047

IN THE SUPREME COURT OF FLORIDA

LESTER JOYNER, :

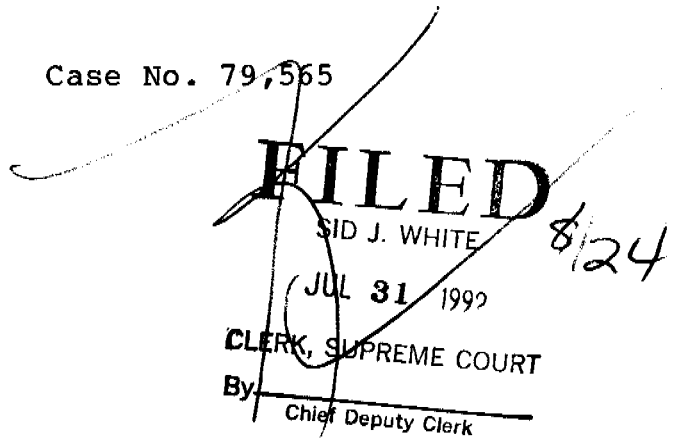
Petitioner, :

vs. : Case No. 79,565

STATE OF FLORIDA, :

Respondent. :

:



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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Lester Joyner, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On February 8, 1990, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, charged the Petitioner, LESTER JOYNER, with possession of cocaine in violation of section 893.13(1)(f). Florida Statutes (1989). (R6-8) On February 23, 1990, the trial court accepted Mr. Joyner's plea of nolo contendere and noticed and sentenced him to two years on community control as a "subsequent felony offender," concurrent with community control imposed in 1988 and 1989 violation of probation cases. (R10-18, 62-64) Mr. Joyner's guidelines recommended sentence called for any non-state prison sanction, or community control or twelve to thirty months in prison. (R12)

On May 23, 1990, the court revoked Mr. Joyner's community control on the charge of possession of cocaine and sentenced him to ten years in prison as a "subsequent felony offender," apparently based on the prior convictions in 1988 and 1989. (R70-71, 28-31) The court imposed a sanction of five years on probation on the other two cases, to follow the ten-year prison sentence. (R70-71)

On December 12, 1990, Mr. Joyner filed a pro se petition for writ of habeas corpus, seeking a belated appeal of the judgment and sentence imposed on the charge of possession of cocaine. (R40-45) The Second District Court of Appeal granted Mr. Joyner's pro se motion on January 16, 1990. (R46)

On appeal Mr. Joyner asserted that his sentence of "habitualized community control" followed by a ten-year prison sentence upon revocation of that community control constituted an illegal

application of Fla. Stat. § 775.084 and Chapter 948, requiring his sentence to be vacated. On February 19, 1992, the appellate court affirmed Petitioner's judgment and sentence, holding that any error complained of was waived because there was no objection to the community control sentence when it was imposed and Mr. Joyner did not appeal that initial sentence.

SUMMARY OF THE ARGUMENT

Petitioner's sentence of habitualized community control followed by prison upon its revocation is an unauthorized and illegal sentence. A sentence which is illegal as a matter of law may be successfully challenged at any time. Legislative intent, the plain meaning of section 775.084 and Chapter 948, and public policy considerations compel a holding that Petitioner's sentence must be vacated.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED BY IMPOSING COMMUNITY CONTROL AS A HABITUAL FELONY OFFENDER?

The Petitioner, Lester Joyner, challenges his ten-year prison sentence as a habitual felony offender on grounds it is illegal. His case involves the practice by trial courts of finding a person to be a habitual offender (without meeting the required statutory proof), but then imposing an initial sanction of probation or community control rather than prison. Upon revocation of this "habitualized probation or community control," the trial court then imposes a lengthy habitualized prison sentence. [1]

With regard to the illegality of Mr. Joyner's original sentence of habitualized community control, the plain language of the habitual offender statute applies. In 1971 the Florida Legislature created section 775.084 of the Florida Statutes to provide for extended terms in the state penitentiary for second and subsequent criminal offenders. (Emphasis added). Ch. 71-136, § 5, Laws of Fla. In 1975 references to subsequent offenders and the state penitentiary were deleted by amendments which provided extended terms of imprisonment for habitual felony offenders (emphasis added). Ch. 75-116, § 1, Laws of Fla. The definition of

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[1] This practice has been present in numerous cases in Hillsborough and Polk counties, with the courts imposing ultimate sentences of up to 40 and 60 years.

habitual felony offender then, and now, is "a defendant for whom the court may impose an extended term of imprisonment . . ." (Emphasis added). § 775.084, Fla. Stat. (1975); §775.084, Fla. Stat. (1989).

Section 775.0841, Florida Statutes (1989) states the legislative intent to "incarcerate [habitual offenders] for extended terms." (Emphasis added). Section 775.0843(2) (d) also provides "[a]ll reasonable prosecutorial efforts shall be made to persuade the court to impose the most severe sanction authorized upon a person convicted after prosecution as a career criminal." (Emphasis added). The granting of community control or probation, the purposes of which are to rehabilitate, for a habitual felony offender is squarely in derogation with the stated legislative goal of enhanced punishment by extended terms of imprisonment. See Steiner v. State, 591 So.2d 1070, 1073 (Fla. 2d DCA 1991) (LEHAN, J., Specially concurring).

In this case the Appellant initially was placed on community control as a "subsequent felony offender," a sentencing application not within the meaning of the habitual offender or probation and community control statutes. A court cannot extend the meaning of a statute. Where the language of a penal statute is clear, plain, and without ambiguity, effect must be given to it accordingly; and the courts are without power to restrict or extend the meaning. Graham v. State, 472 So.2d 464, 465 (Fla. 1985), citing Fine v. Moran, 74 Fla. 417, 77 So. 533, 536 (1917) Graham stands for the proposition that penal statutes are to be strictly construed and

neither the state nor the court can rely on another statute to extend the meaning of the applicable statute. This fundamental principle was emphasized in Perkins v. State, 576 So.2d 1310 (Fla. 1991), where the court said words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute. The rule of strict construction of criminal statutes is also explicitly codified in section 775.021 (1), Florida Statutes (1989).

Here, under the authorities cited and the plain language of section 775.084, it cannot be contended that the legislature meant that a finding of habitualization allows a court to impose probation or community control in lieu of prison. The statute, as plainly worded, means a defendant is to go to prison when properly found to be a habitual offender and is to suffer a more extended term in prison. If a court decides that a sentence as a habitual offender is not proper or necessary, sentence is to be imposed without regard to the statute. § 775.084(4) (c), Fla. Stat. (1989). Clearly this means that the court would be restricted to the statutory maximum or guidelines sentence, unless a valid reason for departure existed. State v. Jones, 559 So.2d 204 (Fla. 1990).

The terms habitual offender and probation are mutually exclusive. Certainly the two sentencing alternatives are in opposition. In placing a defendant on probation under section 948.01(3), Florida Statutes (1989), the trial court judge finds that "the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of

society do not require that the defendant presently suffer the penalty imposed by law." Whereas, in finding a defendant to be a habitual offender, the trial court judge is determining that the defendant's prior conduct is indicative of future criminal conduct and that he is inherently a danger to society. § 775.084, Fla. Stat. (1989).

As to the incongruity of the statutory schemes, the court in Scott v. State, 550 So.2d 111, 112 (Fla. 4th DCA 1989), rev. dismissed, 560 So.2d 235 (1990), said:

> We doubt that the legislature ever intended that a person could be placed on probation and then, years later, if the probation failed, be subjected to the provisions of the habitual offender statute. In fact, the findings required to order probation are precisely opposite to the findings required to invoke the habitual offender statute. The purpose of habitualization is to protect society against habitual offenders . . . Probation, on the other hand, may only be imposed if it appears to the court that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law.

Contrary to the above authorities, the Second District Court of Appeal held in the instant case and in Thompson v. State, 591 So.2d 1114 (Fla. 2d DCA 1992) that it would not address the arguments that sentences of probation or community control should not have been allowed after the appellants were declared habitual offenders. The court reasoned that the appellants did not object or timely appeal the initial probation or community control, thereby waiving the right to attack the sanctions at revocation.

The court relied on Wolfson v. State, 437 So.2d 174 (Fla. 2d DCA 1983), implying that the sentence imposed was not illegal but merely unlawful.

Wolfson, however, also stands for the proposition that a defendant cannot confer by waiver jurisdiction to impose an illegal sentence. Wolfson, 437 So.2d at 175. A sentence which is illegal as a matter of law may be challenged at any time. Fla. R. Crim. Pr. 3.800(a). An illegal sentence is one against or not authorized by law. Black's Law Dictionary 673 (5th ed. 1979). The Fifth District Court of Appeal in State v. Kendrick, 17 F.L.W. D812, D813 (Fla. 5th DCA March 27, 1992),[2] specifically held that as the habitual felony offender statute mandates a "sentence" of "a term of years," the placing of a defendant on straight probation in lieu of sentence constitutes an "unauthorized" and "illegal" sentence. Contra King v. State, 17 F.L.W. D662, D663 (Fla. 2d DCA March 4, 1992).[3] There the Second District Court of Appeal held habitualized community control is not per se illegal. The court went on to state that under section 775.084, absent a decision that sentencing as a habitual felony offender is not necessary, any sentence of such an habitualized defendant must be a prison sentence for a term of years. To properly impose probation or community control, the court would first have to find that a sentence as a habitual offender was not necessary and then impose sentence pursuant to the

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[2] Kendrick v. State, Case # 79,953, is presently before this Court with the issue of jurisdiction still pending.

[3] Review of King, Case # 79,805, has been denied by this Court.

guidelines, finding proper reasons for a downward departure when necessary. King, 17 F.L.W. at D665.

That the sentence imposed in the instant case is unauthorized and illegal is shown not only by the previously cited authorities but also by a long line of cases which support review of illegal sanctions. In Bouie v. State, 360 So.2d 1142, 1143 (Fla. 2d DCA 1978), the court held an illegal sentence may be collaterally attacked at any time, even after the period for a direct appeal has expired. Bouie received an illegal sentence of one year on probation for an offense with a maximum sentence of six months. He did not object or appeal the original illegal probationary sentence. Nine months later the trial court violated his original probation and imposed another one year term of probation. The defendant then raised the illegality of his original probationary sentence after the revocation and the court vacated the illegal sentence and discharged the defendant. Bouie, 360 So.2d at 1144.

Further, a defendant need not make a contemporaneous objection to later challenge an illegal sentence or condition of probation. Larson v. State, 572 So.2d 1368, 1370 (Fla. 1991). A defendant may not confer on a trial court the authority to impose an illegal sentence by agreement, waiver, or failure to object. Clark v. State, 579 So.2d 109, 110-111 (Fla. 1991). See also, Forehand v. State, 537 So. 2d 103, 104 (Fla. 1989) (contemporaneous objection not necessary to preserve review of unauthorized sentencing guidelines departure where error is apparent on the face of the record); State v. Whitfield, 487 So.2d 1045, 1047 (Fla. 1986)

(contemporaneous objection rule not required to preserve review of trial court's failure to make mandatorily written, clear and convincing reasons for upward departure from sentencing guidelines); State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984) (where juvenile statute provides for findings of fact, in order to make effective right of sentence review, contemporaneous objection rule is not applicable).[4]

Section 775.084(3) (a)-(d) and (4) (c), Florida Statutes (1989), sets forth the procedural safeguards Florida trial courts are to follow in making a determination that a defendant is a habitual offender. In the instant case, Mr. Joyner was noticed only at the time he was placed on community control. At the time of his revocation hearing, he was given no further notice that he would be treated as a habitual offender. The court summarily found him to be a habitual offender without making a record at the revocation proceeding of a pre-sentence investigation, certified copies of prior convictions, or evidence that prior felony convictions were neither pardoned nor set aside in a post conviction proceeding. The court merely told someone to get certified copies of two convictions in the file at a future date.

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[4] The State is expected to argue that a sentence may not be challenged after the defendant has accepted the benefits from a plea, but has failed to carry out the conditions imposed on him. See Bashlor v. State, 586 So.2d 488 (Fla. 1st DCA 1991). The sentencing error in Bashlor, however, was considered merely improper and not illegal. The instant case involves a sentence which is illegal as a matter of law, and may not have been bargained for because there is nothing in the plea agreement indicating habitualized community control. (R10-11)

Mr. Joyner contends that since habitualization is such a harsh sentencing sanction the trial court must strictly comply with the statute. In Hodges v. State, 17 F.L.W. D787, 788 (Fla. 1st DCA March 24, 1992) the court held that it was reversible error to fail to make such findings even absent objection. See also, Frazier v. State, 595 So.2d 131 (Fla. 2d DCA 1992); Bryant v. State, 17 F.L.W. D1343 (Fla. 4th DCA May 27, 1992). Contra Baxter v. State, 17 F.L.W. D812 (Fla. 2d DCA May 27, 1992) (affirmative defenses such as lack of pardon must be raised by defendant at trial level to be preserved). [5]

In addition to the foregoing arguments, there are public policy reasons that habitualized community control or probation and their subsequent revocation should not be sanctioned as permissible sentences. In Burdick v. State, 594 So.2d 267, 270, n. 8 (Fla. 1992),[6] this Court recognized that placing limits on the length of sentencing is a legislative function. However, the court noted that the habitual offender statute contradicts the sentencing guidelines. By simply classifying a defendant as a habitual offender, the trial judge regains all the discretion the sentencing guidelines were intended to reduce. In this case, the classification of Mr. Joyner allowed the trial court to thwart the intent of

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[5] In Baxter, Case # 79,993, the Court has postponed a decision on jurisdiction. Petitioner's merit brief has been filed.

[6] The state is expected to rely on Burdick for the proposition that sentencing under the habitual offender statute is entirely permissive. Petitioner notes that Burdick applies only to subsection 775.084(4) (a) and (4) (b). Burdick does not address the issue of whether a sentence of habitualized probation or community control is illegal. See Kendrick, 17 F.L.W. at D812-813.

the sentencing guidelines as well as the probation and community control statutes.

Effective appellate review is also thwarted by the practices employed here. If a trial court offers a defendant probation or community control as a habitual felony offender, it affords a disincentive to make a record below to either challenge or support the sentence. The offer of probation or community control would seldom be declined by a defendant, but the successful completion of probation or community control is actually seldom achieved. The absence of an incentive to the court and counsel to make an adequate record is contrary to the provision in section 775.084 (3), which provides for full appealability of the findings required.

This Court should also consider the practices here in light of sentencing disparity and cost to the public. A report on habitual offender sentencing concludes that habitual sentences create wildly disparate results among offenders with similar criminal backgrounds and may be applied in a racially discriminatory manner. Habitual Offender and Minimum Mandatory Sentencing in Florida. A Focus on Sentencing Practices and Recommendations for Legislative Reform; House Committee on Criminal Justice, at 69, 71 November 1991). A discussion of the changing penal system in which individual trial judges are given the power to commit and spend vast quantities of tax dollars over a long period of time based on a defendant's habitual offender sentencing (60 years at a potential cost of up to $788,400 for his room and board) is found in Brown v. State, 17

F.L.W. D997 (Fla. 2d DCA April 15, 1992) (ALTENBERND, J., Specially concurring). Brown cites Jones v. State, 589 So.2d 1001, 1003, n. 1 (Fla. 3d DCA 1991) (FERGUSON, J., Dissenting), which discusses disparity in sentencing on a cocaine charge and indicates that the average cost to house a male prisoner, exclusive of the construction costs for correctional facilities, is approximately $36 per day, or $13,140 per year. Citing Florida Department of Corrections, Summary of Financial Data for Fiscal Year Ending June 10, 1991.

Based on public policy considerations, statutory provisions and legislative intent, and the foregoing case authorities and arguments, Mr. Joyner's ten-year habitualized sentence must be vacated. Mr. Joyner should be given a guidelines sanction, with the habitual offender designation deemed void. Jones; Scott.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Elaine L. Thompson, Assistant Attorney General, 4000 Hollywood Blvd, Suite 505 South, Hollywood, Florida 33021, (305) 985-4788, on this 30th day of July, 1992.

Respectfully submitted,

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