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IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,

Petitioner,

vs. CASE NO. 79,322

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

1. The trial court correctly imposed consecutive minimum mandatory sentences pursuant to this Court's mandate and opinion.

2. Sections 775.021(2) and (4) are applicable to all sections of the criminal code and grant unfettered discretion to the trial court to impose all sentences either concurrently or consecutively. The certified question should be answered yes.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY IMPOSED CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR FIRST DEGREE MURDER AND AGGRAVATED ASSAULT WITH A FIREARM PURSUANT TO THIS COURT'S MANDATE.

Petitioner was convicted of first degree murder and aggravated assault with the use of a firearm. R 24-25. He was sentenced to death on the murder conviction (R 26) and, consecutively, to a five-year term of imprisonment for the aggravated assault, which also carried a mandatory minimum term of three years. R 26A-27. On direct appeal, this Court affirmed the convictions, vacated the sentence of death and remanded for imposition of a life sentence without possibility of parole for twenty-five years. Concerning the aggravated assault sentence, the Court held in pertinent part

> We also affirm the five-year sentence for aggravated assault. In accordance with the judge's prior order, the two sentences shall be consecutive to each other.

R 42; Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991).

In pertinent part, the Court's mandate orders "that further proceedings be had in accordance with said [attached] opinion." R 33. On remand, sentence was imposed pursuant to the mandate and opinion. R 50-51, TR 11-13.

In the district court below, petitioner failed to point out that this Court established the law of the case in its mandate and opinion by ordering "the two sentences shall be consecutive to each other." Downs, 574 So.2d at 1099 (e.s.). Myers v. Atlantic Coast Railroad Company, 112 So.2d 263 (Fla. 1989) (An appellate court ruling on an issue is the law of the case upon subsequent appeal); Gaskins v. State, 502 So.2d 1344, 1346 (Fla. 2d DCA 1987) ("The law of the case precludes relitigation of all issues necessarily ruled upon by the court, as well as all issues upon which appeal could have been taken but which were not appealed"); Goodman v. Olsen, 365 So.2d 393, 396 (Fla. 3d DCA 1979) (District Court is without authority to alter either conclusions of fact or interpretations of law reached by the supreme court).

The district court below found this Court's mandate and opinion controlling, contrary to petitioner's position. Here, petitioner recognizes this Court's previous mandate and opinion but suggests it is not controlling because the particular issue was not specifically argued. This position epitomizes the piecemeal litigation school of thought: "I didn't raise it before, so it was not ruled on, therefore I can raise it now because it was not ruled on when I didn't raise it before."[1]

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[1] Unfortunately, this pernicious type of circular thinking appears to be the contemporary trend among some district courts. *See* Anderson v. State, 17 F.L.W. D471 (Fla. 1st DCA 1992) (Although, pursuant to Eutsey v. State, 383 So.2d 219 (Fla. 1980), the burden is on the defendant to raise and prove affirmative defenses and the state does not have to disprove such defenses unless raised, it is reversible error unless the trial court makes record findings that the unraised affirmative

Petitioner's position is contrary to controlling case law and the historical precept, without which the appellate system cannot function, that issues not raised are abandoned and cannot be raised for the first time on a subsequent appeal. See State v. Stabile, 443 So.2d 398, 400 (Fla. 4th DCA 1984) ("The law of the case precludes relitigation of all issues necessarily ruled upon by the court, as well as of all issues upon which appeal could have been taken, but which were not appealed. Alford v. Summerlin, 423 So.2d 482 (Fla. 1st DCA 1982); Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976); Marine Midland Bank Central v. Cote, 384 So.2d 658 (Fla. 5th DCA 1980)").

Three facts should be noted about the present case:

1. The facts surrounding this crime and sentence have not changed since its first appearance here.

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defenses do not exist). Anderson exemplifies Judge Letts recent lament on the sad state of contemporary appellate review:

> I grow impatient with the ever increasing demands the appellate courts place on already overburdened trial judges. More and more, we require them to justify themselves in minute detail or we will reverse. As I see it, trial judges should not have to carry the burden of proof to establish they were not wrong. To the contrary, it should be the duty of the criminal-appellant to overcome the presumption that the trial court was right.

Demons v. State, 577 So.2d 702, 703 (Fla. 4th DCA 1991), J. Letts specially concurring,

2. In his previous appearance here, petitioner sought and obtained a reversal of his death sentence which necessarily meant that his consecutive term of imprisonment for aggravated assault would apply unless reversal was sought and obtained.

3. Palmer v. State, 438 So.2d 1 (Fla. 1983), which appellant now cites as controlling, was issued at least five years prior to the previous appeal.

There is no basis for not following the law of the case and the plain language of this Court's previous opinion and mandate.

ISSUE II

CERTIFIED QUESTION:

> **WHETHER** A TRIAL JUDGE HAS DISCRETION TO STACK MINIMUM MANDATORY SENTENCES IN CASES INVOLVING CAPITAL FELONIES TOGETHER WITH NON-CAPITAL FELONIES COMMITTED WITH USE OF A FIREARM, WHERE THE PREDICATE OFFENSES ALL OCCURRED DURING THE COURSE OF THE SAME CRIMINAL EPISODE?

The district court apparently had difficulty reconciling the opinions in State v. Boatwright, 559 So.2d 210 (Fla. 1990), Palmer v. State, 438 So.2d 1 (Fla. 1983), and Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990). Accordingly, the court certified the question above. In addressing this question it is necessary to look at section 775.021, Florida Statutes (Supp. 1988) and at this Court's subsequent opinion in Daniels v. State, 17 F.L.W. S118 (Fla. February 20, 1992), which added further complexity to this tangled web.

Section 775.021 provides rules of construction for determining whether offenses are separate, whether separate offenses are separately sentenced, and whether separate sentences are imposed concurrently or consecutively. Because it is central to the certified question it is important that its full content be kept firmly in mind.

> **775.021 Rules of construction,--**
>
> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed when the language is susceptible of differing

> constructions, it shall be construed most favorably to the accused.
>
> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
>
> (3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitutes one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

It is clear from the plain meaning of subsection (4)(a) that separate offenses, as defined therein, shall be separately sentenced. It is also clear that the trial court is given unfettered discretion to impose separate sentences either

concurrently or consecutively.[2] That being the case, and no one can seriously suggest that the plain meaning of the statute requires any statutory interpretation,[3] it would appear that the answer to the certified question is an unequivocal yes.

The district court below did not have Daniels v. State, 17 F.L.W. S118 (Fla. February 20, 1992) before it. In Daniels, the issue was:

> DOES A TRIAL JUDGE HAVE THE DISCRETION UNDER SECTIONS 775.021(4) AND 775.084, FLORIDA STATUTES (1988), TO IMPOSE CONSECUTIVE FIFTEEN-YEAR MINIMUM MANDATORY SENTENCES FOR FIRST-DEGREE FELONIES COMMITTED BY AN HABITUAL VIOLENT FELONY OFFENDER ARISING FROM A SINGLE CRIMINAL EPISODE?

Daniels argued that the answer was no, relying primarily on Palmer where a sharply divided court held that a trial court did not have the discretion to impose consecutive minimum mandatory sentences on an armed robber who robbed the mourners at a funeral even though separate consecutive sentences were permitted for each of the robberies. The Palmer majority reasoned that section 775.087, Florida Statutes (1981) did not specifically authorize consecutive minimum mandatories and that

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[2] Section 921.16, Florida Statutes also leaves it to the discretion of the trial court as to whether sentences are concurrent or consecutive.

[3] See Carawan v. State, 515 So.2d 161, 165 (Fla. 1987): "As we have noted previously, rules of statutory construction "are useful only in case of doubt and should never be used to create doubt, only to remove it." State v. Egan, 287 So.2d 1, 4 (Fla.1973). The courts never resort to rules of construction where the legislative intent is plain and unambiguous." [cites omitted]

section 775.021(4) Florida Statutes (1981) was not applicable. The dissenters in Palmer relied on section 775.021(4) as it existed in 1981 and reasoned there was no reason why thirteen robberies committed in a single criminal transaction should be treated differently than thirteen robberies committed at separate times.

Relying on Palmer, the Daniels Court rejected the state's argument that section 775.021(4), Florida Statutes (1988) controlled. Acknowledging that the legislature had made substantial changes to section 775.021(4) in 1988,[4] the Court held that the changes were only "designed to overrule this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), pertaining to consecutive sentences for separate offenses committed at the same time, and had nothing to do with minimum mandatory sentences." Id.

Daniels and Palmer rest on the proposition that the language in section 775.021(4) which mandates that separate sentences shall be imposed for separate offenses is applicable to all statutory offenses but the language granting unfettered discretion to the trial court, "the sentencing judge may order the sentences to be served concurrently or consecutively," is applicable to section 775.082 (penalties), but not to, e.g., section 775.084 (habitual offender) (Daniels) or section 775.087 (use of weapons) (Palmer).

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[4] Chapter 88-131, §7, Laws of Florida.

The Court in Daniels acknowledged that it was a close call but concluded that Daniels fell closer to Palmer than Enmund [5] or Boatwright. It is noteworthy that section (4)(a) begins with the words: "[w]hoever, in the course of one criminal transaction or episode commits an act or acts . . . ." That is a very precise, inflexible mandate which is on all-fours here.[6] The state suggests that the plain language of section 775.021(4)(a) granting the trial court unfettered discretion to sentence either concurrently or consecutively is equally applicable to sentences imposed pursuant to sections 775.084 and 775.087.

The state's position, which the Court acknowledged as a close call in Daniels, is irrefutable if another, heretofore overlooked, provision of section 775.021 is brought into play. Section 775.021 is titled Rules of Construction, suggesting that the rules therein should be applied to all criminal statutes. This implied suggestion is transformed into an explicit command by section 775.021(2):

> The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides. (e.s.)

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[5] State v. Enmund, 476 So.2d 65 Fla. 985).

[6] Offenses in separate incidents are governed by section 921.16, Florida Statutes which also gives the trial court unfettered discretion on concurrent or consecutive.

Clearly, then, all of the rules of construction in section 775.021 are applicable to all other sections of the criminal code unless specifically exempted by the particular section. The basis on which Daniels rests, that the statutes, 775.084 and 775.087, do not expressly address consecutive minimum mandatories, actually proves the opposite proposition. Pursuant to section 775.021(2), the trial court has unfettered discretion to impose minimum mandatory sentences either concurrently or consecutively pursuant ta section 775.021(4), unless the statute at issue explicitly provides otherwise.

The state acknowledges that it did not recognize the relevance of section 775.021(2) to the (close) certified question in Daniels and thus did not raise the point with the Court. This oversight by the state may be partially explained by the terms of the question itself which focused narrowly on section 775.021(4). If so, this would illustrate an adage of Justice Frankfurter: "[i]n law also the right answer usually depends on putting the right question."[7] In the same vein, and from the same source, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." Accordingly, despite the recency of Daniels, the state urges the Court to follow the plain meaning of sections 775.021(2) and (4) and hold that trial courts have unfettered discretion to impose sentences, including minimum

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[7] Estate v. Rogers v. Helvering, 320 U.S. 410, 413 (1943). The following "wisdom" quote is from Henslee v. Union Planters National Bank & Trust Company, 335 U.S. 595, 600 (1949). Both were recently quoted in The Florida Bar Journal, March 1992, Legal Wit & Wisdom, Raymond T. Elligett, Jr., p. 19, 20.

mandatories, either concurrently or consecutively unless some provision of the code otherwise provides. There is simply no rational basis, in view of section 775.021(2), for holding that section 775.021(4) applies to some sentencing statutes of the criminal code but not to others.

CONCLUSION

The imposition of the consecutive minimum mandatory sentences should be affirmed. The certified question should be answered yes.

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 W. C. McLain, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 23rd day of March, 1992.

JAMES W. ROGERS

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BOBBY LEE DOWNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 91-1067

Opinion filed January 17, 1992.

An Appeal from the Circuit Court for Duval County, L. P. Haddock, Judge.

Nancy A. Daniels, Public Defender, and W. C. McLain, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant seeks review of consecutive minimum mandatory sentences imposed by the trial court at re-sentencing pursuant to the mandate of the Florida Supreme Court in Downs v. State, 574 So.2d 1095 (Fla.1991). The issue is whether consecutive minimum mandatory sentences may be imposed where the predicate offenses of first-degree murder and aggravated assault occurred during the

course of the same criminal episode. We affirm, but certify the question 'presented by this case pursuant to Article V, section 3(b)(4), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

The murder victim in this case was appellant's estranged wife. Evidence at trial established that appellant threatened his wife's life on several occasions, and that as a consequence, she returned to her parents' home with her two small children. Appellant threatened his wife with a firearm in the presence of a family friend, then shot her to death as she begged for her life.

The jury found appellant guilty of first-degree murder and aggravated assault, but recommended a life sentence. The trial court overrode the jury recommendation and imposed the death penalty, setting forth the supporting facts in a carefully detailed sentencing order. On appeal, the supreme court affirmed the first-degree murder and aggravated assault convictions, but vacated the sentence of death and remanded for imposition of a life sentence. The decretal portion of the opinion states:

> We affirm Downs' conviction of first-degree murder and aggravated assault. However, we vacate the sentence of death and remand for imposition of a life sentence without possibility of parole for twenty-five years. We also affirm the five-year sentence for aggravated assault. In accordance with the judge's prior order, the two sentences shall be consecutive to each other. (Emphasis supplied,)

Downs v. State, 574 So.2d at 1099.

At resentencing, the trial court imposed a life sentence for the murder conviction, with a minimum mandatory term of twenty-five years, and a consecutive five-year sentence for the aggravated assault conviction. Because a firearm was used in the commission of the aggravated assault, a three-year minimum mandatory sentence was imposed to run consecutively to the minimum mandatory sentence on the first-degree murder charge.

In State v. Boatwright, 559 So.2d 210 (Fla. 1990), in response to a certified question from this court, the supreme court ruled that "the trial judge has the discretion to stack minimum mandatory sentences in all cases concerning capital felonies." The opinion discusses the distinction between minimurn mandatory terms for capital felonies and the 3-year minimum mandatory provision for possession of a firearm in commission of a felony. Control of parole eligibility is the focus of the minimum mandatory provisions imposed in connection with capital. felony sentencing. That is, "[t]he mandatory minimum sentence imposed upon a defendant upon conviction of a capital felony is the statutorily required penalty for each capital felony." 559 So.2d at 213. On the other hand, enhancement of the penalty for the underlying felony is the focus of the 3-year minimum mandatory provision for possession of a firearm. It does not appear that the Boatwright decision can be read as a limitation or retreat from Palmer v. State, 438 So.2d 1 (Fla. 1983), which proscribes stacking 3-year minimum mandatory sentences for offenses arising from incidents occurring at the same time and place during a continuous course of criminal conduct.

The court's discussion and analysis in Boatwright suggest that the stacking of minimum mandatory sentences is limited to cases involving only capital felonies, rather than to the situation in this case, that is, a capital felony and a third-degree felony committed with a firearm. See Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990). Nevertheless, we affirm the imposition of consecutive minimum mandatory sentences in this case, as in accordance with the supreme court's mandate, but certify the following question to the Florida Supreme Court as a question of great public importance:

> WHETHER A TRIAL JUDGE HAS DISCRETION TO STACK MINIMUM MANDATORY SENTENCES IN CASES INVOLVING CAPITAL FELONIES TOGETHER WITH NON-CAPITAL FELONIES COMMITTED WITH USE OF A FIREARM, WHERE THE PREDICATE OFFENSES ALL OCCURRED DURING THE COURSE OF THE SAME CRIMINAL EPISODE.

Accordingly, the trial court's sentencing disposition is affirmed.

JOANOS, C.J., WIGGINTON and BARFIELD, JJ., CONCUR.