IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,069

DANNY BOGGAN,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner, the State of Florida, appellee in the case below and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, DANNY BOGGAN, appellant in the case below and defendant in the trial court, will be referred to in this brief as respondent. References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A," and references to the record on appeal will be noted by the symbol "R." All references will be followed by the appropriate volume and page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the decision of the First District in which that court reversed respondent's habitual felony offender sentences on Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991),[1] grounds.

A jury found appellant guilty of possession of cocaine and resisting arrest without violence, and appellant pled nolo contendere to the following crimes: Two counts of possession of cocaine with intent to sell; reckless driving; possession of cocaine; and attempting to elude (R 139, 152). On May 23, 1990, the trial court adjudicated appellant guilty of these crimes, and sentenced appellant as follows: Eight years' imprisonment on each of the possession with intent to sell counts, to run concurrently, to be followed by two years' probation, to run consecutively with the prison sentence in case number 89-6836; 10 years' imprisonment as a habitual felony offender on the possession of cocaine charge in case number 89-6836; one year county jail on the resisting arrest charge; and one year county jail on the reckless driving charge, to run concurrently with the other county jail term (R 152-57).

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1 Barnes is currently pending in this Court, Case No. 77,751.

Regarding habitual felony offender sentencing, the state proved the following prior felony convictions of appellant: In case number 87-2179, grand theft auto, conviction entered on July 27, 1987 (R 132-35); in case number 87-2180, dealing in stolen property, conviction entered on July 27, 1987 (R 136-38, 147).[2] Respondent appealed to the First District, arguing that his sentence was illegal because his prior convictions were entered on the same date. The First agreed, vacated respondent's sentence, remanded for resentencing, and certified the following question of great public importance:

> WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

(A 2).

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[2] The state supplemented the record on appeal in the First District with respondent's presentence investigation which revealed the following record: burglary, grand theft, possession of marijuana, delivery/sale of marijuana, grand theft auto, dealing in stolen property, sale/delivery of a controlled substance, another sale/delivery of a controlled substance, possession of a controlled substance without a prescription, attempted elusion of a police officer, sale/delivery of a controlled substance, possession of 20 grams of marijuana, resisting a police officer without violence, and driving with a suspended license. While appellant committed these crimes on different dates, the convictions were entered on the same date: July 27, 1987.

The state timely filed its notice to invoke this Court's discretionary jurisdiction, and moved this Court to stay issuance of the mandate. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The plain language of Fla. Stat. §775.084(1)(a)(1) (1989), which requires that a defendant must have "previously been convicted of any combination of two or more felonies" to be sentenced as a habitual felony offender, in no way requires that each of the felonies be committed after conviction for the immediately previous offense. The provision clearly reflects the legislative intent to habitualize a defendant convicted of two or more felonies, regardless of the order of conviction. The line of cases which requires an interim between convictions was based on a 1947 Florida Supreme Court case in which this Court construed the then-existing recidivist statutory scheme, one which is materially different from the 1989 habitual offender statute. The 1989 statute on its face mandates the result reached by the trial court in this case.

ARGUMENT

Issue

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

The question as phrased begs a negative answer. While respondent's enhanced sentence, which was based on prior felony convictions entered on the same date, apparently violates Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), it is clearly legal under the terms of the habitual felony offender statute, and, in holding to the contrary, the First District has overridden the plain meaning of section 775.084.

Section 775.084(1), Florida Statutes (1989),[3] provides:

> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;

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[3] Appellant committed the instant offense on December 27, 1989 (R 130).

> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any postconviction proceeding.

Thus, a defendant may be subject to an enhanced sentence as a habitual felony offender if two or more felony convictions have been entered within five years of the instant conviction, regardless of whether the prior convictions were adventitiously entered the same day. Section 775.084(1) on its face plainly does not require one previous conviction to precede another previous conviction for a defendant to qualify for habitual offender status. The statute clearly requires only that a defendant have "previously been convicted of two or more felonies."

This Court has repeatedly held that unambiguous statutory language must be afforded its plain meaning. White v. Pepsico, Inc., 568 So.2d 886 (Fla. 1990); Graham v.

State, 472 So.2d 464 (Fla. 1985); Jenny v. State, 447 So.2d 1351 (Fla. 1984); Citizens v. Public Serv. Comm'n, 435 So.2d 784 (Fla. 1983); Carson v. Miller, 370 So.2d 10 (Fla. 1979); Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1974); State v. Egan, 287 So.2d 1 (Fla. 1973); Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951). Thus, to read into section 775.084(1) a requirement for an interim between the two or more convictions ignores the plain meaning of the statute and leads to an absurd result, especially where a defendant habitually engages in felonious behavior of an ongoing nature but, for one reason or another, is convicted and sentenced on one day for multiple separate offenses.

The First District, however, in Barnes, did precisely that, transplanting a "sequentiality" requirement from the 1944 version of the habitual felony offender statute to the 1988 version. The 1944 version, by express language, required the second felony to be committed after the first, the third after the second, and so on. See Joyner v. State, 30 So.2d 304, 306 (Fla. 1947) (emphasis added) (sections 775.09 and 775.10 provided "*in terms* that the second offense must have been committed subsequent to the first conviction."); Copeland v. Mayo, 65 So.2d 743, 744 (Fla. 1953) ("the offenses committed, as well as the convictions therefor, must have occurred on subsequent days to the last

preceding offense or conviction in order to be counted under . . . 775.10 . . . ."). See also Johnson v. Cochran, 139 So.2d 673 (Fla. 1962); Guilford v. Mayo, 93 So.2d 110 (Fla. 1957); Mayo v. State ex rel. Murray, 66 So.2d 256 (Fla. 1953); Rambo v. Mayo, 65 So.2d 754 (Fla. 1953); Scott v. Mayo, 32 So.2d 821 (Fla. 1948); Washington v. Mayo, 31 So.2d 870 (Fla. 1947); Ex parte Cantrell, 31 So.2d 540 (Fla. 1947); Mowery v. Mayo, 31 So.2d 249 (Fla. 1947).

"In 1971, however, the legislature enacted § 775.084 and, in the same act, expressly repealed §§ 775.09 and 775.10. Moreover, it is clear from such enactment that the new section was intended to be substituted in the stead of the repealed sections and that it was to be the sole recidivist statute in force." Wright v. State, 291 So.2d 118, 120 (Fla. 2d DCA 1974). Thus, after 1971 but before 1988, Florida's habitual felony offender statute required only that a defendant be convicted of "a" felony in Florida or other qualified offense, and the felony for which a defendant is to be sentenced to be committed within five years of the date of the last prior felony. Whereas, sections 775.09 and 775.10 expressly required sequential convictions, section 775.084 simply required that a defendant commit "a" previous felony. See Smith v. State, 461 So.2d 995, 996 (Fla. 5th DCA 1984).

Quite instructive on this point is Castle v. Gladden, 270 P.2d 675 (Or. 1954). There, the Oregon Supreme Court concluded that the only "sequence" requirement in the Oregon habitual offender statute was that a defendant commit the present felony after having been convicted of a requisite number of felonies. Id. at 681. The Court based its decision on a literal reading of the statute and a "significant change in the law." Id. Notably, Oregon patterned its habitual offender statute after the New York statute in 1927, when Oregon repealed its 1921 version of the statute which contained a sequence requirement. See State v. Carlson, 560 P.2d 26, 29 (Alaska 1977) (emphasis added) (the Oregon legislature, in repealing the 1921 version of the habitual offender statute, "substituted a statute patterned after s. 1942 of the New York Penal Law, *which omitted any reference to a particular sequence of commission and conviction*."). See also People ex rel. Reynolds v. Morhous, 50 N.Y.S.2d 272 (A.D. 1944).

Similarly, with its express repeal of sections 775.09 and 775.10 in 1971, the Florida legislature intentionally rung Joyner's death knell. Although, in 1988, the legislature changed the "a" felony provision of section 775.084(1)(a)(1) to "two or more" felonies, it did not thereby resurrect Joyner's "opportunity to reform" and sequentiality requirements. In 1989, the legislature

further amended section 775.084(1)(a)(1) to read "any combination of two or more" felonies. If the legislature had intended to limit this "combination" to offenses for which convictions were not entered on the same day, the legislature could have so stated. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). For the First District to read into the 1988 and 1989 amendments to section 775.084 requirements which had not existed since 1971 and which were not even implicitly mentioned by the legislature is patently absurd and flies in the face of unequivocally expressed legislative intent.

Joyner's "opportunity to reform" rationale is clearly incompatible with the 1988 and 1989 amendments to section 775.084. In a different context, the Second District discussed the purpose of sections 775.09 and 775.10 in Karz v. State, 279 So.2d 383, 384 (Fla. 2d DCA 1973): "The reason for enhancing a sentence for a subsequent offense is to serve as a warning to first offenders and to afford them an opportunity to reform. The reformatory object of the statute, namely to deter future crime, would be frustrated if the offender were given no opportunity to reform."

In Barnes, the First District found that the legislature did nothing to definitively signal that this purpose had been overridden in the post-1971 amendments to the habitual offender statute. However, in Fla. Stat.

§775.0841 (Supp. 1988), the legislature made clear that, due to "a substantial and disproportionate number of serious crimes" being committed by "a relatively small number of multiple and repeat felony offenders," its intent was to "investigate, apprehend, and prosecute career criminals and to incarcerate them for extended terms," not to afford first time offenders a chance to "wise up." See also Fla. R. Crim. P. 3.701(b)(2) ("[t]he primary purpose of sentencing is to punish the offender. Rehabilitation . . . must assume a subordinate role.").

Further, the clear legislative mandate to give enhanced sentences to felons who have the predicate two felony convictions is thwarted by continued reliance on Joyner. Rule 3.701(d)(1), Florida Rules of Criminal Procedure, requires one guidelines scoresheet to "be utilized for each defendant covering all offenses pending before the court for sentencing." This Court recently expanded this rule, holding that:

> Defendants should be allowed to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending against the same defendant in the same court at the same time, regardless of whether a plea of guilty or nolo contendere or a conviction has been obtained. The trial court must grant the motion, we believe, when the defendant can show that the use of a single scoresheet would not result in an unreasonable delay in sentencing. For each sentence that

> would not be unreasonably delayed, the trial court must order simultaneous sentencing.

Clark v. State, 572 So.2d 1387 (Fla. 1991).

Although it is clear that respondent is a repeat offender, one whom the legislature obviously had in mind when it enunciated its intent in section 775.0841, Barnes precludes the trial court from habitualizing respondent because another trial court convicted and sentenced respondent for his prior felonies on the same date. This result becomes even more absurd when considering the reasons for simultaneous entry of convictions and sentences: Uniformity in sentencing and judicial economy. See Clark, 572 So.2d at 1387. Prohibiting habitualization in these circumstances permits a rule of judicial convenience to take precedence over a substantive legislative pronouncement that trial courts should "provide substantially enhanced terms of imprisonment for habitual felony offenders," i.e., defendants who have "previously been convicted of two or more felonies" to enhanced sentences. See Fla. Stat. §921.001(4)(c)(2) (Supp. 1988).

For these reasons, Joyner and Clark cannot coexist. Joyner requires sequential commission of offenses and sequential convictions. See Copeland, 65 So.2d at 744. While respondent committed his manifold offenses on

sequential dates, chances are highly unlikely that he could ever have convictions entered sequentially, based on Clark's mandate to consolidate all pending cases for sentencing. Thus, under Barnes, despite his very extensive record, respondent cannot be sentenced as a habitual felony offender. Such a result is untenable in light of the clear legislative intent expressed in section 775.0841 and the reiteration in section 775.084(4)(c) that trial courts have discretion in imposing enhanced sentences. Accordingly, this Court should not permit the outdated policy of Joyner to thwart an otherwise unequivocal expression of legislative intent.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the habitual felony sentence imposed in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to DANNY BOGGAN, Inmate #A-207292, Inmate Mailbox #D-22, Apalachee Correctional Institution, Post Office Box 699-E, Sneads, Florida 32460, and KEITH D. COOPER, ESQ., 900 North Palafox Street, Pensacola, Florida 32501, this 6th day of January, 1992.

GYPSY BAILEY
Assistant Attorney General