IN THE SUPREME COURT OF FLORIDA

CHARLES ANDREW WALSINGHAM, :

Petitioner, :

vs. : Case No. 79,399

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On May 25, 1989, the Petitioner, CHARLES ANDREW WALSINGHAM, was found guilty of arson, a first degree felony (R7-9). The trial court found the Petitioner to be a habitual offender and sentenced him to 25 years in prison followed by 20 years probation (R10-11). The recommended guidelines sentence was 7-9 years in prison (R12). An appeal was filed and an opinion rendered by the Second District Court of Appeal on March 6, 1991 (R42-45). In Walsingham v. State, 576 So.2d 365 (Fla. 2d DCA 1991), the court affirmed the Petitioner's conviction but held the sentence was illegal. Under section 775.084(4)(a)1, Florida Statutes (1989), a first-degree felony offender "shall" be sentenced for life. Id. at 576. If a trial court decides not to impose a life sentence, it must impose a sentence within the recommended or permitted guidelines, unless a valid written reason for departure exists. Id. The Second District Court stated "as we cannot determine whether the trial court intended to sentence the defendant as a habitual offender or attempted to use habitual offender status as a reason for departure from the guidelines, we must remand for reconsideration of the sentence."

A new sentencing hearing was held on April 17, 1991, before Circuit Judge E. Randolph Bentley (R46-67). The trial court stated it preferred the sentence it originally imposed because a substantial sentence with restitution and probation was appropriate but under the Second District's ruling, it was forced to choose between life and the guidelines (R49, 62). The trial court chose

to sentence the Petitioner to life as a habitual offender (R63, 66, 68-69). The Petitioner filed a timely notice of appeal on May 7, 1991 (R70).

On December 27, 1991, the Second District Court of Appeal affirmed the Petitioner's life sentence in Walsingham v. State, 17 F.L.W. D139 (Fla. 2d DCA December 27, 1991). The court did certify the same question as in Walsingham v. State, 576 So.2d 365 (Fla. 2d DCA 1991), and further certified its decision was in conflict with Henry v. State, 581 So.2d 928 (Fla. 3d DCA 1991).

On April 7, 1992, this Court handed down an order postponing its decision on jurisdiction and ordering the Petitioner to file a merit brief.

SUMMARY OF THE ARGUMENT

The Second District's opinion is incorrect that section 775.084(4)(a)(1) mandates a life sentence.

ARGUMENT

ISSUE

THE INSTANT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE OPINION OF THIS COURT IN BURDICK V. STATE, 17 F.L.W. S88 (Fla. February 6, 1992).

The Petitioner was convicted of the first-degree felony of arson and found to be a habitual offender. The trial court sentenced the Petitioner to 25 years in prison followed by 20 years probation. The Second District reversed the decision, holding the sentence was illegal because a first-degree felony offender "shall" be sentenced for life under section 775.084(4)(a)1, Florida Statutes (1989). Forced to choose between a life sentence or a guidelines sentence, the trial court chose to sentence the Petitioner to life as a habitual offender. The trial judge stated his preference for his original sentence. Under Burdick v. State, 17 F.L.W. S88 (Fla. February 6, 1992), the trial court's original sentence was appropriate.

In Burdick, this Court held that sentencing under section 775.084(4)(a)1 is permissive, not mandatory. Id. at S89. A court can sentence a defendant anywhere up to the maximum sanction. Therefore, the trial court's original sentence in the present case was legal.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Petitioner respectfully asks this Honorable Court to reverse the instant decision and reinstate the trial court's original judgment and sentence.

APPENDIX

PAGE NO.

1. Decision of District Court of Appeal of Florida, Second District filed on March 6, 1991. A1

2. Opinion of District Court of Appeal of Florida, Second District filed December 27, 1991. A2

because substitute teachers are not "regularly employed" by the school district within the statutory definitions. Florida Administrative Code Section 38B-2.011(1)(b) defines "part-total unemployment" as:

> unemployment of any individual in any week of less than full-time work in which he earns some remuneration, but less than his weekly benefit amount, and throughout which he is not attached to a regular employer.

Since our previous case has established that the school district does not "regularly employ" substitute teachers as defined in the statutes and codes, then the claimant herein who has received some remuneration from her substitute teaching while looking for full-time work has not been attached to a "regular employer" and is thus entitled to unemployment benefits under the statute, reduced of course by any income earned in substitute teaching. *See* § 443.111(3)(b) (1989). Any other result would only serve to discourage an unemployed individual from seeking what work he or she can find while seeking more permanent full time employment, to the detriment both of the individual and at greater cost to the unemployment compensation fund.

AFFIRMED.

HERSEY, C.J., and STONE, J., concur.

Charles Andrew WALSINGHAM, Appellant,

v.

STATE of Florida, Appellee.

No. 89-01610.

District Court of Appeal of Florida, Second District.

March 6, 1991.

Defendant was convicted in the Circuit Court, Polk County, E. Randolph Bentley, J., of arson and he appealed. The District Court of Appeal, Scheb, Acting C.J., held that the court which properly habitualized defendant erred in not imposing a life sentence, a guidelines sentence, or a departure sentence based on a factor other than habitual-offender status.

Affirmed and remanded.

1. Criminal Law ⇐1203.32

It was error for trial court which had properly habitualized defendant to sentence him to a 25-year prison term and subsequent 20-year probationary term; court was required to either impose a life sentence or, if it found that such a sentence was not necessary for the protection of the public, a guidelines sentence, or a departure sentence based on a factor other than that defendant was an habitual offender. West's F.S.A. § 775.084.

2. Criminal Law ⇐1181.5(8)

Where it could not be determined whether court intended to sentence defendant as an habitual offender or attempted to use habitual-offender status as a reason for departure from the guidelines, and where court did not impose the life sentence for an habitual offender, remand was required for reconsideration of sentence. West's F.S.A. § 775.084.

James Marion Moorman, Public Defender, and Robert D. Rosen, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Elaine L. Thompson, Asst. Atty. Gen., Tampa, for appellee.

SCHEB, Acting Chief Judge.

Charles Andrew Walsingham challenges his conviction and sentence for arson. He raises several points but the only meritorious issue we find concerns his sentencing.

[1] The state charged the defendant with committing arson on November 5, 1988, a first-degree felony proscribed by

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section 806.01(1), Florida Statutes (1987). A jury found him guilty as charged. The state filed a notice of intention to seek an enhanced sentence under section 775.084, Florida Statutes (1988), the habitual offender statute. At the hearing, the trial court determined that the defendant satisfied the statutory criteria for sentencing as a habitual offender. On the sentencing guidelines scoresheet, the trial court wrote "Deft declared habitual felon" in the space provided for reasons for departure from the guidelines. The result of being declared a habitual felon was that rather than be sentenced under the guidelines [1], he was to be sentenced under section 775.084. Under section 775.084(4)(a)1, a first-degree felony offender "shall" be sentenced for life. Notwithstanding its proper habitualization of the defendant, the trial court sentenced him to a twenty-five year prison term and subsequent twenty year probationary period. This was error.

If the trial court decides not to impose a life sentence, it must find that such a sentence is not necessary for the protection of the public pursuant to section 775.084(4)(c), and it would be restricted to the recommended or permitted guidelines, unless a valid written reason for departure exists. *State v. Jones*, 559 So.2d 204 (Fla.1990). We note, however, a finding that the defendant is a habitual offender is not a permissible basis for departing. *Whitehead v. State*, 498 So.2d 863 (Fla.1986).

Here, the record does not reflect that the trial court determined the life sentence was unnecessary. Thus, the court should have sentenced the defendant to life in accordance with section 775.084(4)(a)1. *See Donald v. State*, 562 So.2d 792 (Fla. 1st DCA 1990) (under section 775.084, as amended in 1988, once the court determines that a defendant has met the criteria as set forth in section 775.084 and is habitualized, it must sentence the defendant to a sentence pursuant to section 775.084).

This case is similar to *State v. Allen*, 573 So.2d 170 (Fla. 2d DCA 1991). There, as here, the defendant was convicted of a first-degree felony, was sufficiently noticed, and was declared a habitual felony offender. Although the trial court found he met the criteria under section 775.084, it wrote "habitual offender" in the space provided for reasons for departure on the scoresheet and sentenced him to forty years' incarceration followed by ten years' probation. We held that once the trial court determines the defendant has met the criteria as set forth in section 775.084(1)(a), it must sentence the defendant to such sentence in section 775.084(4)(a)1, 2 or 3. However, since it was unclear whether the defendant was being sentenced under the habitual felon statute or under the guidelines, the court remanded the case for reconsideration by the trial court.

[2] We affirm the defendant's conviction, but as we cannot determine whether the trial court intended to sentence the defendant as a habitual offender or attempted to use habitual offender status as a reason for departure from the guidelines, we must remand for reconsideration of the sentence.

Our decision in this case, as well as the decisions in *Allen* and *Donald* appear to be in conflict with *State v. Brown*, 530 So.2d 51 (Fla.1988), which held that:

> when a felony offender is properly habitualized and the guidelines sentence is less than life, the trial judge may not exceed the guidelines' recommendation absent a valid reason for doing so, notwithstanding the mandatory language of section 775.084(4)(a)1. as contained in Florida Statutes.

Brown, 530 So.2d at 53. Therefore, we again certify the following question as one of great public importance:

> HAS THE 1988 AMENDMENT OF SECTION 775.084, FLORIDA STATUTES, ALTERED THE SUPREME COURT'S RULING IN BROWN, HOLDING THAT THE LEGISLATURE INTENDED SENTENCING UNDER SECTION 775.084(4)(a) TO BE PERMISSIVE, RATH-

1. A recommended guidelines sentence would have been seven-nine years; the permitted range would have been five and one-half-twelve years. Fla.R.Crim.P. 3.701.

ER THAN MANDATORY, AS STATED IN DONALD?

THREADGILL and PARKER, JJ., concur.

Daniel J. LEVITAN, Appellant,

v.

STATE of Florida, Appellee.

Nos. 90–0218, 90–0257.

District Court of Appeal of Florida, Fourth District.

March 6, 1991.

Consolidated appeals of order denying rule 3.800 motion from the Circuit Court for Broward County; Russell E. Seay, Jr., Judge.

Daniel J. Levitan, Belle Glade, pro se appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

LETTS and STONE, JJ., concur.

GLICKSTEIN, J., concurs specially with opinion.

GLICKSTEIN, Judge, concurring specially.

As I understand this pro se appeal from denial of a motion for post conviction relief, which denial was, upon relinquishment of jurisdiction, effectively modified to a partial grant, there are basically two issues: Whether appellant's written sentence for one of two sets of offenses varied from what the judge announced in court; and whether appellant failed to receive, when he was imprisoned anew for violating his probation, proper credit for time previously served on a split prison/probation sentence.

Inasmuch as appellant is now on probation, I would favor dismissing the appeal as moot, without prejudice. Appellant cannot be affected by the matters on appeal, except, arguably, if he violates his probation. What is arguable will become clearer below.

It does appear from the record furnished on appeal that there was no discrepancy between the oral and written sentences, as appellant claimed. Thus that issue could properly be affirmed. As to the second issue, it is not clear whether appellant received full credit for time actually served during his earlier incarceration, albeit that the trial court upon relinquishment of jurisdiction granted appellant previously earned gain time.

This court presumably may affirm as to the second issue because appellant did not carry his burden of showing on the record that he failed to receive such credit. I prefer dismissal without prejudice as moot, so as to assure that, in the event appellant has reason in the future to try to establish a right to such credit, the issue is not viewed as res judicata.

I do not say that, if appellant was entitled to such credit and failed to receive it, the law requires that he be given this credit at a future time should he violate his present probation. I merely prefer not to foreclose his opportunity to litigate this point, if the circumstance arises.

Sabrina Michelle MAXWELL, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1536.

District Court of Appeal of Florida, First District.

March 7, 1991.

Defendant was sentenced in the Circuit Court, Bay County, Clinton Foster, J., to

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CHARLES ANDREW WALSINGHAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 91-01571

Opinion filed December 27, 1991.

Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge.

James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Michele Taylor, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

We affirm defendant's life sentence imposed pursuant to section 775.084(4)(a)1, Florida Statutes (1989). We certify the

same question as in Walsingham v. State, 576 So. 2d 365 (Fla. 2d DCA 1991). We further certify that we are in conflict with Henry v. State, 581 So. 2d 928 (Fla. 3d DCA 1991).

LEHAN, A.C.J., and HALL and PATTERSON, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michele Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 17th day of April, 1992.

Respectfully submitted,

Robert D. Rosen

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