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FILED
SID J. WHITE
DEC 11 1991
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES F. BAKER, :

Petitioner, :

vs. : Case No. 79,054

STATE OF FLORIDA, :

Respondent. :

______________________________:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN S. LYNCH
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STATEMENT OF THE CASE AND FACTS

On January 3, 1990, the State Attorney for the Twelfth Judicial Circuit, Sarasota County, Florida, filed an information charging James Franklin Baker in two counts with two single-episode December 5, 1989 robberies with a firearm, first degree felonies punishable by life. (R288, 289) An amended information filed April 2, 1990 charged essentially the same offenses but redescribed the property as to one of the counts. (R295,296)

Mr. Baker faced possible habitual offender treatment. (R3,340) The trial court stated during a colloquy as to whether Mr. Baker would accept a plea "[I]f he's convicted of robbery with a firearm then I wouldn't have much choice but to give him life in prison; is that correct?" and the State assented to that statement. (R4,5) Mr. Baker went to trial and was found guilty of the lesser included offenses of robbery with a weapon, which is a first degree felony. (R252,253,307,308) Mr. Baker would have only scored 22 to 27 years under the sentencing guidelines if he had been found guilty as charged; however, apparently because the State was seeking habitual offender status, the State prepared no post-verdict scoresheet. (R3)

On April 26, 1990, Mr. Baker was habitualized and sentenced to life in prison concurrent on each count. (R259-280,343,344) At sentencing, the trial judge expressed distaste for sending people to prison and said:

> I would probably not sentence you to life, I would probably sentence you to 30 years but my interpretation of the statute is that I'm

> given no discretion if it is a first degree felony and I have made the finding that you're an habitual felony offender. Maybe another Court will tell me I'm wrong on that. So I sentence you at this time to life imprisonment. (R278,279)

Mr. Baker filed a timely notice of appeal on May 15, 1990. (R381) On September 13, 1991, the District Court of Appeal, Second District, affirmed Mr. Baker's conviction and sentence by per curiam affirmance without opinion or case citation, said decision being subsequently reported as Baker v. State, 585 So.2d 938 (Fla. 2d DCA 1991). Mr. Baker filed a timely motion for rehearing, serving it on September 16, 1991. On November 8, 1991, the District Court of Appeal denied the motion for rehearing but for purposes of clarification withdrew the original opinion and issued a substitute opinion citing cases and noting apparent conflict with a case of this Court, as well as two cases from another District Court of Appeal. The denial of the motion for rehearing and the substitute opinion currently appear as Baker v. State, 16 FLW D2824 (Fla. 2d DCA Nov. 8, 1991). A copy of said opinion is attached hereto. Mr. Baker filed a Notice to Invoke Discretionary Jurisdiction of this Court with the District Court of Appeal, serving said notice on December 3, 1991.

SUMMARY OF THE ARGUMENT

The trial judge indicated he probably would not sentence Mr. Baker to life in prison in connection with his habitualized sentences for two first degree felonies but for the fact he believed the statute made a life sentence mandatory. This ruling and the District Court of Appeals' affirmance were in conflict with a decision of this Court and are in conflict with decisions of other district courts of appeal. This Court should take jurisdiction and reverse the decision of the District Court of Appeals for the Second District.

ARGUMENT

ISSUE

THIS COURT HAS JURISDICTION BASED UPON CONFLICT WITH THIS COURT'S DECISION IN STATE v. BROWN, 530 So.2d 51 (FLA. 1988) AS WELL AS BASED UPON CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL SUCH AS HENRY v. STATE, 581 So.2d 928 (Fla. 3d DCA 1991), STATE v. EASON, 16 FLW D 2211 (Fla. 3d DCA Aug. 20, 1991) AND JONES v. STATE, 16 FLW D2871 (Fla. 5th DCA Nov. 14, 1991).

This case involves the trial court's sentence of Mr. Baker to habitualized life in prison on a first degree felony and the District Court of Appeal's affirmance of said sentence, both the sentence and the affirmance being based upon the mistaken assumption that when a judge habitualizes a defendant on a first degree felony, the judge's hands are tied, requiring that the sentence be one to life in prison. Although the District Court of Appeals' opinion is somewhat cryptic, its citation to its own decisions and note of apparent conflict with a decision of this Court and two decisions of the Third District Court of Appeal are sufficient to vest jurisdiction in this Court. Jollie v. State, 405 So.2d 418 (Fla. 1981).

In its opinion in the present case, the District Court of Appeals cited to State v. Allen, 573 So.2d 170 (Fla. 2d DCA 1991) and Walsingham v. State, 576 So.2d 365 (Fla. 2d DCA 1991) in support of its affirmance. Both cases hold that a life sentence is mandatory when a defendant is habitualized on a first degree

felony. Allen is pending review in this Court, with oral argument having been recently re-scheduled from December of 1991 to March of 1992. In its opinion, the District Court also noted apparent conflict with this Court's opinion in State v. Brown, 530 So.2d 51 (Fla. 1988) and the opinions of the Third District Court of Appeals in Henry v. State, 581 So.2d 928 (Fla. 3d DCA 1991) and State v. Eason, 16 FLW D2211 (Fla. 3d DCA Aug. 20, 1991). These cases, as well as the recently decision of the Fifth District Court of Appeals in Jones v. State, 16 FLW D2871 (Fla. 5th DCA Nov. 14, 1991), all hold that when a defendant is habitualized on a first degree felony, the length of sentence is discretionary and a life sentence is not mandatory.

The opinion of the District Court of Appeals is also in direct, but less apparent, conflict with its own decision in State v. Davis, 559 So.2d 1279 (Fla. 2d DCA 1990). Davis held that a sentence of ten years probation is not an illegal sentence for a habitualized third degree felony, even if said sentence would constitute an illegal downward departure if the defendant had been sentenced under the Sentencing Guidelines. Davis apparently relies upon the fact that although the Habitual Felony Offender Statute states that one of its purposes is to allow extended terms of imprisonment, the statute, at least as it concerns Habitual Felony Offenders as opposed to Habitual Violent Felony Offenders, does not require any incarceration for any offense. Compare Section 775.084(1)(a), Florida Statutes (1989) with Section 775.084(4)(a), Florida Statutes (1989). Rather, the statute speaks of lengths of

terms of sanctions rather than the nature of sanctions to be imposed. Clearly, the Legislature knows how to speak when it intends that a term of imprisonment be required as a criminal sanction; when it so intends, the Legislature speaks of a "term of imprisonment" or denial of probation and not just a "term." Compare Section 316.193(6)(b) and Section 316.193(c), Florida Statutes (1989); Section 775.082(1), Florida Statutes (1989); Section 775.087(2)(a), Florida Statutes (1989); Section 775.0823, Florida Statutes (1989); Section 893.13(1)(c)(2), Florida Statutes (1989); Section 893.13(1)(e)(1), Florida Statutes (1989); Section 893.135(1)(c)(1)(2), Florida Statutes (1989); Section 893.135(3), Florida Statutes (1989); and Section 893.20, Florida Statutes ((1989).

The difference between the 30 year sentence Mr. Baker probably would have received, if the trial court and the District Court of Appeal had correctly followed the law, and the habitualized life sentence he actually did receive, is a significant one. Mr. Baker's sentence should not stand merely due to his misfortune in not having his initial appellate review before this Court or the District Courts of Appeals for the Third or Fifth Districts. Nor should it stand merely because of the accidental circumstance that Mr. Allen preceded him through the pipeline. Compare Moreland v. State, 582 So.2d 618, 620 (Fla. 1991) ("It would be fundamentally unfair to deny Moreland the relief provided in Spencer merely because his sentence directed his appeal to a court other than this one.").

This Court should grant review and reverse the decision of the District Court of Appeals for the Second District.

CONCLUSION

The decision of the District Court of Appeals is in conflict with this Court's decision in Brown and the decisions of other District Courts of Appeals. This Court should grant review and reverse the decision of the lower court.

APPENDIX

PAGE NO.

1. Opinion from the Second District Court in Baker v. State, Case No. 90-01426, filed on November 8, 1991.

APPENDIX

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES FRANKLIN BAKER, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 90-01426

Opinion filed November 8, 1991.

Appeal from the Circuit Court
for Sarasota County;
John R. Blue, Judge.

James Marion Moorman, Public
Defender, Bartow, and John
S. Lynch, Assistant Public
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Robert A. Butterworth, Attorney
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William I. Munsey, Jr., Assistant
Attorney General, Tampa, for
Appellee.

Received
NOV - 8 1991
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ON MOTION FOR REHEARING

PER CURIAM.

The appellant's motion for rehearing is denied. For the purpose of clarification, however, the original opinion, issued on September 13, 1991, is hereby withdrawn and the attached opinion is substituted.

SCHEB, A.C.J., and THREADGILL and ALTENBERND, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES F. BAKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 90-01426

Opinion filed November 8, 1991.

Appeal from the Circuit Court
for Sarasota County;
John R. Blue, Judge.

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Appellate
Public Defen...

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Defender, Bartow, and John
S. Lynch, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
William I. Munsey, Jr., Assistant
Attorney General, Tampa, for
Appellee.

PER CURIAM.

Affirmed. See State v. Allen, 573 So.2d 170 (Fla. 2d DCA 1991) and Walsingham v. State, 576 So.2d 365 (Fla. 2d DCA 1991). We also note apparent conflict with State v. Brown, 530 So.2d 51 (Fla. 1988), Henry v. State, 581 So.2d 928 (Fla. 3d DCA

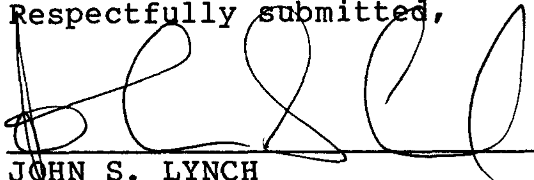
1991) and State v. Eason, 16 F.L.W. D2211 (Fla. 3d DCA Aug. 20, 1991).

SCHEB, A.C.J., and THREADGILL and ALTENBERND, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of December, 1991.

Respectfully submitted,



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