IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DONNIE EVERETT GIBSON,

Respondent.

CASE NO. 79,354

ANSWER BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0664261
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. DONNIE EVERETT GIBSON, Respondent.	)	Case No. 79,354

ANSWER BRIEF OF RESPONDENT ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts, and adds the following.

In its opinion, the district court noted that apart from the invalid out-of-state convictions, the state relied on multiple Florida convictions occurring on June 20, 1987. Gibson v. State, 17 FLW D186 (Fla. 1st DCA Jan. 6, 1992). The record reflects that the multiple grand theft and worthless check convictions were prosecuted in successive case numbers, and that appellant was adjudicated guilty of the offenses on the same day in 1987. (R181, 286-295)[1]

[1]Herein, record references appear as (R[page number]).

SUMMARY OF THE ARGUMENT

This Court has indeed already answered the certified question in the negative, in Barnes v. State, 17 FLW S119 (Fla. Feb. 20, 1991). The two prior convictions necessary for a habitual offender sentence need not be sequential. However, the Court did not decide whether eligibility for a sentence under the habitual offender statute required that the two prior offenses arise from separate incidents. In a specially concurring opinion, Justice Kogan stated that in his view, convictions from separate incidents are required. This is the better view, and one which this Court should adopt. The record does not reflect that appellant's prior offenses, all committed on the same day, meet that standard. Consequently, the case must be remanded to determine whether the prior offenses arose from separate incidents for the purpose of habitual offender sentence enhancement.

ARGUMENT

THE RECORD DOES NOT CONTAIN EVIDENCE MEETING THE REQUIREMENT THAT APPELLANT'S PRIOR OFFENSES AROSE FROM SEPARATE INCIDENTS, NECESSARY FOR SENTENCE ENHANCEMENT UNDER SECTION 775.084, FLORIDA STATUTES.

As stated by petitioner, this Court has indeed already answered the certified question in the negative, in Barnes v. State, 17 FLW S119 (Fla. Feb. 20, 1991). The two prior convictions necessary for a habitual offender sentence need not be sequential. However, the Court did not decide whether eligibility for a sentence under the habitual offender statute requires that the two prior offenses stem from separate incidents. In Barnes, two Justices expressed the view that the prior offenses must arise from separate incidents. Justice Barkett joined a specially concurring opinion in which Justice Kogan wrote:

> I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prosecutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would have enhanced the penalties for all crimes rather than resorting to a "back-door" method of increasing prison sentences.

17 FLW at S120 (Kogan, J., specially concurring). This is the better view, and one which this Court should adopt. The purpose of the habitual offender statute is ill-served by a construction which punishes an offender for a single incident of crime, which

by creative charging and statutory definition may be separated into numerous discretely charged offenses. Nothing in the wording of the statute suggests legislative intent to construe crimes committed in a single incident as separate offenses for purposes of recidivist sentence enhancement.

Here, the record does not reflect that appellant's prior offenses meet that standard. The worthless check and grand theft offenses were committed on the same day, were prosecuted in successive case numbers, and resulted in imposition of adjudication on the same day, probably in a single proceeding. Quite plausibly, all the worthless check offenses stemmed from a single incident, but were discretely charged because they stemmed from uttering different checks or depositing different items with intent to defraud. Sec. 832.05, Fla. Stat. (1987). Also, grand theft and issuing a worthless check may have been jointly prosecuted in each of Escambia County Case Nos. 87-1242, 87-1243 and 87-1244 although only a single incident or item was involved in each case. Cf. Henderson v. State, 572 So.2d 972 (Fla. 3d DCA 1990), approved, 583 So.2d 1030 (Fla. 1991) (defendant may be convicted and sentenced for theft and uttering a forged instrument when both offenses arise from a single transaction). The state has made no showing that the offenses in the 1987 Escambia County cases, on which habitual offender enhancement depends, arose from separate incidents.

For these reasons, respondent's sentence cannot stand. On remand, a habitual offender sentence should be barred unless the state proves that respondent committed two felonies arising from

separate incidents, and that the last met the five-year requirement of section 775.084(1)(a)2, Florida Statutes.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, respondent requests that this Honorable Court quash the decision of the district court and remand with directions that the sentence be vacated and the case remanded to the trial court with appropriate directions.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 0664261
Leon Co. Courthouse
301 S. Monroe St., 4th Fl. N.
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 13th day of April, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER