

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 THE RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by Petitioner. In Respondent's brief on jurisdiction, Respondent recognized the conflict of holdings certified by the Second District. This Court, on March 2, 1992, rendered an Order accepting jurisdiction and dispensing with oral argument. Respondent was furnished with Petitioner's brief this past March 11, 1992.

SUMMARY OF THE ARGUMENT

In Burdick, this Court has determined that sentencing under the habitual offender statute is discretionary. The trial court has determined that sentencing at bar was mandatory and not permissive. The Second District has affirmed the trial court. In light of Burdick, this Court may be inclined to remand for the trial court to reconsider Baker's sentence in light of this Court's holding that sentencing under the habitual offender statute is permissive rather than mandatory.

ARGUMENT

In light of this Court's decision in Burdick v. State, ___ So.2d ___, 17 FLW S88, 1992 WL 18563 (Fla. No. 78,466)(Opinion filed 02/06/92)[disapproving Donald and holding sentencing under the habitual offender statute to be permissive], Petitioner's claim is not completely without merit. There has been confusion in the district courts of appeal as to whether the 1988 amendment of §775.084, Florida Statutes altered this Court's ruling in State v. Brown, 530 So.2d 51 (Fla. 1988) which hold that the Florida Legislature intended sentencing under §775.084(4)(a) to be permissive as stated in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990).

Subsequent to Burdick, this Court has addressed the issue in State v. Eason, ___ So.2d ___, 17 FLW S97, 1992 WL 18579 (Fla. No. 78,508)(Opinion filed 02/06/92)[rejecting Florida's interpretation of the habitual offender statute held the statute to be permissive]; State v. Washington, ___ So.2d ___, 17 FLW S98, 1992 WL 18588 (Fla. No. 77,626)(Opinion filed 02/06/92)[disapproving Donald to the extent it is inconsistent with Burdick]; and, Sheffield v. State, ___ So.2d ___, 17 FLW S148, 1992 WL 34830 (Fla. No. 78,650)(Opinion filed 02/27/92)[approving Sheffield v. State, 585 So.2d 396 (Fla. 1st DCA 1991), on the authority of Burdick].¹

¹ As an aside, the First District in Jenkins v. State, ___ So.2d ___, 17 FLW D420, 1992 WL 21089 (Fla. 1st DCA No. 90-01997)(Opinion on Motion for Rehearing filed 02/05/92) followed Donald v. State, 562 So.2d 792, 795 (Fla. 1st DCA 1990), review denied, 576 So.2d 291 (Fla. 1991) holding that our legislature

Your undersigned understands from the Clerk of this Court that Allen v. State, Fla. No. 77,321 (pending) and Walsingham v. State, Fla. No. 79,399 (pending) have yet to be decided on this issue.² This Court has disapproved Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), review denied, 576 So.2d 291 (Fla. 1991) in Burdick. This Court holds that sentencing under the habitual offender statute is discretionary. The Second District must be given an opportunity to allow the trial court to reconsider its opinion in light of this Court's determination in Burdick that sentencing under the habitual statute is discretionary.

intended a life sentence under §775.084, Florida Statutes to be mandatory. Your undersigned has spoken with the clerk of the First District and has been informed that the Jenkins opinion was withdrawn this past March 2, 1992.

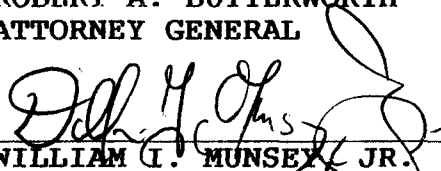
² In fact, the Second District has reassessed its holding in Walsingham v. State, 576 So.2d 365 (Fla. 2d DCA 1991); State v. Allen, 573 So.2d 170 (Fla. 2d DCA 1991); and, State v. Davis, 559 So.2d 1279 (Fla. 2d DCA 1990). See, King v. State, ___ So.2d ___, 17 FLW D663 (Fla. 2d DCA No. 91-00036) (En Banc Opinion filed 03/04/92). In light of King, the Second District would appear to be inclined to reassess its position as it has recognized that a trial judge does have discretion to exercise leniency even after determining a defendant to be an habitual offender.

CONCLUSION


WHEREFORE, based on the foregoing reasons, argument, and authority, Respondent would urge this Court to consider a remand so that the trial court might reconsider Baker's sentence in light of this Court's determination in Burdick that sentencing under the habitual offender statute is discretionary.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



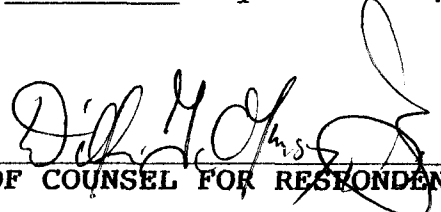
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John S. Lynch, Ass't Public Defender, Office of the Public Defender, P.O. Box 9000-- Drawer PD, Bartow, FL 33830 on this 20th day of March, 1992.



OF COUNSEL FOR RESPONDENT