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JUN 10 1992
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

REGINALD MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 79,729

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

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, Reginald Miller, 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 which was utilized on the District Court level will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND THE FACTS

Respondent is in agreement with Petitioner's statement of the case and the facts.

SUMMARY OF THE ARGUMENT

ISSUE

WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE TO THE HABITUAL FELONY OFFENDER STATUTE.

Petitioner was properly sentenced as an habitual offender based upon his present conviction for felony petit theft and his prior two convictions for felony petit theft. The sentence does not violate double jeopardy because the Petitioner is not being twice punished for one offense. The sentence is legislatively authorized as there is no legislative intent that one statute applies to the exclusion of the other.

ARGUMENT

ISSUE

WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE TO THE HABITUAL FELONY OFFENDER STATUTE.

The Petitioner in the instant case was charged and entered an open plea to felony petit theft. (R. 3-4; 13-14). Prior to sentencing, the state filed "Notice that Defendant be Treated as an Habitual Felony/Habitual Violent Felony Offender" (R. 15). At the sentencing hearing, the state placed into evidence, without objection, certified copies of defendant's prior convictions for felony petit theft in 1988 and 1990 (Cas #88-15734 and 90-18740). (R. 47).

In the case of Gaymon v. State, 584 So.2d 632 (Fla. 1st DCA 1990), the First District Court of appeal determined that the sentencing procedure employed in this case did not violate double jeopardy, stating that

> We must disagree with appellant's premise that the provisions utilized herein are dependent on each other and are alternative methods of enhancement. The supreme court in State v. Harris, 356 So.2d 315 (Fla. 1978), ruled that the felony petit theft statute creates a substantive offense "and is thus distinguishable from section 77.084, the habitual criminal offender statute.'' Id. at 316. In the light, the rule is that "[d]ouble jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." State v. Heqstrom, 401

> So.2d 1345. Here, the legislature defined the offense of felony petit theft in section 812.014(2)(d). It then specifically made the offense subject to punishment " as provided in 88775.082, 775.083, and 775.084." (Emphasis added.) Thus provided the procedural safeguards are complied with under section 775.084 in sentencing the defendant as an habitual violent felony offender, we see nothing in the respective statutes indicating that the legislature did not intent the sentenced imposed herein.

Id. at 634. The appellate court, however, certified the following as a question of great public importance:

> WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT AND THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE PURSUANT TO THE HABITUAL VIOLENT FELONY OFFENDER STATUTE.

The Supreme Court has accepted the case for review. Gayman v. State, No. 78,547 and it is set for oral argument on October 5, 1992. This court should adopt the reasoning of Gayman v. State, Id. as set forth by the First District Court of Appeals.

Petitioner argues that the reclassification of his petit theft offense to felony petit theft and his habitual felony offender sentence based upon his prior two convictions for felony petit theft constitute double jeopardy. He claims he is being punished twice for his recidivism.

Petitioner's argument is without legal merit. Each statute in question, §812.014(2)(d) and §775.084, address different evils. The felony petty theft statute reclassies a misdemeanor

petit theft offense to a third degree felony based upon a defendant's third or subsequent conviction for petit theft. (§812.014(1)(d)). The Petit theft statute creates a new substantive offense. As the Florida Supreme Court reasoned in State v. Harris, 356 So.2d 315, at 316 (Fla. 1978):

> Section 812.021(3) provides in pertinent part, that upon the third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree (rather than a misdemeanor in the second degree). This statute creates a substantive offense and is thus distinguishable from Section 775.084, the habitual criminal offender statute. While both sections provide for the enhanced punishment of a repeat offender, under Section 775.084 the prior offense serving as the basis for the increased sentence need not be related to the present offense (as long as it is "qualified" under Subsection (3)) and enhanced punishment is sought in a separate proceeding following conviction or adjudication of guilt.

The petty theft reclassification addresses Appellant's recurrent thievery. Petitioner's enhanced penalty under 8775.084 is based upon his repeated convictions for felonies in the general use of the term. Petitioner incorrectly argues that his past record was twice use to increase his punishment. To the contrary, and to be more specific, his past Misdemeanor record was use to reclassify the degree of his new offense while his past felony record was use to increase the length of the sentence which the court could impose. Obviously Petitioner's past felony record has nothing to do with the current misdemeanor reclassification. As the court reasoned in Eutsey v. State, 383 So.2d 219, at 223 (Fla. 1980):

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism. The enhanced punishment, however, is only an incident to the last offense. The act does not create a new substantive offense. It merely prescribes a longer sentence for the subsequent offenses which triggers the operation of the act. The determination of whether one may be sentenced as an habitual offender is independent of the determination of guilt of the underlying substantive offense, and new findings of fact separate and distinct from the crime charged are required. *Reynolds v. Cochran*, 138 So.2d 500 (Fla. 1962).

In Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. ____, 74 L.Ed.2d at 544 (1983), the United States Supreme Court held that where a State legislature authorizes cumulative punishment under two statutes regardless of whether based on the same conduct, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court impose cumulative punishments.

The Florida Supreme Court has also reasoned that:

> Consistent with the recognized rule on the subject, conviction under a habitual offender statute involves neither double jeopardy nor double punishment for the same offense. Under these statutes the law simply prescribes a longer sentence for the subsequent offense. The increased punishment authorized by the statute is an incident to the last offense for which conviction was obtained. State v. Nelson, 160 Fla. 744, 36 So.2d 427.

Washington v. Mayo, 91 So.2d 621, at 623 (Fla. 1956).

Here Petitioner was convicted of a third degree felony (Felony Petit Theft) which the law provides can carry a maximum penalty of five years imprisonment. (§775.082(3)(d)), and he was sentenced as an habitual felony offender (based upon two prior convictions for felony petit theft) to five years imprisonment even though the court had the option to increase the penalty to 10 years imprisonment pursuant to §775.084(4)(a)3.

Additionally, Petitioner's five year sentence is within the statutory maximum for third degree felonies (§775.082(3)(d)) and was also not prohibited by the Guidelines recommended sentence of 5 1/2 - 7 years (R. 17), had he not been habitualized. The only difference is that he loses basic gain time, §775.084(4)(e).

Petitioner's argument would also destroy the entire purpose of the habitual offender statute if carried to its logical conclusion. Offenders such as the Appellant could continue to commit felony petit thefts, incurring numerous felony convictions but never be classified as an habitual felony offender for further convictions of felony petit theft.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the judgment and sentence should be affirmed.

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 MEGAN OLSON, Assistant Public Defender, P. O. Box 9000 Drawer PD, Bartow, Florida 33830, on this 8 day of June, 1992.

OF COUNSEL FOR APPELLEE