IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,260

BRIAN TULLIS WILLIAMS,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

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	:	

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state seeks review from the decision of the First District Court of Appeal in Williams v. State, 16 FLW D2711 (Fla. 1st DCA Oct. 21, 1991), certification granted, 17 FLW D277 (Fla. 1st DCA Jan. 15, 1992) (copies attached as an appendix).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement as reasonably accurate.

III SUMMARY OF ARGUMENT

A summary of argument will be omitted due to the nature of this case.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

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

This Court recently decided this issue in State v. Barnes, 17 FLW S119 (Fla. Feb. 20, 1992), quashed Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), and held that prior convictions need not be sequential under the 1988 habitual offender statute. In the companion cases of State v. Goodman, 17 FLW S___ (Fla. Feb. 20, 1992), State v. Razz, 17 FLW S___ (Fla. Feb. 20, 1992), State v. Price, 17 FLW S___ (Fla. Feb. 20, 1992), and State v. Martin, 17 FLW S___ (Fla. Feb. 20, 1992), this Court reached the same result under the 1989 habitual offender statute.

V CONCLUSION

Unless this Court is willing to alter its opinion on rehearing in Barnes, the issue has been decided adversely to respondent.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Brian Tullis Williams, this 4th day of March, 1992.

P. DOUGLAS BRINKMEYER

Kids Bargain Store, Inc., 565 So.2d 1332 (Fla. 1990) (both holding that trial judge need not disqualify himself or herself based on allegation that opposing counsel contributed to the judge's political campaign). *Cf. Sikes* (recusal required because of trial judge's dismissal of punitive claim, facial gestures during trial, and objection to defense); *Brewton v. Kelly*, 166 So. 2d 834 (Fla. 2d DCA 1964) (judge biased against attorneys because they signed petition to impeach). Additionally, appellant's motion, which was filed in November 1989, would appear to be untimely in that it alleged information known to appellant soon after he had filed his complaint in April 1989, i.e., the longstanding relationship between Judge Hair and attorney Sulik. Appellant also waited several months to complain about the judge's alleged failure to acknowledge his representatives. *Fischer v. Knuck*, 497 So.2d 240, 243 (Fla. 1986) (motion to disqualify must be made within a reasonable time after discovering the facts upon which the motion is based). Finally, given the fact that the defendant is an attorney, if such a ground was legally sufficient, then all lawsuits against attorneys would require disqualification of all judges.

The third and final point warranting discussion arises from appellant's contention that the trial court erred by not having him transported from prison to attend the trial. Pertinent case law indicates that when an inmate is involved in civil litigation, it is improper to enter a default because he or she is unable to attend a hearing or trial, in the absence of findings regarding the inmate's inability to be present. *See, e.g., Leone v. Florida Power Corp.*, 567 So.2d 992 (Fla. 1st DCA 1990); *Brown v. Sheriff of Broward County Jail*, 502 So.2d 88 (Fla. 4th DCA 1987). Under this authority, because the final judgment does not make any findings regarding appellant's inability to be present, it should be reversed and the matter remanded to the trial court with directions that it specifically address the issue of appellant's inability to appear. *See, e.g., Conner v. Conner*, 16 F.L.W. D3026 (Fla. 1st DCA Dec. 4, 1991). However, unlike the above cases, appellant never made any motion or request to the trial court to transport him to the trial. Absent such a request, it cannot be said that the trial court abused its discretion by not ordering appellant be transported to the trial. Nevertheless, because the judgment must be reversed and the case remanded for trial by jury, the lower court, if appellant makes a request for transportation, should consider the factors listed in *Leone* and *Brown* in deciding whether or not to grant any such motion.

AFFIRMED in part, and REVERSED and REMANDED for trial by jury. (ALLEN AND WOLF, JJ., CONCUR.)

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[1]The only authorized pleadings are a complaint or petition and an answer to it; answers to counterclaims and crossclaims; third party complaints and answers; and a reply. *See* Fla. R. Civ. P. 1.100(a).

[2]*See Wertman*, 166 So.2d at 667-68.

[3]Although a party is not ordinarily entitled to a jury trial in actions in equity, For Adults Only, Inc. v. State ex rel. Gerstein, 257 So.2d 912 (Fla. 3d DCA 1972), *cert. denied*, 292 So.2d 592 (Fla. 1974), an action for replevin entitles a party to jury trial. Blackburn v. Blackburn, 393 So.2d 51 (Fla. 2d DCA 1981).

* * *

Criminal law—Sentencing—Habitual offender—Question certified 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" requires that each of the felonies be committed after conviction for the immediately previous offense

BRIAN TULLIS WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-1335. Opinion filed January 15, 1992. An Appeal from the Circuit Court for Escambia County. Frank L. Bell, Judge. Keith D. Cooper, Pensacola, for appellant. Bradley Bischoff, Assistant Attorney General, Tallahassee, for appellee.

OPINION ON MOTION FOR CLARIFICATION AND CERTIFICATION
[Original Opinion at 16 F.L.W. D2711]

(PER CURIAM.) Appellant's motion for clarification and certification is granted. Our previous opinion is amended to reflect that counsel of record for the appellee is Bradley Bischoff, Assistant Attorney General.

As we did in *Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991) (en banc), *review pending*, case number 77,751. (Fla. 1991), we certify the following question as a 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" REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

(JOANOS, C.J., BOOTH and SHIVERS, JJ., CONCUR.)

* * *

Insurance—Attorney's fees—Multiple-employer welfare arrangement is an insurer for purpose of award of attorney's fees upon rendition of judgment against insurer in favor of insured who is one of group of persons insured under a master group health insurance policy—Federal preemption—Employee Retirement Income Security Act—If record established that MEWA at issue in instant case complied with ERISA, applicable federal law would preclude assessment of attorney's fees pursuant to state statute—Preemption is question of subject matter jurisdiction which may be raised for first time on appeal when resolution of the issue does not require factual determinations by appellate court—MEWA waived preemption issue by failing to show that plan in question was consistent with federal law definition of ERISA plans and was included within coverage definition

FLORIDA AUTOMOBILE DEALERS INDUSTRY BENEFIT TRUST, Appellant, v. ROOSEVELT N. SMALL, Appellee. 1st District. Case No. 90-3129. Opinion filed January 15, 1992. An Appeal from the Circuit Court for Okaloosa County. Robert G. Barron, Judge. William C. Owen and Loula M. Fuller, of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tallahassee, for Appellant. Walter A. Steigleman, Ft. Walton Beach, for Appellee.

ON MOTION FOR REHEARING
[Original Opinion at 16 F.L.W. D2136]

(ERVIN, J.) Appellant's motion for rehearing is denied; our opinion of August 12, 1991 is, however, withdrawn and the following opinion substituted therefor.

Appellant, Florida Automobile Dealers Industry Benefit Trust (FADIBT), appeals an order of the trial court awarding prevailing-party attorney's fees to appellee, Roosevelt N. Small, who prevailed on his claim that FADIBT wrongfully refused to pay his hospital and medical expenses following an accident. FADIBT contends that the attorney's-fee statutes of Chapter 627, Florida Statutes, do not apply to it because it is a self-insurer. We affirm.

FADIBT contends that it is a multiple-employer welfare arrangement (MEWA),[1] established, pursuant to Sections 624.436 through 624.446, Florida Statutes (1989), by a group of automobile dealerships in accordance with the federal Employee Retirement Income Security Act. The issue at trial was whether FADIBT, a self-insurer, is subject to the attorney's fee provisions of Sections 627.428 and 627.6698, Florida Statutes (1989), which refer to insurers rather than self-insurers. After an evidentiary hearing, the trial court entered a judgment in favor of Small, awarding him attorney's fees and costs, and FADIBT filed a notice of appeal. Six days later, the trial court entered an order that was consistent with the prior final judgment, except that it specified that Small was entitled to attorney's fees pursuant to section 627.6698.

We first point out that our review of this case has been impeded by appellee's failure to file an answer brief, an omission that placed an undue burden on this court. *Title & Trust Co. of Fla. v. Salameh*, 407 So.2d 1035, 1035-36 (Fla. 1st DCA 1981).

Nevertheless, we conclude that attorney's fees were properly

...N, Appellee. 1st District. Case No. 90-03832. Opinion filed ... An Appeal from an Order of Judge of Compensation Claims ... Marshall and J. Larry Hanks of Jeffery, Thomas ... Maitland, for Appellants. Ronson J. Petree of Whitaker, ...er, Orlando, for Appellee.

... This cause is before us on appeal from a final order ...ompensation benefits for injuries sustained by claim- ...ing on a softball team sponsored by the employer, ... The sole issue presented is whether the injury arose ...the course of claimant's employment. § 440.02(16), (1989).

...ce showed that the employer had periodically spon- ...composed primarily of employees, with some ...employees and other nonemployees. None of the ...tice sessions were held during work hours or on the ...property. On January 2, 1990, claimant began work ...on for Copytronics and shortly thereafter, was ...on the company-sponsored softball team. On Janu- ..., claimant was injured while playing in a softball ...a claim for workers' compensation benefits that ...controverted.

...aring, claimant testified that the employer did not ...m to play softball, and he was not required to be on ... testified he would often discuss business at local ...bars after the games and that he received one lead ...playing softball.

... Bates, a former employee, testified that conversa- ...games were mostly company gossip concerning ...and winning contests. Ms. Bates further testified ..." of leads were obtained at the games and that the ..."benefited" in a number of ways, such as by employ- ..."talking and thinking" about work. The order on ... states that the judge of compensation claims "[ac- ...testimony of the Employee/Claimants [sic] witnesses ...she testified that the Employer benefitted [sic] from ...'s participation in the company sponsored softball ...

...has previously adopted Professor Larson's[1] three- ...compensability of injuries occurring during recre- ...ational activities. This test requires that:

...They occur on the premises during a lunch or recreation ...as a regular incident of the employment; or

...The employer, by expressly or impliedly requiring partic- ...or by making the activity part of the services of an em- ...brings the activity within the orbit of the employment; or

...The employer derives substantial direct benefit from the ...beyond the intangible value of improvement in employee ...and morale that is common to all kinds of recreation and ...

...relies on the third alternative of Larson's test, but our ...the record fails to reveal a "substantial direct benefit" ...employer from claimant's participation in the games. In ... *City of Dania*, 428 So. 2d 745, 746 (Fla. 1st DCA ...court held that:

...mant] has failed to demonstrate that the [employer] ...substantial direct benefit" from the game beyond the ...benefit of improvement of employee morale common ...of recreational activity.

...ial direct benefit" to the employer contemplates ...the intangible, undefined benefits referred to here and ...*man* case. Advertising, publicity, and financial bene- ...ples of those types of benefits that can be shown and ...ficient.

...e of the kind of findings necessary to show a sub- ...benefit are those recited in *Bari Italian Food v.* ... So. 2d 255, 256 (Fla. 1st DCA 1988), which held ...

...eputy commissioner made extensive findings that the ...received advertising and publicity benefits from the team's efforts. He found that the uniforms displayed the company name; team members, other employees of the company, wives and girlfriends went to various pizza parlors that were clients of the company after the games; sales representatives from the company who handled the pizza parlors' account also attended those postgame activities; the wives and girlfriends wore T-shirts, identifying the company and matching the company's jerseys worn by the players, to the games and to the postgame activities. Placing great significance on the fact that the company is a small family owned corporation which benefited perhaps to a greater extent than a large corporation from such a team endeavor, and due also to the fact that the team patronized company customers as a group following the games, the DC concluded that the company benefited from the teams' efforts to the extent that this injury should be deemed compensable.

Accordingly, the order below is reversed and the cause remanded with directions that the claim be dismissed. (BARFIELD AND MINER, JJ., CONCUR.)

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[1]1A A. Larson, *Workmen's Compensation Law* § 22.00 (1990); Brockman v. City of Dania, 428 So. 2d 745 (Fla. 1st DCA 1983).

* * *

Criminal law—Sentencing—Habitual offender sentence cannot be predicated on prior convictions which occurred on same day—Appeals—Appellate court has jurisdiction to hear defendant's argument that sentence is illegal—Contemporaneous objection not required to raise issue of illegal sentence on direct appeal—Plea agreement stating that defendant would be sentenced as habitual offender only if trial court found him qualified for such sentence did not constitute waiver of right to appeal habitual offender sentence—Defendant could appeal illegal sentence even if sentence was agreed upon in plea bargain

BRIAN TULLIS WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-1335. Opinion filed October 21, 1991. An appeal from the Circuit Court for Escambia County. Frank L. Bell, Judge. Keith D. Cooper, Pensacola, for appellant. James Rogers, Assistant Attorney General, Tallahassee, for appellee.

(PER CURIAM.) Appellant argues his sentence as a habitual felony offender is illegal because his two prior felony convictions occurred on the same date. We agree, vacate appellant's sentence and remand for resentencing.

Appellant was originally charged with burglary of a structure, possession of cocaine and possession of drug paraphernalia. He reached a plea agreement with the state. The agreement called for appellant to enter a plea of nolo contendere to all three charges.[1] The agreement further provided that if the trial court found that appellant qualified as a habitual offender under section 775.084, Florida Statutes, appellant would be sentenced as follows:

A) Burglary - 5 years imprisonment followed by five years probation.

B) Possession of cocaine - 5 years probation to be served concurrent to the other probation.

C) Possession of paraphernalia - 1 year in jail to be served concurrent to the other jail sentence.

However, if the trial court did not find appellant qualified as a habitual offender, appellant would receive a guidelines sentence. The guidelines scoresheet in the record reflects a total score of 59 points, which corresponds with a sentence of community control or 12 to 30 months incarceration.[2]

At the sentencing hearing appellant moved to withdraw his plea to the possession of cocaine charge because the lab report came back negative as to cocaine. The trial court granted appellant's motion and the state nolle prossed that count. Before imposing sentence on the remaining two counts the court heard argument from counsel for both sides. The state argued that appellant qualified as a habitual offender because he had two prior felony convictions, one for burglary of a conveyance and one for grand theft. The state conceded and the record clearly reflects that both of the prior convictions were entered on the

same date. The court asked appellant's counsel whether the two prior convictions qualified appellant for sentencing as a habitual offender. Appellant's counsel "conceded" the two prior convictions qualified appellant as a habitual offender. Counsel argued, however, that the spirit of the statute was not met because appellant only had one prior felony incident. Appellant's counsel argued that the legislature did not intend to punish such persons as habitual offenders. The trial court rejected the argument and appellant received a sentence of five years in prison followed by five years probation for the burglary charge and one year in jail for the possession charge, both terms to be served concurrently.

On appeal appellant argues that the two prior felony convictions, both of which occurred on the same day, are not a sufficient predicate to qualify appellant as a habitual felony offender. We agree. *Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991) (En banc).

The state argues appellant "abandoned" his statutory right to appeal by pleading nolo contendere without expressly reserving his right to appeal. In support of that argument the state cites to *Brown v. State*, 376 So.2d 382 (Fla. 1979), *Robinson v. State*, 373 So.2d 898 (Fla. 1979) and section 924.06(3), Florida Statutes. We are not sure what the state means by "abandoned," but if the state is arguing we have no jurisdiction we reject the argument for the reasons expressed in *Walker v. State*, 579 So.2d 348 (Fla. 1st DCA 1991).[3] If the state is arguing the appellant "abandoned" his right to appeal because no contemporaneous objection was made to the sentence, we also reject that argument because no objection was required. Without the necessary predicate convictions appellant's sentence as a habitual offender is illegal. No objection is required to raise the issue of an illegal sentence on direct appeal.[4] *Larson v. State*, 572 So.2d 1368, 13[illegible] Fla. 1991); *State v. Whitfield*, 487 So.2d 1045 (Fla. 1986); *Rhoden v. State*, 448 So.2d 1013 (Fla. 1984).[5]

The state also argues appellant waived the right to appeal his sentence because "appellant expressly agreed to be sentenced as a habitual felony offender." That is not what the record reflects. The written plea agreement in the record signed by appellant specifically states that appellant agreed to be sentenced as a habitual felony offender *only if* the trial court found that appellant qualified for such sentencing under the statute. Moreover, even if appellant had agreed to be sentenced as a habitual offender he could still appeal if he did not actually qualify as a habitual offender. "A trial court cannot impose an illegal sentence pursuant to a plea bargain." *Williams v. State*, 500 So.2d 501, 503 (Fla. 1986).[6]

Since we have decided that appellant's sentence is illegal because of the lack of the requisite predicate, we need not address the other issue raised by appellant.

Accordingly, we vacate appellant's sentence and remand for resentencing. (JOANOS, C.J. and SHIVERS, J., CONCUR. BOOTH, J., DISSENTS.)

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[1]There are two written agreements in the record; only one is signed by appellant.

[2]There are two scoresheets in the record. The other reflects a total score of 61 points. We are not sure which, if either, is correct.

[3]We note that in *Caristi v. State*, 578 So.2d 769 (Fla. 1st DCA 1991) the state argued that the sole avenue for challenging an illegal sentence was by direct appeal and if not raised on direct appeal could not be raised in a collateral proceeding. That appears to be inconsistent with the state's position in this case and in *Walker*.

[4]We agree with the dissent that no objection was made. [illegible]rary to what is stated by the dissent we believe *Williams v. State*, 500 So.[illegible]1, 502 (Fla. 1986) does prohibit the defendant and the state from entering into an agreement which provides for an illegal sentence.

[5]The "concession" by appellant's counsel that appellant's two prior convictions qualified appellant as a habitual felony offender was legally incorrect and makes no difference in the result. If appellant cannot agree to an illegal sentence, he cannot concede to an illegal sentence.

(BOOTH, J., DISSENTING.) The instant case differs significantly from *Barnes v. State*, 576 So. 2d 758 (Fla. 1st [illegible] 1991), relied on by appellant. In *Barnes*, the defendant [illegible] to and preserved the habitual offender issue by specific [illegible] based on his being placed on probation for both prior felo[illegible] the same day.

In the instant case, defendant entered into a plea agr[illegible] that included habitual felony offender status. Nothing in [illegible] of this state prohibits a defendant from entering into [illegible] agreement,[1] and it should be upheld by this court.

In addition to the plea agreement, defendant's counsel [illegible] stated to the judge at the sentencing hearing that defend[illegible] qu[illegible]fied as a habitual offender. Counsel asked that the court [illegible] in mitigation that the prior two felony convictions were [illegible] *felony* convictions defendant had and that both arose fr[illegible] same incident. Counsel stated, "[w]e are really just leavi[illegible] you whether or not he was going to be classified as a [illegible] offender." The court asked counsel if he had "any quarr[illegible] the fact that [appellant] has had the prior felony con[illegible] within the five-year period, that he does qualify as a [illegible] offender?" Appellant's counsel responded that appellant [illegible] qualify, but those are the only two felony convictions [illegible] had." The court responded by reviewing his notes as t[illegible] dant's extensive record and numerous violations of pro[illegible] and sentenced defendant as a habitual offender. I do not [illegible] colloquy between the judge and counsel as raising the se[illegible] conviction objection, but rather as seeking the judge's [illegible] evaluation under Section 775.084(4)(c) of whether impo[illegible] sentence under the habitual offender statute was necessary [illegible] protection of the public."[2]

We should uphold the judgment and sentence belo[illegible]

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[1]*Barnes, supra*, involved a defendant who was convicted after [illegible] and did not involve a plea agreement such as here.

[2]Defendant's contention that the court should have made [illegible] findings in justification of the enhanced sentencing is correctly re[illegible] majority.

* * *

Child support—Modification—Civil procedure—Abuse of [illegible]cretion to deny father's motion to strike deposition of [illegible] of business in which father worked which was taken [illegible] mately one month after final hearing and filed without [illegible] father—Abuse of discretion to deny motion for rehearing [illegible] trial court obviously relied on deposition in refusing to [illegible] father's child support obligation—Clean hands doctr[illegible] vents court from relieving party of his support obligation [illegible] decrease in financial ability to pay is brought about by [illegible] voluntary acts—On remand, trial court may, in its d[illegible] allow mother to depose business owner upon proper [illegible] compliance with procedural rules—Trial court should [illegible] consider good faith test and make appropriate findings [illegible]

FREDRICK THOMAS, Appellant, v. JANELL THOMAS, and [illegible] FLORIDA, DEPARTMENT OF HEALTH AND REHABILI[illegible] VICES, Appellees. 1st District. Case No. 90-2623. Opinion [illegible] 1991. An Appeal from the Circuit Court for Leon County, John [illegible] Thomas W. Lager, of Lager & O'Steen, P.A., Tallahassee, [illegible] Joseph R. Boyd and William H. Branch, of Boyd & Branch, P.A. [illegible] and Chriss Walker, Department of Health and Rehabilitative [illegible] Appellees.

ON MOTION FOR CLARIFICATION

[Original Opinion at 16 F.L.W. D235]

Appellees' Motion for Clarification is granted and [illegible] in this case dated September 6, 1991, is hereby with[illegible] the attached opinion substituted therefor.

(ERVIN, J.) Appellant, Fredrick Thomas, seeks re[illegible] order denying his supplemental petition for modifi[illegible] child support obligation. He contends that the trial [illegible] its discretion in finding no substantial change in circum[illegible] as to justify modification, in not granting his motion [illegible] and for rehearing filed in connection with the ad[illegible]