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IN THE SUPREME COURT OF FLORIDA

LAWRENCE TAYLOR,

Petitioner,

v.

CASE NO. 79,095

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LYNN WILLIAMS #195484
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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Respondent.	:	

JURISDICTIONAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

The opinion sought to be reviewed is Taylor v. State, District Court of Appeal Case No. 90-2210, opinion filed November 15, 1991. Filed with this brief is a copy of the opinion. References to pages in the appendix will be designated by "A".

II. STATEMENT OF THE CASE AND FACTS

Petitioner was convicted at trial of two counts of armed robbery with a firearm. Petitioner was sentenced an each count as an habitual violent felony offender to 35 years with a fifteen year minimum mandatory as well as a three year minimum mandatory for possession of a firearm. The sentences were imposed to run consecutively (A 2-3).

The First District Court of Appeal reversed petitioner's conviction on Count II and remanded with directions that the trial court enter a judgment of conviction for aggravated assault with a deadly weapon and resentence petitioner accordingly (A 6-7).

The Court further found that petitioner's offenses arose from a single incident and reversed petitioner's consecutive minimum mandatory sentences imposed pursuant to Section 775.087(2), Florida Statutes (1989), providing for a three year minimum mandatory sentence for possession a firearm during the commission of certain enumerated offenses (A 6-7).

However, the Court also held that petitioner could be sentenced to consecutive minimum mandatory sentences under the habitual violent felony offender statute, Section 775.084, (1989) (A 6-7).

Petitioner seeks discretionary review in this Court of the lower appellate court's ruling which held that petitioner can be sentenced to consecutive minimum mandatory sentences, under the habitual violent felony offender statute, for offenses which arose out of a single incident.

III. SUMMARY OF ARGUMENT

The offenses for which petitioner was sentenced arose out of a single incident. The First District Court of Appeal relied on this in holding that it was error for the trial judge to sentence appellant to consecutive three year minimum mandatory sentences under Section 775.087(2), Florida Statutes (1989). However, the First District Court went on to hold that consecutive minimum mandatory sentences could be imposed under the habitual violent felony offender sentencing statute, Section 775.084, Florida Statutes (1989).

The appellate court relied in its ruling on Daniels v. State, 577 So.2d 725 (Fla. 1st DCA 1991), review pending, Daniels v. State, Florida Supreme Court Case No. 77,853.

In Daniels the appellate court certified to this Court the question of whether or not consecutive minimum mandatory sentences could be imposed for first degree felonies when sentencing under Section 775.084, Florida Statutes (Supp. 1988). The issue has been briefed and is presently pending in this Court and set for oral argument on January 8, 1992.

The decision of the appellate court in petitioner's case directly conflicts with this Court's decisions in Palmer v. State, 438 So.2d 1 (Fla. 1983) and McGouirk v. State, 493 So.2d 1016 (Fla. 1986).

These cases stand for the proposition that consecutive minimum mandatory sentences are improperly imposed for offenses arising from a single criminal transaction unless there is an express legislative intent to allow such consecutive terms.

See State v. Boatwright, 559 So.2d 219 (Fla. 1990). No such intent is expressed in the habitual violent felony offender statute.

This Court should accept jurisdiction, The decision in the case at bar conflicts with the above-cited cases from this Court. Furthermore, the issue has been certified to be one of great public importance by the First District Court of Appeal in Daniels. This Court has accepted jurisdiction in Daniels and set the case for oral argument.

IV. ARGUMENT

ISSUE

THE DECISION OF THE APPELLATE COURT IN PETITIONER'S CASE CONFLICTS WITH OTHER DECISIONS OF THIS COURT

The offenses for which petitioner was sentenced arose out of a single incident. The First District Court of Appeal relied on this in holding that it was error for the trial judge to sentence appellant to consecutive three year minimum mandatory sentences under Section 775.087(2), Florida Statutes (1989). However, the First District Court of Appeal went on to hold that consecutive minimum mandatory sentences could be imposed under the habitual violent felony offender sentencing statute, Section **775.084,** Florida Statutes **(1989).**

Petitioner submits the appellate court's ruling that minimum mandatory sentences can be imposed consecutively under the habitual violent felony offender statute directly conflicts with this Court's decisions in Palmer v. State, 438 So.2d 1 (Fla. **1983)** and McGouirk **v.** State, **493 So.2d 1016** (Fla. **1986).**

This Court set the legal parameters for imposition of consecutive minimum mandatory sentences in Palmer v. State, **438** So.2d 1 (Fla. 1983). Palmer robbed several mourners at a funeral parlor by brandishing a gun toward them and the funeral director. He further forced the assistant funeral director to open a cash box belonging to the business. Palmer was convicted of thirteen counts of armed robbery, The sentence on all thirteen counts included consecutive minimum mandatory three

year sentences without possibility of parole under Section 775.087(2), Florida Statutes.

Reasoning that the offenses Palmer was convicted of did not arise "from separate incidents occurring at separate times and places", Palmer, 438 So.2d at 4, this Court held the thirteen mandatory minimum sentences would be imposed concurrently.

The prohibition in Palmer on stacking minimum mandatory sentences is not limited to the three year minimum mandatory proscribed by Section 775.087(2).

In McGouirk v. State, 493 So.2d 1016 (Fla. 1986), this Court considered the imposition of consecutive minimum mandatory sentences where two different statutes prescribed the minimum mandatory sentence. McGouirk's sentence included a three-year minimum mandatory under section 775.087(2) on his conviction of attempted murder and a consecutive ten-year mandatory minimum imposed under 790.161(3) on his conviction for placing a destructive device.

Citing Palmer, this court found the mandatory minimum portions of McGouirk's sentence could only be imposed concurrently.

Like the underlying sentencing statutes at issue in Palmer and McGouirk, the habitual violent felony offender statute contains no express legislative intent authorizing consecutive terms. Moreover, similar to the sentencing statute at issue in Palmer, the habitual violent felony offender sentencing statute provides for enhancement of the penalty already statutorily

proscribed for the underlying felony. **See** State v. Boatwright, 559 So.2d 210, 213 (Fla. 1390) (distinguishing three year minimum mandatory for possession of a firearm during the commission of an enumerated offense from statutorily mandated punishment for commission of a capital felony).

The sentencing statute under which petitioner was sentenced is not distinguishable on any legally relevant grounds from the sentencing statutes utilized in Palmer and McGouirk. Palmer and McGouirk hold that mandatory minimum terms cannot be imposed consecutively when the underlying offenses are from a single criminal incident.

Thus, the decision of the First District Court of Appeal in petitioner's case conflicts with this Court's decisions in Palmer and McGouirk.

Petitioner respectfully submits that this Court should accept jurisdiction. Not only is there conflict between the decision in petitioner's case and other decisions of this Court, but the question of whether or not consecutive minimum mandatory terms can be imposed under the habitual violent felony offender statute has been certified by the First District Court of Appeal to be an issue of great public importance. Daniels v. State, 577 So.2d 725 (Fla. 1st DCA 1991), review pending, Daniels v. **State**, Florida Supreme Court Case No. 77,853. This Court accepted jurisdiction in Daniels and set oral argument.

Based on the foregoing argument and citation of authority, petitioner submits this Court should accept jurisdiction in petitioner's case.

V. CONCLUSION

Based on the foregoing argument and citation of authority, petitioner submits this Court should accept jurisdiction in petitioner's case.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LYNN A. WILLIAMS #195484
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Ms. Laura Rush, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Lawrence Taylor, Baker Correctional Institution, Post Office Box 500, Olustee, Florida, 32072, on this 20th day of December, 1991.

LYNN A. WILLIAMS #195484
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

LAWRENCE TAYLOR, :

Petitioner,

vs.

STATE OF FLORIDA, :

Respondent, :

_____/

SUP. CASE NO. 79,095
DCA CASE NO. 90-2210

APPENDIX

TO

PETITIONER'S BRIEF ON JURISDICTION

IN THE DISTRICT COURT OF APPEAL

FIRST **DISTRICT,** STATE OF **FLORIDA**

LAWRENCE TAYLOR,

Appellant,

v.

STATE **OF FLORIDA,**

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED,

CASE NO. 90-2210

Opinion filed November 15, **1991.**

An appeal from the Duval County Circuit Court, R. Hudson Olliff, Judge.

Nancy Daniels, Public Defender; Lynn A, Williams, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for Appellee.

MINER, J.

Urging several grounds for reversal, appellant challenges his conviction and sentences for two counts of armed robbery with a firearm. However, finding that the trial court did not err in admitting the testimony complained of or in granting the state's motion in limine, we address only two of appellant's points on appeal.

Appellant was charged by information with two counts of armed robbery with a firearm. Both offenses were alleged to have been committed on November 12, 1989, at a Baskin-Robbins Ice Cream Store in Jacksonville. Count I charged appellant with taking currency from Christopher Elrod, a custodian of the store, and Count II charged him with taking currency from another employee, Kimberly Smith.

At trial, Kimberly Smith testified that she and her manager, Christopher Elrod, were working at Baskin-Robbins on the evening in question. Prior to the closing of the store, a man whom she identified as appellant entered and ordered a scoop of ice cream. Kimberly Smith filled his order and as she began to ring up the purchase, appellant lifted his shirt to reveal a light brown wooden handle of a gun with the barrel tucked into the waistband of his jeans. He told Smith that nobody would be hurt if she gave him the money. Appellant then told Christopher Elrod to step forward and to move away from the sink where he was working. When Elrod joined Smith, appellant showed Elrod the gun and told him to take the money from the register and place it on the counter top, with which order Elrod complied. After picking up the money appellant departed and the police were called. Appellant was subsequently apprehended, identified, charged as aforesaid and convicted. At sentencing, appellant was sentenced as an habitual violent felony offender to 35 years on Count I with the applicable 15 year minimum mandatory as well as a 3 year minimum mandatory for possession of a firearm. An identical

sentence was imposed for Count II which was to be served consecutively with that imposed on Count I. This appeal followed.

Citing to Brown v. State, 430 So.2d 446 (Fla. 1983) and Hill v. State, 293 So.2d 79 (Fla. 3d DCA 1974), appellant first argues that he cannot be convicted of two robberies in connection with the above described incident because there was only one forceful taking. We agree and reverse his conviction for armed robbery of Kimberly Smith.

But for the supreme court's disapproval in Brown v. State, supra, there would be no doubt that the instant case was controlled by Hill v. State, supra, which case is factually similar. In Hill, the armed robber entered an office area of a Publix grocery store and ordered the cashier and her manager to give him money from a cash drawer and a safe. The defendant was convicted of two counts of armed robbery, but the Third DCA reversed one of the convictions. Although the court did not offer a lengthy explanation of its reasoning, it held that there was only a single robbery committed.

In Brown, the armed robber entered a store and ordered a cashier to put the money from her register into a paper bag. He then ordered the cashier to open a second register, but she informed him that she did not have the key to the second register. When she summoned a fellow employee who had a key, the robber ordered the second employee to place the money from the register into the paper bag. The supreme court affirmed dual

convictions for armed robbery, and offered the following explanation:

> [T]he taking was from separate cash registers, over the second of which the first employee had no control. The two events were separated in time and each required separate criminal intent. Actual ownership of the money obtained is not dispositive of the question of whether multiple robberies have been committed. What is dispositive is whether there have been successive and distinct forceful, takings with a separate and independent intent for each transaction.

Brown, 430 So.2d at 447 (emphasis added). **Although** the **court** found Hill factually distinguishable because Hill only involved one transaction, the court saw **the** need **to disapprove of Hill to** the extent that the case suggested that there cannot be two robberies where the stolen property belongs to a single entity. Apparently, the court read Hill as holding that there was only one robbery in that case because all the stolen property belonged to Publix.

Aside and apart from Hill, it is clear from the quoted language in Brown that there was but one armed robbery in the instant case. Appellant's only forceful taking was from Christopher Elrod and his single intent was to obtain the cash contained in the register. This is not similar to Brown, where two individuals were robbed of two sums of money. Compare Ponder v. State, 530 So.2d 1057 (Fla. 1st DCA 1988) (evidence would have **supported dual armed** robbery convictions where the defendant entered a fast food restaurant, ordered one **employee** to put money in a bag, and then ordered a second employee to put money in the

bag) and Holmes v. State, 453 So.2d 533 (Fla. 5th DCA 1984) (two armed robbery convictions were proper where the defendant entered a grocery store and ordered a cashier to empty her register while he robbbed the store supervisor in the office) with Pettigrew v. State, 552 So.2d 1126 (Fla. 3d DCA 1989) (where the defendant took the victim's purse at gunpoint and the purse contained a bracelet belonging to a second person, the evidence would not support dual armed robbery convictions because nothing was taken from the person of the bracelet owner), rev. den., 563 So.2d 633 (Fla. 1990).

Although appellant's conviction for armed robbery of Kimberly Smith must be reversed, we direct the trial court, pursuant to section 924.34, Florida Statutes (1989), to enter a judgment of conviction against appellant for the crime of aggravated assault with a deadly weapon committed against Kimberly Smith. Section 924.34 provides as follows:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

(Emphasis added). In Royal v. State, 490 So.2d 44 (Fla. 1986), the supreme court employed section 924.34 to do precisely what we now do. The court in Roval reversed an armed robbery conviction and remanded for entry of a judgment of conviction "of aggravated assault with a deadly weapon, which is a necessarily lesser

included offense of robbery with a firearm," Id. at 46. Although not discussed in Roval, the Schedule of Lesser Included Offenses does not include aggravated assault with a deadly weapon as a category T necessarily lesser included offense of robbery with a firearm. In fact, the court's holding in Royal prompted the Fifth DCA in Wright v. State, 519 So.2d 1157 (Fla. 5th DCA 19881, to conclude that aggravated assault with a deadly weapon was, on the authority of Royal, a necessarily lesser included offense of robbery with a firearm. This confusion was dispelled, however, by G.C. v. State, 560 So.2d 1186, 1189-90 (Fla. 3d DCA 1990), aff'd on other grounds, 572 So.2d 1380 (Fla. 1991), where the court held that the emphasized language in section 924.34 referred to both category I and and category II lesser included offenses. Because aggravated assault with a deadly weapon is a category II lesser included offense of robbery with a firearm, we apply section 924.34 and order the trial court to enter the judgment of conviction in accordance with the above directive.

With respect to appellant's other meritorious point on appeal, we find that resentencing will also be necessary. He argues and we agree that the trial court erred in imposing consecutive minimum mandatory sentences pursuant to the firearm possession statute. Where the offenses are committed in a single incident Palmer v. State, 438 So.2d 1 (Fla. 1983), and cases decided subject to its mandate indicate that it is improper to stack 3 year minimum mandatory sentences for possession of a firearm. However, we must disagree with appellant's assertion

that the minimum mandatory sentences imposed upon habitual violent felony offenders cannot be stacked in this manner. In Daniels v. State, 570 So.2d 725 (Fla. 1st DCA 1991), this court held that habitual mandatories may be imposed consecutively for offenses arising from the same incident.

Accordingly, we REVERSE appellant's conviction on Count II and REMAND the case for the trial court to enter a judgment of conviction for aggravated assault with a deadly weapon. The case must also be remanded for resentencing, and the trial court is herewith instructed to impose concurrent 3 year minimum mandatories. Otherwise, the sentence imposed is proper under Daniels. We likewise affirm as to all other issues.

SMITH, J., and WENTWORTH, SENIOR JUDGE, CONCURS.