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IN THE SUPREME COURT OF FLORIDA

LONNIE CHRISTOPHER FAWCETT,

Appellant,

versus

CASE NO. 79,752

STATE OF FLORIDA,

Appellee.

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# PETITIONER'S BRIEF ON THE MERITS


JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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## STATEMENT OF THE CASE

Petitioner was charged by an amended information filed in the Circuit Court of Volusia County, Florida, with resisting an officer with violence. (R 101) He was tried by a jury on April 15 and 16, 1991, and found guilty of resisting an officer without violence. (R 73, 106) He was sentenced on May 7, 1991, to pay a fine of five hundred dollars and spend six months in the county jail. (R 107-110)

Petitioner timely appealed to the Fifth District Court of Appeal, and on March 27, 1991, the District Court affirmed his conviction, certifying to this Honorable Court two questions deemed to be of great public importance:

> I. WHEN A CHARGING DOCUMENT IN CHARGING A SPECIFIED OFFENSE INCLUDES ADDITIONAL LANGUAGE SUFFICIENT TO ALSO CHARGE A PERMISSIVE (CATEGORY 2) LESSER OFFENSE IS THE ACCUSED THEREBY PLACED IN JEOPARDY AS TO A CONVICTION OF THE PERMISSIVE (CATEGORY 2) LESSER OFFENSE?
>
> 11. IF A CHARGING DOCUMENT IS SUFFICIENT TO ALLEGE A PERMISSIVE (CATEGORY 2) LESSER OFFENSE AND THE DEFENDANT IS THEREBY PUT IN JEOPARDY OF THE CONVICTION OF THAT OFFENSE IS THE STATE ENTITLED, OVER THE OBJECTION OF THE DEFENDANT, TO HAVE THE JURY INSTRUCTED AS TO THE PERMISSIVE (CATEGORY 2) LESSER OFFENSE?

Fawcett v. State, 17 F.L.W. D812 (Fla. 5th DCA March 27, 1992); (APPENDIX),

## STATEMENT OF THE FACTS

About three o'clock in the morning of July 17, 1990, Volusia County Sheriff's Deputy Richard Nunn received a dispatch telling him that a theft had been attempted at a Circle K convenience store in Deltona. (R 5, 6; 24, 28) He drove to another Circle K store where he saw a car matching the one described in the dispatch pull into the unlit far south corner of the parking lot. (R 7, 18) Three of the car's occupants went into the store for a very brief period of time, and returned empty-handed to the car. (R 8, 18)

Deputy Nunn stopped the vehicle about 200 yards from the store in order to fill out field identification cards on the car's occupants. (R 9-10, 14; 26) He described Petitioner as displaying an aggressive attitude and said that the other three occupants of the car told him they did not know his name. (R 11-13; 25) Deputy Nunn separated Petitioner from his companions and told him he needed his name for further investigation regarding the Circle K store, and Petitioner refused to cooperate. (R 13, 14; 26) When Deputy Nunn told Petitioner he was under arrest for obstruction and tried to handcuff him, he said Petitioner turned around, pushed the deputy, and ran into the darkness. (R 14, 15; 27, 29)

Petitioner and one of the occupants of the car testified that Deputy Nunn ordered Petitioner to put his hands against a wall for no apparent reason and never told him he was under arrest. (R 46, 47; 39-42)

## SUMMARY OF ARGUMENT

**POINT I:** A defendant is placed in jeopardy of all offenses necessarily and permissibly included within the main offenses charged when he or she is tried by a jury for, or when he or she enters a plea to, the charged offenses. The offenses may share the same elements, but for purposes of determining whether double jeopardy prohibits further prosecution for a given offense, the critical inquiry is what conduct the state will prove in the subsequent prosecution, not simply whether each offense requires proof of an element which the other does not. If the State intends to rely on the same conduct for proof of any additional offenses, then further prosecution is barred by former jeopardy. It is the State's prerogative and duty to include all offenses for which the defendant is to be prosecuted within the initial information or indictment.

**POINT 11:** There is no authority for the trial court to instruct a jury on lesser included offenses which have been affirmatively waived by a defendant. This Honorable Court has held only that the State is entitled to jury instructions on necessarily included lesser offenses, and there is no logical basis for extending the doctrine of "jury pardon" to the prosecution in whom rests sole discretion for choosing which charges to bring.

POINT III: Petitioner's motions for a judgment of acquittal should have been granted where his arrest for "obstruction" was not justified by his refusal to identify himself to a deputy making an "investigative stop." That the law enforcement officer's actions be justified is a prerequisite to a finding that a defendant has resisted an officer in the performance of a legal duty.

POINT IV: The trial court erred by refusing to instruct Petitioner's jury that flight alone from a officer seeking to detain a defendant does not constitute resisting an officer without violence.

## ARGUMENT

## POINT I

**WHEN** A CHARGING DOCUMENT IN CHARGING A SPECIFIED OFFENSE INCLUDES ADDITIONAL LANGUAGE SUFFICIENT TO ALSO CHARGE A PERMISSIVE (CATEGORY 2) LESSER OFFENSE IS THE ACCUSED THEREBY PLACED IN JEOPARDY AS TO A CONVICTION OF THE **PERMISSIVE** (CATEGORY **2)** LESSER OFFENSE?

The certified question should be answered in the affirmative. The Fifth Amendment to the United States Constitution provides that no "person shall be subject for the same offence to be twice put in jeopardy of life or limb," and is applicable to the states through the Fourteenth Amendment. Florida's Constitution prohibits placing a person in jeopardy twice for the same offense. Art. 1 s. 9, Fla. Const.

In Scalf v. State, 573 So.2d 202 (Fla. 1st DCA 1991), the First District Court of **Appeal** recognized that the defendant's prosecution in the Circuit Court for trafficking in stolen property **was** barred by the double jeopardy clause where he had been previous convicted and sentenced in the county court for fraudulent transfer of property to a pawnbroker based upon the same conduct on which the trafficking offense was premised. The First District Court based its decision on the rule announced by the United States Supreme Court in Grady v. Corbin, *495* U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d *548* (1990):

> . . . To determine whether a subsequent prosecution is barred by the double jeopardy clause, a court must first apply the traditional Blockburger [v. U. S., *284* U.S. 299,

> 52 S.Ct. 180, 76 L.Ed. 306 (1932)] test. If application of that test shows that the offenses have identical statutory elements, or that one is a lesser included offense of the other, then the inquiry must cease and the subsequent prosecution is forbidden. Even if the later prosecution survives the Blockburger test, the double jeopardy clause still prevents prosecution in cases in which the government, in order to establish an essential element of an offense charged, relies upon conduct that constitutes an offense for which the defendant has already been prosecuted. Thus, the critical inquiry is what conduct the state will prove, not simply whether each offense requires proof of an element which the other does not. Corbin. ___ U.S. at ___, 110 S.Ct. at 2093, 109 L.Ed.2d at 564. The Court concluded that because the conduct whfch supported the underlying misdemeanor offenses for which [Corbin] had been convicted was the same as that supporting the later-filed felony offenses, the subsequent prosecutions were barred by the double jeopardy clause, even though the later offenses required proof of an element which the earlier crimes did not.

Scalf v. State, 573 So.2d at 203-204. (Emphasis supplied.) The Scalf Court determined that the misdemeanor that Scalf was convicted of in county court was not the same offense as the dealing in stolen property charge under the Blockburger analysis; but because the prosecution effectively admitted in Scalf that it would rely on the same conduct for which Scalf had been convicted for fraudulent transfer to a pawnbroker in order to establish the essential elements of dealing in stolen property, Scalf's

conviction for dealing in stolen property was reversed.

When a defendant is tried for an offense which includes permissible lesser offenses, he is placed jeopardy for those lesser offenses, both by virtue of the elements the lesser offenses share with the main offense and the fact that proof of the lesser offense would rely on the same conduct as that which would establish the main offense. See, e. g., Dixon v. State, 584 So.2d 195 (Fla. 5th DCA 1991), wherein the District Court found that a prior plea to dealing in stolen property barred further prosecution for a charge of organized fraud, because the State would rely on the same transaction and conduct for the organized fraud charge as it had for the dealing in stolen property charge. The Fifth District Court of Appeal noted:

> By way of a caveat we point out that the state could have prosecuted appellant for both dealing in stolen property and organized fraud in a single proceeding, thereby avoiding the double jeopardy snare. Grady, 110 S.Ct. at 2095.

Id.' 584 So.2d at 196.

A defendant therefore is placed in jeopardy of all necessarily and permissibly included lesser offenses by his trial for a greater offense. The certified question must be answered in the affirmative.

## POINT 11

IF A CHARGING DOCUMENT IS SUFFICIENT TO ALLEGE A PERMISSIVE (CATEGORY 2) LESSER OFFENSE AND THE DEFENDANT IS THEREBY PUT IN JEOPARDY OF THE CONVICTION OF THAT OFFENSE IS THE STATE ENTITLED, OVER THE OBJECTION OF THE DEFENDANT, TO HAVE THE JURY INSTRUCTED AS TO THE PERMISSIVE (CATEGORY 2) LESSER OFFENSE?

The amended information charging Petitioner with resisting Volusia County Sheriff's Deputy Richard Nunn in the lawful execution of a legal duty alleged that:

> [Petitioner] did then and there offer to do or did do violence to the person of the said deputy by pushing away from Deputy Nunn and running away after he had been advised he was under arrest.

(R 101) Deputy Nunn testified that he had told Petitioner he was under arrest for obstruction because Petitioner refused to give his name to the deputy during an "investigative stop." (R 10, 13, 14, 17, 22) He said that when he tried to handcuff Petitioner he was pushed away and Petitioner ran into the darkness. (R 15)

Defense counsel asked for a judgment of acquittal on the basis that there was no legal basis far arresting Petitioner and because there had been no showing of violence. (R 30, 31, 58, 59) Judge Eastmoore denied the motion, saying that whether Deputy Nunn had made a justified stop was an issue for the jury to decide and that the deputy's testimony that he was pushed made it a question of fact. whether there had been any violence. (R 34, 59-60)

Petitioner objected to the giving of a jury instruction on resisting an officer without violence as a lesser included offense because it is not a necessarily lesser included offense of resisting an officer with violence. See, e. g., Tice v. State, 569 So.2d 1327 (Fla. 2d DCA 1990); Benjamin v. State, 462 So.2d 110 (Fla. 5th DCA 1985); Ferrell v. State, 544 So.2d 336 (Fla. 1st DCA 1989). (R 72) The objection was noted but overruled and the jury was instructed on, and convicted Petitioner of, resisting an officer without violence . (R 72)

In Gallo v. State, 491 So.2d 541 (Fla. 1986), this Honorable Court held that even where a defendant requests that no instructions on lesser included offenses be given and affirmatively waives his right to such instructions, the State has a right to have a jury instructed on all necessarily included lesser offenses. Because the conviction approved in Gallo was for a permissible lesser included offense, the First District Court of Appeal in Johnson v. State, 572 So.2d 957 (Fla. 1st DCA 1990), review pending, Johnson v. State, Florida Supreme Court Case Number 77,2391, relied on Gallo to affirm a conviction for aggravated battery as a lesser included offense of attempted first-degree murder where the defendant had objected to a jury instruction on the Category 2 offense. The First District Court

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In Johnson, the First District Court of Appeal certified the question of whether the State is entitled to have jury instructions given on Category 2 lesser included offenses, in addition to Category 1 necessarily included lesser offenses, in a case where the defendant requests that no such instructions be given and knowingly and intelligently waives his right to such instructions. Id., 572 So.2d at 959.

of Appeal also cited Courson v. State, *414* So.2d **207 (Fla.** 3d DCA 1982), as further authority for the State's right to jury instructions on permissible lesser included offenses; but in Courson, the District Court had affirmed the defendant's conviction primarily on the basis that his objection to the jury instructions was not sufficiently distinct to preserve the issue for appellate **review,** and that "even if . . . it was error . . . the error was not fundamental." Id., *414* So.2d at *209.*

**As** Judge Ervin pointed out in his concurring opinion in Johnson, the decisions in Gallo, supra, and State v. Washington, 268 So.2d 901 (Fla. 1972), did not distinguish between necessarfly or permissibly included lesser offenses. See Johnson, supra, 572 So.2d **at** 959-960. This was recognized by this Honorable Court in Gould v. State, 577 So.2d 1305 (Fla. 1991):

> The state relies on **Gallo** v. State, 491 So.2d 541 (Fla. 1986), for **the** proposition that permissive lesser-included **offenses** are necessarily included lesser offenses. Such reliance is misplaced. The question certified in Gallo was whether the state was entitled to jury instructions on necessarily included lesser **offenses** when the defendant waives such instructions. There **was** no dispute or discussion in Gallo regarding the appropriate characterization of the lesser offenses in that case. The opinion addressed only the certified question, which assumed for purposes of the question that the lesser offenses involved were necessarily included **lesser** offenses.

Id., 577 So.2d at 1305.

Petitioner contends that this Honorable Court: should revisit Gallo and Washington and any implication they might carry that the State has a right, over a defendant's objection, to jury instructions on permissible lesser included offenses, and answer the certified question in this case in the negative.

The defendant in a criminal trial is entitled to have his jury instructed on a permissible lesser included offense where the pleadings and evidence demonstrate that it is included in the offense charged. See, e. g., Amado v. State, 585 So.2d 282 (Fla. 1991); Tice, supra. Where a defendant objects to jury instructions on permissible lesser included offenses, however, the objection should be sustained.

Juries are allowed to convict of lesser offenses under Florida's recognition of the jury's right to exercise its "pardon power." See State v. Wimberly, 498 So.2d 929 (Fla. 1986). This rationale for allowing a defendant to present verdict options other than "as charged" for his jury to consider does not apply to the State, upon whose initiative the charges are brought. It is illogical to extend the doctrine of "jury pardon" to the party which has the full and exclusive power and discretion to decide what: offenses to charge in the first place. As this Honorable Court observed in State v. Washington, supra:

> The rule established by the District Court [in Washington v. State, *247* So.2d *743* (Fla. 1st DCA 1971)] comports with logic and fairness. By not objecting to a lesser included offense instruction, a defendant would waive any contention that he was not given

> notice that the jury could convict him for lesser included offenses. When he did object, the State would be forced to have its case stand or fall on whether the jury found the defendant guilty of the crimes charged in the indictment or information. . . .

Id., 268 So.2d at 902. The Court in State v. Washington, however, proceeded then to reverse the First District Court of Appeal on the basis of Section 919.16, which was repealed in 1971, which provided that the jurors in a criminal trial may convict a defendant of attempt or "any offense which is necessarily included in the offense charged. . . . Petitioner contends that neither the holding in State v. Washington nor the result in Gallo supports an affirmance in this case.

Because the State has no right to jury instructions on offenses which are not necessarily included in the crimes which the prosecution elected to charge, Petitioner's objection to a jury instruction on resisting an officer without violence at his trial for resisting an officer with violence should have been sustained. His conviction should be reversed.

## POINT III

**THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTIONS FOR A JUDGMENT OF ACQUITTAL.**

Volusia County Sheriff's Deputy Richard Nunn testified that about three o'clock in the morning he received a dispatch about an attempted theft at a Circle K convenience store in Deltona. (R 5, 6; 24, 28) He drove to a second Circle K store in Deltona where he saw a car matching the one described in the dispatch pull into the unlit far south corner of the parking lot. (R 7, 18) Three of the car's occupants went into the store for a very brief period of time, and returned empty-handed to the car. (R 8, 18)

Deputy Nunn testified that he stopped the car in order to effect an "investigative stop," to identify the subjects in the vehicle, and take photographs of them. (R 9) He said he would have then gone back to the Circle K stores and see if there had indeed been a theft. (R 9)

Deputy Nunn said that making photographic field identification cards on citizens in Deltona is a routine part of his patrol that he performs once or twice a night. (R 9-10; 26) He said he had received no further word on any possible theft and made the stop solely for investigative purposes. (R 10) When Petitioner refused to identify himself or cooperate, the deputy testified that he told him he was under arrest for obstruction and had begun to handcuff him when Petitioner pushed the deputy away and ran into the darkness. (R 13, 14, 15; 27, 29)

In Robinson v. State, 550 So.2d 1186 (Fla. 5th DCA 1989), the defendant was suspected of being the caller who called the Ocala Police Department to say, "I just put a bomb in one of your cars," After Robinson refused to identify himself or answer any of the police's questions when he returned to the station, he was arrested for "obstructing justice without violence," a charge which was later changed to loitering and prowling. This Honorable Court: wrote:

> The defendant's failure to cooperate -- his refusal to answer questions -- cannot itself be criminal consistent with the fourth and fifth amendment protections. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Steele v. State, 537 So.2d 711 (Fla. 5th DCA 1989); Burgess v. State 313 So.2d 479 (Fla. 2d DCA 1975) certified question dismissed 326 So.2d 441 (Fla. 1976). The state's argument would effectively render all uncooperative Terry-stop detainees criminals. A lawful arrest is an essential element of the offense of resisting arrest without violence. Johnson v. State, 395 So.2d 594 (Fla. 2d DCA 1981); Lee v. State, 368 So.2d 395 (Fla. 3d DCA), cert. denied, 378 So.2d 349 (Fla. 1979). . . .

Id., 550 So.2d at 1187-1188. See also, Huntley v. State, 575 So.2d 285 (Fla. 5th DCA 1991) (proof of lawfulness of the officer's conduct is an essential element of resisting an officer without violence); and Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (law requiring identification upon a lawful police stop was improper and violative of the Fourth Amendment).

Deputy Nunn was not justified in stopping and detaining Petitioner and his companions. Petitioner was justified in refusing to identify himself, absent a reasonable suspicion by the deputy that he was engaged in criminal conduct. His conviction for resisting an arrest for "obstruction" by failing to cooperate with the deputy's routine pursuit of filling out field contact identification cards should be reversed.

## POINT IV

THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUEST FOR A SPECIAL JURY INSTRUCTION THAT FLIGHT FROM A LAW ENFORCEMENT OFFICER DOES NOT CONSTITUTE OBSTRUCTION.

Petitioner requested that his jury be instructed on the law as stated in Nelson v. State, 543 So.2d 1308 (Fla. 2d DCA 1989), i. e., that flight alone does not constitute obstructing an officer, nor does it give rise to a well-founded suspicion of criminal activity. (R 71, 105) Judge Eastmoore had earlier denied Petitioner's motions for a judgment of acquittal, in part because he found that whether Deputy Nunn had justifiedly stopped Petitioner and his companions was a question for the jury to decide from the facts and circumstances. (R 34, 59) Deputy Nunn had testified that he stopped the car as an "investigative stop," to determine if the occupants had taken anything, and to identify them. (R 10, 17, 22)

One of the elements of resisting an officer without violence is that the officer be engaged in the lawful execution of a legal duty. s. 843.02, Fla.Stat. (1989). Even though this is an essential element and Judge Eastmoore had felt that it was up to the jury to determine whether Deputy Nunn was engaged in a legal duty, the trial court twice instructed the jury:

> THE COURT: The Court further instructs you that investigation of criminal activity constitutes a lawful execution of a legal duty.

(R 63) Especially in light of this jury instruction which basically directed a finding that an essential element of the

charge had been proven, and the jury's rejection of the other primary element of the main charge (offering violence to the deputy), Petitioner was entitled to his requested instruction based on a correct statement of the law.

## CONCLUSION

For the reasons expressed in **Point III** herein, Petitioner respectfully requests that this Honorable Court reverse his **conviction** and **remand** this cause to the trial court with directions that he **be** discharged. **In** the alternative, **and** for the **reasons** expressed in **Points I, 11,** and **IV** herein, Petitioner respectfully requests that this Honorable Court reverse his conviction and remand this cause to the trial court for a **new** trial.

Respectfully submitted,

**JAMES** B. **GIBSON,** PUBLIC **DEFENDER**
**SEVENTH JUDICIAL CIRCUIT**

**BRYNN NEWTON**
**ASSISTANT PUBLIC DEFENDER**
Florida Bar **Number** 175150
112-A Orange Avenue
**Daytona** Beach, Florida 32114-4310
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Lonnie C. Fawcett, 2700 Hoover Drive, Deltona, Florida 32738, this 26th day of May, 1992.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

LONNIE CHRISTOPHER FAWCETT,

Appellant,

versus

CASE NO. 79,752

STATE OF FLORIDA,

Appellee.

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# APPENDIX

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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be corrected on remand. (PETERSON and GRIFFIN, JJ., con-

[redacted]

[redacted]'Section 958.04, Florida Statutes (Supp. 1990).

* * *

Criminal law—Jury instructions—Lesser included offenses—Where charging document contained allegations of elements of main offense and also additional allegations of elements of permissive lesser included offense, no error in giving instruction and permitting verdict and conviction of lesser included offense—Question certified whether an accused is placed in jeopardy as to a conviction of permissive (category 2) lesser offense when a charging document in charging a specified offense includes additional language sufficient to also charge a permissive (category 2) lesser offense—Question certified whether, if a charging document is sufficient to allege a permissive (category 2) lesser offense and the defendant is thereby put in jeopardy of a conviction of that offense, the state is entitled, over objection of defendant, to have jury instructed as to permissive (category 2) lesser offense

**LONNIE CHRISTOPHER FAWCETT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-1192. Opinion filed March 27, 1992. Appeal from the Circuit Court for Volusia County, E. L. Eastmoore, Judge. James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and John W. Foster, Jr., Assislant Attorney General, Daytona Beach, for Appellee.**

**(PER CURIAM.)** The defendant was charged with a criminal offense. The charging document contained allegations of the essential facts (elements) of the main offense and also additional allegations of facts constituting elements of a permissive lesser included offense.[1] At trial the State requested the judge charge the jury on, and submit a verdict alternative as to, the permissive lesser included offense. The defendant objected. The court overruled the objection and gave the charge and verdict alternative and the defendant was found guilty of the permissive lesser included offense. The defendant appeals claiming the court erred in giving the instruction and permitting the verdict and conviction. Consistent with *Johnson v. State*, 572 So.2d 957 (Fla. 1st DCA 1990), rev. *granted*, Case No. 77,239 (Fla. 1991), we affirm but certify, as of great public importance, the following two questions:

> WHEN A CHARGING DOCUMENT IN CHARGING A SPECIFIED OFFENSE INCLUDES ADDITIONAL LANGUAGE SUFFICIENT TO ALSO CHARGE A PERMISSIVE (CATEGORY 2) LESSER OFFENSE IS THE ACCUSED THEREBY PLACED IN JEOPARDY AS TO A CONVICTION OF THE PERMISSIVE (CATEGORY 2) LESSER OFFENSE?
>
> IF A CHARGING DOCUMENT IS SUFFICIENT TO *ALLEGE* A PERMISSIVE (CATEGORY 2) LESSER OFFENSE AND THE DEFENDANT IS THEREBY PUT IN JEOPARDY OF A CONVICTION OF THAT OFFENSE IS THE STATE ENTITLED, OVER THE OBJECTION OF THE DEFENDANT, TO HAVE THE JURY INSTRUCTED AS TO THE PERMISSIVE (CATEGORY 2) LESSER OFFENSE?

AFFIRMED. (GOSHORN, C.J., COBB and COWART, JJ., concur.)

[1]See Brown v. State, 206 So.2d 377 (Fla. 1968). *See* also In re Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases. 431 So.2d 594 (Fla. 1981), *modified*, 431 So.2d 599 (Fla. 1981).

* * *

Criminal law—Sentencing—Habitual offender—Where habitual offender statute mandates sentence of a term of years, placing defendant on straight probation in lieu of sentence constitutes unauthorized and illegal sentence—State is entitled to appeal such sentence

**STATE OF FLORIDA, Appellant, v. LARRY LEON KENDRICK, Appellee. 5th District. Case No. 90-1659. Opinion filed March 27, 1992. Appeal from the Circuit Court for Brevard County, John D. Moxley, Judge. Norman R. Wolfinger, State Attorney, and Joseph N. D'Achille, Jr., Assistant State Attorney, Titusville, for Appellant. James B. Gibson. Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach. for Appellee.**

**(COWART, J.)** The issues in this case are whether: (1) the trial court, after adjudicating a defendant to be an habitual felony offender, may place the defendant on probation, thus imposing a sanction that is lower than the range recommended by the sentencing guidelines, and (2) the State can appeal such a disposition.

The defendant pled guilty to the offense of escape (§ 944.40, Fla. Stat.), a second degree felony, with a statutory maximum punishment of 15 years' incarceration. His sentencing guidelines category 8 scoresheet totaled 93 points, indicating a sentencing recommended range of 3½ to 4½ years incarceration and a permitted range of 2½ to 5½ years incarceration.

The trial court determined that it was necessary for the protection of the public that the defendant be sentenced as an habitual felony offender[2] (§ 775.084, Fla. Stat.), adjudicated him guilty of escape and placed him on straight probation[3] for 15 years, with conditions including 6 months confinement in the county jail. The State appeals the probation disposition. We reverse.

Section 924.07(1), Florida Statutes, provides that the state may appeal from (e) a sentence, on the ground that it is illegal and (i) a sentence imposed outside the range recommended by the guidelines authorized by section 921.001. Similarly Florida Rule of Appellate Procedure 9.140(c)(1) provides that the State may appeal (I) an illegal sentence, and (J) a sentence imposed outside the range recommended by the guidelines authorized by section 921.001, Florida Statutes (1983) and Florida Rule of Criminal Procedure 3.701.

The relevant portion of the Habitual Offender Act, section 775.084(4)(a) provides:

> (4)(a) The court ***shall sentence*** the habitual felony offender as follows:
>
> * * *
>
> 2. In the case of a felony of the second degree, ***for*** a ***term of*** years not exceeding 30.

[Emphasis added].

The State argues that the probation disposition is "illegal" in that section 775.084(4)(a), Florida Statutes (1988), mandates that the habitual felony offender receive a prison sentence of a term of years and that, accordingly, the probation disposition in this case constitutes an "illegal" sentence.

The defendant does not assert that the State has no right of appeal but, citing State v. Brown, 530 So.2d 51 (Fla. 1988), joins issue with the State as to whether the habitual felony offender statute mandates a prison sentence.

In *Brown* the supreme court held that when a felony offender is properly adjudicated an habitual offender and the guidelines sentence is less than life, the trial court may not exceed the guidelines recommendation absent a valid reason for doing so, notwithstanding the seemingly mandatory language of section 775.084(4)(a)(1), Florida Statutes. Thereafter, the legislature amended the habitual offender statute to make habitual offender sentencing independent of the sentencing guidelines. Chapter 88-131, § 6, Laws of Florida. In Burdick *v. State*, 17 F.L.W. S88 (Fla. Feb. 6, 1992), however, the supreme court held that section 775.084(4)(a), which *states:*

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life[,]

does not make imposition of a life sentence mandatory but rather makes it permissive with the trial court. *See also State v. Washington*, 17 F.L.W. S98 (Fla. Feb. 6, 1992); *State v. Eason*, 17 F.L.W. S97 (Fla. Feb. 6, 1992).

*Brown* and *Burdick* do not control here where the operative