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IN THE SUPREME COURT OF FLORIDA

GREGORY MCKNIGHT,

Petitioner,

vs. : Case No. 79,689

STATE OF FLORIDA,

Respondent.

_____ .

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT PETITIONER OF BURGLARY AND THEFT.

The State claims that Petitioner failed to present the insufficiency of the evidence before the trial court. Contrary to the State's position, it was clear that Franks' testimony alone was insufficient to rule out the possibility that Franks' sister's co-resident McKnight had or thought he had permission to enter or that the apparently open and unconcealed removal of the apparently jeopardized items was without larcenous intent. Although it is true that the pecuniarily motivated Zeno Franks claimed he did not give personally Petitioner permission to live in his sister's uninhabitable house after the fire, this was not proof Petitioner did not have express or implied permission from Franks or his sister, the true owner, to enter it. (R33, 34) Whoever took the items apparently had a key. As previously stated, Franks admitted his "knowledge" of whether Petitioner lived there right before the fire was based on Petitioner's arrest form address from four months later. (R6, 7, 55) This does not even rise to a scintilla of evidence as to non-residence; if anything, it shows the inferior status of the apparently non-resident Franks' familiarity with the premises.

Petitioner did address the insufficiency of the evidence below, including the issue of intent in removal, if one considers

what counsel said at the close of the State's case and at the close of the trial. (R36, 38, 39)

It should be noted that the State failed to object in the trial court to any insufficiency in the Petitioner's motion for judgment of acquittal. Apparently everyone below knew exactly what the problem was. Now the State plays "gotcha."

If Petitioner's objections to the sufficiency of the evidence below are somehow viewed as lacking, it should be noted that this was a non-jury trial and the judge found Petitioner guilty beyond a reasonable doubt. Therefore, it would have been futile to take whatever action the State claims was omitted. In these circumstance, the matter should be deemed sufficiently preserved. A lawyer is not required to pursue a completely useless course in order to preserve error. Birge v. State, 92 So.2d 822 (Fla. 1957); Brown v. State, 206 So.2d 377, 384 (Fla. 1968); Bailey v. State, 224 So.2d 296 (Fla. 1969); Harding v. State, 301 So.2d 513 (Fla. 2d DCA 1974), cert. den'd, 314 So.2d 151 (1975). See also, Seeba v. Bowden, 86 So.2d 432, 434 (Fla. 1956); Henderson v. State, 155 Fla. 487, 20 So.2d 649, 651 (Fla, 1945); Wright v. Schulte, 441 So.2d 660, 663 (Fla. 2d DCA 1983), rev. den'd, 450 So.2d 488 (Fla. 1984); Reaves v. State, 531 So.2d 401 (Fla. 5th DCA 1988); Warren v. State, 421 So.2d 808 (Fla. 3d DCA 1982).

The purposes of the contemporaneous or trial objection rule have been variously stated. One rationale is that the trial judge should be "allowed to 'make his error'"; however, once he (the trial judge) has, the this Court has stated that it is a gross

injustice to preclude review. Mancini v. State, 273 So.2d 371, 373 (Fla. 1973). As Mancini stated,

> When the reason for a rule disappears, so should the rule, At least the rule should not apply when the reason for it is absent.

Mancini relied upon Justice Terrell's definitive statement of the interaction of rules of procedure and justice, appearing in Kelley v. Gottschalk, 143 Fla. 371, 196 So. 844 (1940). Gottschalk was a civil case, but its language is even more poignant in the criminal justice setting, where the improper caging of human beings can occur. In Gottschalk, Justice Terrell stated:

> The administration of justice is the most precious function a democracy is called on to perform and no rule of procedure was ever intended to defeat it. Courts must have rules to guide them in the performance of this function, but it has never been considered improper to toss right and common sense in the scales and weigh them with the evidence to reach a just result. Rules of procedure are as essential to administer justice as they are to conduct a baseball game, but they should never be permitted to become so technical, fossilized, and antiquated that they obscure the justice of the cause and lead to results that bring its administration into disrepute.
>
> Rules of procedure are of value only as they point the path to justice or lead the litigants to the truth of the controversy. Any other purpose in their observance is beside the question. There is nothing sacrosanct about them, they should never be permitted to overshadow the main purpose of the litigation, to lead the Court to detachment from the more vital issues or to absorption in shop worn technicalities that defeat the very purpose of the litigation.

~~See also~~, Justice Terrell's thorough discussion of the proper jurisprudential position of procedural rules that is found in **Ex**

parte Welles, 53 So.2d 708 (Fla. 1951), which culminates in the conclusion at 53 So.2d 712:

> They [rules] are not sacrosanct, in fact, when they fail to lead to justice, the time for change has arrived,

In a non-jury trial where everyone on the trial court level is apparently aware to their own desired level of specificity of what is going on, and the factfinder himself reveals the futility of greater specificity by finding the defendant guilty beyond a reasonable doubt, the point and purpose of any contemporaneous objection rule is a mere chimera. In such a setting, the rule should not be used to deny justice.

Another justification for the contemporaneous objection rule appears to be that a party should not be allowed to play "gotcha" or "hedge his bets" by foregoing a chance to correct an error at "an early state of the proceedings." The party cannot acquiesce in an evidentiary or similar procedural error, await the trier of fact's decision, and, if "necessary", then use his back-pocketed error as grounds for a "second bite at the apple." Compare Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978); Snook v. State, 478 So.2d 403 (Fla. 3d DCA 1985); Dueitt v. State, 491 So.2d 1258 (Fla. 1st DCA 1986).

Such concerns and interests are specious in the present setting. If the State's case is fundamentally lacking, there is nothing to be hedged by failing to irrevocably terminate the proceeding at the earliest post-jeopardy point possible. Further, the motion for judgment of acquittal is a gotcha maneuver by its

very nature; the person making the motion need not advise the other party of deficiencies so that they might be remedied prior to the making of the motion. To complain of lack of specificity is baseless in such a setting; the specificity would not allow correction by the adversary. There is really no trial procedure that is quite like the motion for judgment of acquittal; to apply to motions for judgment of acquittal a contemporaneous objection rule that arose in garden variety settings, such as failure to lay a proper predicate or improper form of a question, exalts consistency far beyond what virtues it may have and makes it a vice. To allow review merely turns the clock back, without prejudice to anyone, to the turning point in the cold record at which the motion was made; a point at which appellate intervention is uniquely appropriate and freed from the disadvantageous perspective most appellate issues must be viewed from.

Finally, to assert the contemporaneous objection rule in connection with a motion for judgment of acquittal is, at bottom, to claim our system of justice is a sham and a mockery. There is no tactical reason to move for judgment of acquittal and allegedly not do it right. To raise the contemporaneous objection rule here is to give mere lip-service to deeply held notions that the innocent should not be convicted, forcing such fundamental and civilized notions to yield to legal-jungle technicalities that do not vindicate essential interests. In essence, the State appears to be arguing that Petitioner's trial counsel failed to give Petitioner effective assistance of counsel; therefore, Petitioner

should be penalized, regardless of whether his guilt is extremely doubtful on the record. If the State is correct in asserting the trial attorney was ineffective in making his motion for judgment of acquittal, this Court should reverse, as the ineffectiveness appears on the face of the record and is not even arguably justifiable by any tactical reason. Further, if insufficiency is not deemed preserved, Petitioner would argue the conviction was fundamental error. Nelson v. State, 543 So.2d 1308 (Fla. 2d DCA 1989); Williams v. State, 516 So.2d 975 (Fla. 5th DCA 1987), rev. den'd, 525 So.2d 881 (1988). There was simply no proof that a burglary or theft actually occurred.

ISSUE II

IT WAS REVERSIBLE ERROR TO EXCLUDE EDMONDS' STATEMENTS TO HEATH.

Petitioner would rely upon his prior argument and also cite to Morris v. State, 487 So.2d 291 (Fla. 1986) (non-testifying confidential informant's statement that he intended to set up Mercury Morris admissible). Petitioner would reassert the matters raised in the previous issue as to futility. The trial court apparently sustained the State's objections without allowing argument. (R37, 38) It was therefore unnecessary for Petitioner to proffer reasons to the preemptive judge. Further, the highly appropriate purposes of admissibility were obvious, therefore the justifications did not need to be offered. Brown v. State, 362 So.2d 437, 439 (Fla. 4th DCA 1978).

At page 8 of its brief, the State appears to introduce a new element of confusion into this case. However, it appears apparent from the record that the apparently non-sequestered witness Heath did not recognize the individual who testified as Zeno Franks, and that Edmunds apparently impersonated Franks in cashing checks. (R33, 36) It is simply not correct to say that Petitioner wanted to and was able to get into evidence that Mr. Franks himself approached Heath about removing the items. Edmunds impersonated Franks and not vice-versa. At the conclusion of the case, Petitioner's attorney made clear that Edmunds had not testified. (R38) It is simply specious to suggest that any error is harmless because Petitioner was supposedly able to present the convoluted and singularly unhelpful theory the State, disgruntled with the actual state of affairs below, claims Petitioner was trying to prove.

ISSUE III

IT WAS REVERSIBLE ERROR TO SENTENCE APPELLANT TO HABITUALIZED PROBATION.

Petitioner would reassert that this case falls within the holdings of Charatz v. State, 577 So.2d 1298 (Fla. 1991) and Wright v. State, 599 So.2d 767 (Fla. 2d DCA 1992). The district court has held that habitualizing probation is sufficiently substantive that the imposition of that type of probation must be raised on direct appeal. Kins v. State, 597 So.2d 309, 313 (Fla. 2d DCA 1992); Joyner v. State, 594 So.2d 328 (Fla. 2d DCA 1992); Thompson v. State, 591 So.2d 1114 (Fla. 2d DCA 1992). If it is a matter of

substance, it should have been made an expressly known and available condition of the waiver of jury trial. See also, Trott v. State, 579 So.2d 807 (Fla. 5th DCA 1991) (agreement to be sentenced as habitual offender did not permit sentence as habitual violent felony offender).

The State claims it relies on the "second district's well reasoned en banc decision in King." (State Brief, Page 10, citing King v. State, 597 So.2d 309 (Fla. 2d DCA 1992)) It is not clear what King hath wrought, other than the notion that habitualized sentence must either be enhanced or must comply with the sentencing guidelines, notwithstanding the fact that habitualized sentences, by statute, are not subject to the guidelines. King at 597 So.2d, 316; Section 775.084(4)(e). But see, Burdick v. State, 594 So.2d 267 (Fla. 1992) (enhancement or its degree apparently not mandatory).

The issue of whether habitualized probation exists and is legal is complicated by the fact that it is less than clear what the attributes of habitualized probation are. One can not begin to answer such questions as whether unicorns exist or whether there is a zebra in the lobby of the Barnett Bank unless one knows what unicorns or zebras would look like if they exist. Although the attributes of the habitualized probation posited by the district court remain yet unclear, this legal chimera appears to be assuming gradual form. That form, emerging in a legal Twilight Zone of the district court's own making, is of extremely dubious legality and neither clear nor pretty.

King appears to envision a procedure somewhat analogous to a practice we may see in the future, that of conducting a death penalty phase in attempted first degree murder cases where physical injury has occurred, so that we will have future guidance as to whether to execute the defendant in the event the victim later succumbs to his injury. Such hypothetical jurisprudence may seem absurd, but it is no less absurd than the present scheme of entering a declaratory judgment that a defendant might be a habitual offender at the time he hypothetically violates his probation some time in the future and is hypothetically sentenced. The habitual offender "status" envisioned by the district court is, by its very nature, evanescently defeasible. A defendant may be statutorily eligible when placed on probation on Monday and then have one of the requisite convictions pardoned or set aside in post conviction relief on Wednesday, rendering Monday's judicial efforts of no relevance when the defendant is violated on Friday. Nor can it be said that placing of a defendant on habitualized probation constitutes a finding that a habitualized prison sentence will be necessary for the protection of the public if the defendant violates that probation. There are simply too many sentencing variables related to the past record of the defendant, his present and future circumstances, future prison overcrowding, and the nature of the hypothetical probation violation, the latter of which may arise from anything ranging from a failure to pay costs of supervision to a serious new charge. The trial courts are simply insufficiently clairvoyant to engage in such predictive sentencing.

The procedure envisioned in King V. State, 597 So.2d 309 (Fla. 2d DCA 1992) merely appears to be a purportedly legislative directive that the allegedly underworked and overfunded trial judges of this state busy themselves with speculative, ephemeral, and useless acts lest they become sluggards or vagrants. Not only that, the district court apparently has determined that the unfavorable *yet* only speculatively and hypothetically relevant finding must immediately be appealed to the underworked and overfunded appellate courts, or its incorrectness is waived. King; Joyner; Thompson. If King is correct in assuming that the Legislature has directed the courts to expend their time and resources making adjudications that have no present effect on anyone and which may never have any effect whatsoever on anyone, the Legislature appears to have disregarded the nature of a coequal branch, the Judiciary, to the extent of violating separation of powers and encroaching on it. As this Court stated in Askew V. Sonson, 409 So.2d 7, 8 (Fla. 1981):

> It is a wise rule that courts will only determine issues which are based on a genuine controversy, supported by a sufficient factual predicate.

In a setting such as the present one, where the State, defendant, and trial court have agreed that incarceration would be contrary to the interests of justice and the public, it is an overreaching encroachment for the Legislature to demand a judicial proceeding of absolutely no practical effect whatsoever.

Recently, in Russell V. State, Case No. 92-00518 (Fla. 2d DCA Oct. 21, 1992), the district court, considering this Court's uniform forms broke and in need of fixing, held that when a

defendant is found to be an habitual offender but sentenced to prison under the guidelines instead of the statute, it should be noted on his uniform sentencing form that he has been adjudged an habitual offender, with deletion of the reference on the form that he has been sentenced as such. This would not appear to be part of his sentence or a matter of any consequence; the district court requires this in Russell, with deletion of reference to an extended term, in order to "indicate clearly to the DOC when to credit habitual offenders with gain time." One might well ask, instead, why it is necessary to note the legally ineffective finding on the sentencing form at all.

In Bamberg v. State, 599 So.2d 769 (Fla. 2d DCA 1992), the district court held that enhanced straight probation is permissible under the habitual offender statute. In Bamberg, the defendant was placed on 10 years habitualized probation for a grand theft. Apparently the district court envisions this habitual offender probationary sentence as being subject to enhancement, contrary to the plain meaning of Section 775.084(4)(d), Florida Statutes (1989), the statutory provision in regard to only one imposition of sentence under the statute being allowed (cited and addressed in Petitioner's Initial Brief), if the defendant violates his statutorily extended probation. In Sims v. State, 17 F.L.W. D2321 (Fla. 2d DCA Oct. 9, 1992), the district court held that if the trial court places an habitual violent felony offender on probation, apparently without taking the procedural step of making the non-

necessity finding, the sentence is illegal and subject to enhancement by the trial court at a later date.

Finally, in Burrell V. State, 17 F.L.W. D2135 (Fla. 2d DCA Sept. 11, 1992), the district court held that is illegal to sentence a defendant to a nonhabitualized prison sentence followed by habitualized probation, and that any such illegality must be resolved by a rule of nonlenity, whereby the nonhabitualized prison sentence is made habitual to harmonize it with the habitualized probation. Apparently, to the district court at least, we can not evaluate the sentence, read between the lines, and consider that the fact that habitualization is not mentioned until the probationary portion of a split sentence is a finding that the court does not find it necessary for the public that the defendant serve the initial incarcerative portion as an habitual offender, with a harsher sentence hanging over his head should he violate the subsequent probation. The only thing that saved the defendant in Burrell from a harsher prison sentence was the fact that his waiver of jury trial was conditioned on him not receiving an habitualized prison sentence.

Meanwhile, the District Court of Appeals, Fifth District, continues to hold that when a defendant is found to be an habitual offender, he must be given a prison sentence. Bridges V. State, 17 F.L.W. D2225 (Fla. 5th DCA Sept. 25, 1992); Lowe V. State, 17 F.L.W. D2082 (Fla. 5th DCA Sept. 4, 1992); State V. Manning, 17 F.L.W. D2083 (Fla. 5th DCA Sept. 4, 1992). Bridges is particularly interesting, in that it appears to hold that it is not enough to

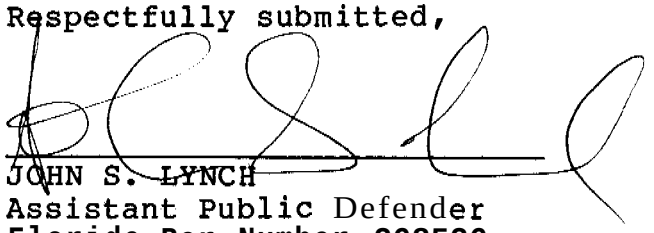
give an habitualized prison sentence on one count, habitualized prison sentences of some type must be given on all counts that are pending sentencing. A close reading of the opinion indicates that the district court does not find anything glaringly illegal about concurrent sentences, however.

These decisions of the various district courts of appeals have resulted in a legal morass that only this Court can clarify. Habitualized probation should be eliminated as either inconsistent with the purposes and intent of the habitual offender statute, or declared a misbegotten, premature superfluity that should be eliminated from our jurisprudence. Compare Snead v. State, 598 So.2d 316 (Fla. 5th DCA 1992); Zambuto v. State, 413 So.2d 461 (Fla. 4th DCA 1982) (defendant can be habitualized for first time at violation of probation) with Scott v. State, 550 So.2d 111 (Fla. 4th DCA 1989), rev. den'd, 560 So.2d 235 (Fla. 1990). In any event, it was improper to place Petitioner on habitualized probation in violation of the terms of his waiver of jury trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis G. Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of October, 1992.

Respectfully submitted,



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