1981). Applying these principles hereto, it is clear that the legislature amended section 775.084 in order to change the interpretation this Court gave the statute prior to the amendment. Any other interpretation of the statute would frustrate the legislative intent and would only require further legislation to once again clarify that it means to gave habitual offenders lengthy mandatory sentences when it is necessary for the protection of the public.

CONCLUSION

Based on the foregoing points and authorities the State respectfully requests that this Court disapprove of and quash the instant decision.

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 PETITIONER'S BRIEF ON THE MERITS was furnished by mail to RONALD S. LOWY, Attorney for Respondent, Barnett Bank Building, 420 Lincoln Road, Penthouse (7th Floor) Miami Beach, Florida 33139 on this 24 day of July, 1991.

MICHAEL J. NEIMAND
Assistant Attorney General

/ml