FILED
SID J. WHITE
JAN 6 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JAMES F. BAKER,

Petitioner,

vs. Case No. 79,054

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW FROM THE
FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT
IN LAKELAND, FLORIDA

BRIEF OF RESPONDENT ON THE JURISDICTION

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SUMMARY OF THE ARGUEMENT

In an effort to conserve far too scarce judicial resources, Respondent stipulates to the jurisdiction of this Court in light of the conflict noted in the opinion below; and, Respondent proceeds to address the merits.

This Court has accepted jurisdiction on the exact issue noted in the opinion below; and, Oral Argument on the question certified in Allen v. State, Fla. No. 77,321 is calendared for March 4, 1991. Also, this Court has heard Oral Argument this past November 4, 1991, on this same question in State v. Washington, Fla. No. 77,262. The Washington and Allen decisions will be dispositive of the apparent conflict in the case sub judice.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts. In the trial court, Petitioner was found guilty of two counts of robbery with a weapon; noticed as to habitulization; and, at sentencing, certified copies of five (5) prior convictions were introduced into evidence. When the Second District filed its revised opinion, apparent conflict of holdings was acknowledged within the opinion. See, Baker v. State, ___ So.2d ___, 1991 WL 235143, 16 FLW D2824 (Fla. 2d DCA No. 90-01426)(Substituted Opinion filed on Motion for Rehearing 11/08/91) and Pet.App. 001, pp 2 & 3. Respondent does not contest this Court's jurisdiction as the Second District has certified this exact question in State v. Allen, 573 So.2d 170 (Fla. 2d DCA 1991):

> HAS THE 1988 AMENDMENT OF SECTION 775.084, FLORIDA STATUTES, ALTERED THE SUPREME COURT'S RULING IN BROWN, HOLDING THAT THE LEGISLATURE INTENDED SENTENCING UNDER SECTION 775.084(4)(A) TO BE PERMISSIVE, AS STATED IN DONALD?
>
> (Text of 573 So.2d at 171)

Respondent concurs with Petitioner that the apparent conflict noted below confers jurisdiction and Respondent now addresses the merits of the claim raised.

ISSUE ON THE MERITS

HAS THE 1988 AMENDMENT OF SECTION 775.084, FLORIDA STATUTES ALTERED THE SUPREME COURT'S RULING IN BROWN, HOLDING THAT THE LEGISLATURE INTENDED SENTENCING UNDER SECTION 775.084(4)(a) TO BE PERMISSIVE, RATHER THAN MANDATORY, AS STATED IN DONALD?

For purposes of brevity and clarity, Respondent adopts and incorporates the exact question certified as being in "conflict" to this Court in State v. Allen, 573 So.2d 170, 171 (Fla. 2d DCA 1991). This issue is pending before this Court in Allen v. State, Fla. No. 77,321; and, Oral Argument is calendared for March 4, 1991.[1] The same issue has been argued this past November 4, 1991, and is pending before this Court in State v. Washington, Fla. No. 77,262. Respondent would suggest that in an effort to conserve far too scarce judicial resources, that this Court accept jurisdiction of this case on the merits[2]; and, defer filing a decision until Allen and Washington are decided.

It is Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), rehearing denied July 10, 1990, discretionary review denied, State v. Donald, 576 So.2d 291 (Fla. 1991) which is the watershed case on this claim. Also see, Walsingham v. State, 576 So.2d 365, 366-67 (Fla. 2d DCA 1991) and Henry v. State, 581 So.2d 928, 929 fn 4 (Fla. 3d DCA 1991). In Pittman v. State, 570 So.2d 1045

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[1] The briefs have been submitted on the Allen case; and, it is pending as Allen v. State, Fla. No. 77,321 (Oral Argument calendared for March 4, 1992).

[2] The Second District has noted "apparent conflict" in its opinion below. See, Pet.App. 001.

(Fla. 1st DCA 1990), discretionary review denied, Pittman v. State, 581 So.2d 166 (Fla. 1981), this Court perhaps has implicitly approved the Donald opinion in the declination to accept jurisdiction.

On the merits, this case is similar to Allen v. State, Fla. No. 77,321 (pending). There, too, as here, James Odell Allen was convicted of a first-degree felony; was given notice as to habitulization; and, declared to be a habitual felony offender. At bar, Petitioner was found guilty of two counts of robbery with a weapon. Petitioner was noticed as to habitulization. At the sentencing hearing, the prosecution introduced certified copies of prior convictions: (1) a July 8, 1987 conviction for conspiracy to sell cocaine; (2) a July 8, 1987, conviction for Sale of a Substance in Lieu of a Controlled Substance; (3) a January 18, 1989 conviction for Sale of a Substance in Lieu of a Controlled Substance and Displaying a Weapon while Committing a Felony; (4) a May 14, 1984 conviction for Strong Arm Robbery and Grand Auto Theft; and, (5) a May 14, 1984, conviction for a second degree robbery. In Allen, the Second District held that once the trial court determines that a defendant has met the criteria as set forth in §775.084(4)(a), it would appear the trial court must sentence a defendant to such a sentence as provided in §775.084(4)(a)1, 2, or 3, Florida Statutes (1989). Respondent maintains that if the trial court determines that sentencing is proper under §775.084(4)(a), Florida Statutes (1989), then the trial court is required to impose a sentence in conformity with the statute. Thus, in the context of the entire

statute, "may" is given an obligatory meaning. See, Pittman v. State, 570 So.2d 1045, 1046 (Fla. 1st DCA 1990), discretionary review denied, 581 So.2d 166 (Fla. 1991). There, Judge Erwin writes:

> Pittman also claims that section 775.084 contains an internal inconsistency which renders the law fatally vague, in that subsection (4)(a) of the statute provides that once the criteria are met for determining that a defendant is a habitual felony offender, the court "shall" sentence the defendant under the statute, whereas under subsection (4)(b), if the court finds the criteria are met for habitual violent felony offenders, the court "may" sentence the defendant. This court previously construed these provisions in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). A trial court initially has the discretion to determine whether to sentence a defendant under the statute. If the court decides that such sentence is proper, regardless of whether a defendant is a habitual felony offender or a habitual violent felony offender, "then the court is required to impose sentence in conformity with sections 775.084(4)(a) or 775.084(4)(b)." Id. at 795 (emphasis added). In the context of the entire statute, "may" must be given an obligatory meaning. Id. at 794.
>
> (Text of 570 So.2d 1046)

In Smith & Washington v. State, 574 So.2d 1195 (Fla. 1991), Lem Adam Washington [Fla. 1st DCA No. 89-1818] sought discretionary review on as to whether the sentencing under §775.084(4)(a) is permissive or mandatory. This Court has accepted discretionary review and entertained oral argument this past November 4, 1991. See, State v. Washington, Fla. No. 77,262 (submitted and pending).

The "State" would submit that State v. Washington, Fla. 77,262 (Oral Argument this past November 4, 1991) and State v.

Allen, Fla. No. 77,321 (Oral Argument calendared for March 4, 1992) will be dispositive of the apparent "conflict" noted in the decision below. See, Pet.App. 001. And, the "State" would urge this Court to adopt the Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990) decision thereby approving the decision below.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, **Respondent would urge this Court to accept jurisdiction of this case on the basis of the apparent conflict noted below and treat the case as submitted on the merits pending this Court's decisions in both Allen and Washington.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. mail to John S. Lynch, Esq., Ass't Public Defender, Office of the Public Defender, P.O. Box 9000-Drawer PD, Bartow, FL 33830 on this 24th day of December, 1991.

OF COUNSEL FOR RESPONDENT