IN THE SUPREME COURT OF FLORIDA

JAMES MONROE RAULERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,051

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal rejected petitioner's assertion that he could not be sentenced as a habitual felony offender for a first-degree felony punishable by life, armed robbery. Raulerson v. State, 16 FLW D2889 (Fla. 1st DCA Nov. 12, 1991)(copy attached). The court noted that the issue had been decided adversely to petitioner in Burdick v. State, 16 FLW D1963 (Fla. 1st DCA July 25, 1991)(en banc), rev. pending, Fla. S.Ct. No. 78,466. The court also rejected petitioner's argument that the violent felony provisions of section 775.084, Florida Statutes, violate the constitutional prohibitions against double jeopardy and ex post facto laws, The court cited to Perkins v. State, 16 FLW D1991 (Fla. 1st DCA July 31, 1991), rev. pending, Fla. S.Ct. No. 78,613 as authority for rejection of the constitutional challenge.

SUMMARY OF THE ARGUMENT

The panel decision cites as controlling authority two First District Court of Appeal decisions now pending review in this Court. Conflict jurisdiction arises from the reliance by the court of appeal on the cited cases.

ARGUMENT

THE COURT SHOULD ACCEPT THIS CAUSE FOR REVIEW ON CONFLICT WITH TWO **DECISIONS** NOW PENDING **REVIEW** BEFORE THIS **COURT.**

A district court of appeal opinion that cites as controlling authority a decision pending review before this Court constitutes prima facie express conflict allowing this Court to exercise its jurisdiction. Jollie v. **State**, 405 So.2d 418, 420 (Fla. 1981). **In** rejecting petitioner's contention that he could not be sentenced **as** a habitual offender for a first-degree felony punishable by life, the First District Court of Appeal cited **as** controlling authority Burdick **v.** State, **16** FLW D1963 (Fla. 1st DCA July 25, 1991)(en banc), rev. pending, Fla. S.Ct. No. 78,466. If this Court decides in Burdick that a first-degree felony punishable by life imprisonment is **not** subject to enhancement under section 775.084, Florida Statutes (1989), petitioner will have received an illegal sentence.

The panel opinion also cites Perkins v. **State**, 16 FLW D1991 **(Fla. 1st DCA** July **31,** 1991), rev. pending, **Fla.** S.Ct. No. **78,613, as** controlling authority for its rejection of the argument that the habitual violent provisions of the statute violate constitutional double jeopardy and ex post facto protections. This Court has accepted review in Perkins. If this Court invalidates the habitual violent **felony** provisions in Perkins or another similar case, petitioner will have received a sentence lacking a valid statutory basis.

The citations to Burdick and Perkins create direct and express conflict under Article V, Section 3(b)3 of the Florida

Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). This Court should accept this case for review pending the decisions in those cases.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court accept this case for review.

Respectfully submitted,

NANCY A. DANIELS
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Amelia Beisner, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 17th day of December, 1991.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

off" certain drug dealers at Hurlbert Field. He followed her plan to first sell cocaine to some drug dealers and then forcibly recoup the money and the drugs. Instead, one of the drug dealers in the confrontation that ensued shot his girlfriend. Barnes managed to get away, taking his girlfriend to his mother's home and then to the hospital for medical treatment. He disappeared for fear of retaliation. No physical evidence was found from which this account or the state's theory could be corroborated.

After the jury began its deliberations, the jury asked the court whether Attachment "A", was "a sworn-to statement by that officer." Defense counsel now objected that Attachment "A" was inadmissible because it contained the unsworn hearsay statements attributed to Barnes' stepfather, who was apparently unavailable to testify.

The state responded that even though Attachment "A" contained hearsay, it was already in evidence and under oath. The court then instructed the jury as follows:

> Gentlemen of the Jury, in answer to your question, the statement attached to the search warrant which has been admitted into evidence, the statement referenced as Attachment "A", was a statement made under oath by the law enforcement officer before a judge in Pensacola, Florida, in order to establish probable cause for the search warrant, The Court will advise you that because the requirements of a probable cause finding are less restrictive than the evidentiary requirements in a trial, that there might be some information contained in that statement that might not be admissible in a trial in the nature of hearsay testimony; however, the statement is in evidence, it was sworn to by the police officer before a magistrate, and it may be considered by you as evidence in this case.

In reviewing appellant's contention that fundamental error took place in the circumstances of this case, we are compelled to agree. The trial court's admission of Attachment "A" into evidence, despite the appellant's lack of contemporaneous objection, goes to the very heart of the fairness of the trial here. It is well established that the fundamental error doctrine is to be applied only in those rare instances where the error is so substantial that it goes to the foundation of the case. See *Ray v.* State, 403 So.2d 956 (Fla. 1981). Here, no physical evidence was brought forth linking the appellant to the crime. The question of who committed the crime heavily depended upon an evaluation of the credibility of several witnesses—particularly the victim and the appellant. When the jury interrupted its deliberations here to query the judge on what weight to attach to Attachment "A," the trial court instructed, with some qualification, that the jury could consider the police officer's sworn statement to the judge which consists, in pertinent part, of the stepfather's statement that the appellant told his mother he shot the victim.

A search warrant, with any attachments thereof such as an affidavit of probable cause, requires a judicial finding that evidence of crime will be found in a location or a crime has been committed. By admitting the search warrant and the subject attachment into evidence, the trial court permitted the placement before the jury of a judicial determination that either a crime had been committed or that evidence of its commission would be found, thereby removing this issue from the province of the jury. Once admitted, the trial court's jury instructions on Attachment "A" merely qualified the degree of probative value of the police officer's sworn statement to the judge containing the underlying prejudicial evidence that the police officer witnessed the stepfather's statement that the appellant told his mother he shot the victim. Wholly admitting these multiple hearsay statements, which do not fall within any recognized exception and are highly prejudicial, constitutes fundamental error which deprived the appellant of his right to a fair trial, particularly in view of the unique factual circumstances in the record of this case. In finding fundamental error here, we emphasize that the court's application of the doctrine is narrowly restricted to the court's examination of the detailed record in this cause.

On the second issue, whether the trial court abused its discretion in allowing the prosecutor to impeach a state witness, we find that appellant's contention is without merit and affirm.

Accordingly, the trial court's conviction is reversed and remanded for a new trial. (SHIVERS and WOLF, JJ., CONCUR.)

'Case no. 90-469, where the appellant seeks a writ of habeas corpus on a belated appeal, and case no. 90-2423, wherein appellant directly challenges his conviction, were consolidated for all purposes by this court's September 17, 1990 order.

* * *

Criminal law—Sentencing—Habitual offender—First-degree felony punishable by life is subject to enhancement under habitual offender statute—Habitual violent felony offender statute does not violate constitutional prohibitions against double jeopardy and ex post facto laws

JAMES MONROE RAULERSON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-3801. Opinion filed November 12, 1991. An Appeal from the Circuit Court for Duval County. John D. Southwood, Judge. Nancy Daniels, Public Defender; and Glen Gifford, Assistant Public Defender, for Appellant. Robert A. Butterworth, Attorney General; and Amelia Beisner, Assistant Attorney General, for Appellae.

(PER CURIAM.) We affirm appellant's first issue without comment. The second issue, whether a sentence for committing a first-degree felony punishable by life may be enhanced under Section 775.084, Florida Statutes (1989), has been decided adversely to appellant in *Burdick v. State*, 16 F.L.W.D1963 (Fla. 1st DCA July 25, 1991) (en banc), *petition for review filed*, No. 78466 (Fla. Aug. 20, 1991). The third issue, whether the violent-felony provisions of section 775.084 violate the constitutional prohibitions against double jeopardy and ex post facto laws, has been decided adversely in *Perkins v. State*, 16 F.L.W.D1991 (Fla. 1st DCA July 31, 1991), *petition for review filed*, No. 78613 (Fla. Sept. 17,1991).

AFFIRM. (BARFIELD, J., CONCURS. ZEHMER, J., specially concurring with written opinion. ERVIN, J., concurring and dissenting with written opinion.)

(ZEHMER, J., Specially concurring.) I concur in affirmance on all issues. I concur on the third issue only because it was previously decided by this court in *Perkins v. State*, 16F.L.W. D1991 (Fla. 1st DCA July 31, 1991), *petition for review filed*, No. 78613 (Fla. Sept. 17, 1991). Because I have serious concern that section 775.084(1)(b), Florida Statutes (1989), is facially unconstitutional, my concurrence is made with the same reservations discussed in my special concurring opinion in *Hall v. State*, No. 91-581 (Fla. 1st DCA Nov. __, 1991).

(ERVIN, J., concurring and dissenting.) I agree to affirm on issues one and three. Regarding the issue of whether conviction of a first-degree felony punishable by life is subject to enhancement under the habitual-offender statute, I dissent for the same reasons stated in my dissent in *Burdick v. State*, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (en banc), *petition for review filed*, No. 78466 (Fla. Aug. 20,1991).

* * *

Workers' compensation—Jurisdiction—Claim seeking determination of correct date of permanent total disability and payment of supplemental benefits from date of PTD—Judge of compensation claims erred in dismissing entire claim for lack of jurisdiction on basis that no dispute existed regarding claimant's PTD status where dispute did exist as to when claimant became entitled to supplemental benefits

MARIA CASTRO, Appellant, v. FELLSMERE MANAGEMENT and NATIONWIDE INSURANCE COMPANY, Appellees. 1st District. Case No. 90-2957. Opinion filed November 15, 1991. Appeal from an order of the Judge of Compensation Claims, Judith Brechnct O. John Alpizer of Palm Bay; Bill McCabe of Shepherd, McCabe & Cooley, Longwood, for appellant. James M.