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IN THE SUPREME COURT OF FLORIDA

LONNIE CHRISTOPHER FAWCETT,

Petitioner,

v. CASE NO. 79,752

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as far as it goes and would add the following additional facts in support of the decision of the Fifth District Court of Appeal and the trial judge.

1. The dispatch described a vehicle and its occupants (R 6, 7). The vehicle was maroon or red and contained four occupants, three white and one black (R 7, 24). Nunn testified that he was approximately two miles away from the convenience store, but close to a second Circle K convenience store (R 7).

2. The vehicle was parked where it could not be seen by the store clerk (R 7).

3. Nunn had the four occupants exit the vehicle (R 10). Petitioner was a back seat passenger (R 11). Nunn explained why he stopped them (R 10).

4. Deputy McCroskey testified that he heard the radio dispatch (R 24). McCroskey responded as backup to Nunn (R 24). When McCroskey arrived, Nunn had already stopped the vehicle and the occupants of the vehicle were out (R 25).

5. McCroskey heard Nunn tell petitioner he was under arrest for obstruction (R 27). McCroskey then saw Nunn turn petitioner around (R 27). McCroskey saw Nunn stagger and petitioner take off running (R 29). McCroskey did not see petitioner make any contact with Nunn (R 29).

6. Joseph Civille has been petitioner's friend for 33-4 years (R 37). On July 17, 1990, he along with petitioner and two others went to the Circle K to get some food (R 27). They parked

right in front of the store (R 38). They bought food, sodas, potato chips and sandwiches (R 38). They were in the store 5-10 minutes (R 42). On their way back to the house they were stopped by Nunn (R 38). Nunn told them to get out of the vehicle and they did (R 38). Nunn asked them what they had been doing at the Circle K and they said buying some stuff (R 38). Nunn also asked them if they had been at another Circle K and they said no (R 39). According to Civille, Nunn then got back into his patrol car and talked on the radio (R 38). When Nunn got out he told petitioner to put his hands on the wall (R 38, 39). As Nunn was going to handcuff petitioner, petitioner pulled to the right and ran (R 40). Civille never heard Nunn tell petitioner he was under arrest (R 41). Civille never heard petitioner use any obscenities (R 41).

7. Petitioner testified that he went to the Circle K (R 44). According to petitioner, they did park a little to the left of the front of the store but not where they could not be seen (R 44). They went into the store, bought food and drinks and went out to car (R 44). As he was getting into the car, petitioner saw a police car to the left (R 45). Petitioner told the driver of the vehicle that there was a police car and to be cool so they did not get pulled over (R 45). Petitioner was in the back of the vehicle (R 45). They were pulled over (R 45). Petitioner asked what they had done wrong (R 46). Nunn asked petitioner what his name was (R 46). Petitioner responded that first he wanted to know what he had done wrong (R 46). Nunn asked petitioner a few more times for his name (R 46). Nunn then told

petitioner to get up against the wall (R 46). Nunn grabbed petitioner's hand and put it behind his back (R 46). When petitioner heard the handcuffs he shook his hand loose and ran (R 46). Petitioner ran because he would rather run to his house and have a good nights sleep than a bad nights sleep in jail (R 47). According to petitioner, he did not push Nunn (R 49, 53-54). Petitioner wiggled his hand away from Nunn and then ran (R 54). Petitioner used no force, just a little wiggling (R 55).

8. During the trial, petitioner submitted a written special jury instruction (R 105). Petitioner wanted the jury to be instructed that "Defendant's flight standing alone does not support a charge of resisting [an] officer without violence to his person" (R 105). The trial judge denied the request (R 105). After the trial judge instructed the jury, petitioner objected to the failure to instruct that flight alone does not support a charge of resisting without violence (R 71). Petitioner also objected to instructing the jury on the offense of resisting without violence (R 72).

SUMMARY OF ARGUMENTS

POINT I: This court should decline to exercise its jurisdiction in the instant case in light of its recent decision in Johnson, infra. If this court determines to exercise its jurisdiction, respondent asserts that the decision of the Fifth District Court of Appeal should be affirmed based on the authority of Johnson, infra. Furthermore, in response to the first certified question it appears that it should be answered in the affirmative pursuant to Johnson, infra.

POINT 11: This court should decline to exercise its jurisdiction in light of its recent decision in Johnson, infra. If this court determines to exercise its jurisdiction, the certified question should be answered in the affirmative, as the state has the right to insist on the giving of instructions on permissive lesser included offenses.

POINT III:The trial judge properly denied the motion for judgment of acquittal. Where the facts and inferences in a prosecution for resisting an officer with violence are in dispute, the issue of whether or not the officer was in the lawful performance of his duty should be left to the jury. In the instant case, facts and inferences were in dispute.

POINT IV: The trial judge did not abuse his discretion in denying the requested jury instruction. In the instant case, petitioner was not charged with resisting an officer due to his flight, Petitioner's flight occurred after he resisted the officer. The requested instruction was inapplicable to the facts of petitioner's case.

ARGUMENTS

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?

On May 1, 1992, this court issued an order postponing its decision on jurisdiction. Respondent requests this court decline to exercise its jurisdiction in this case in light of this court's recent decision in State v. Johnson, 17 F.L.W. 299 (Fla. May 28, 1992). If this court determines to exercise its jurisdiction, respondent asserts that the decision of the Fifth District Court of Appeal should be affirmed based on the authority of Johnson, supra.

Furthermore, in response to the first certified question it appears that it should be answered in the affirmative. The question appears to be somewhat confusing due to the use of the word "jeopardy".[1] However, jeopardy is not used in the context of double or former jeopardy in the decision of the appellate court.[2] Rather, it is used as indicating that the defendant is

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[1] This confusion is apparent from Petitioner's Brief on the Merits. In addressing the first certified question, petitioner addresses it as if it were a double jeopardy issue. As stated above, it does not appear that jeopardy is used in the context of double jeopardy.

[2] Double jeopardy is inapplicable in the instant case. Petitioner was convicted and his judgment and sentence were affirmed. There does not appear to be any possibility of further prosecution as to this offense.

subject to conviction on the permissive lesser offense. Pursuant to Johnson, this appears to be true.

POINT II

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?

The second certified question should likewise be answered in the affirmative.[3] In Johnson, at 299, this court held "that the State has a right to insist on the giving of instructions on permissive lesser included offenses over the defendant's objection." The decision of the Fifth District Court of Appeal should be affirmed.

[3] As stated in Point I, respondent requests this court decline to exercise its jurisdiction in light of its decision on the instant issue in Johnson, supra.

POINT III

THE TRIAL JUDGE PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL.

Petitioner was charged by amended information with one count of resisting an officer with violence to his person (R 101). Petitioner was specifically charged with "do[ing] 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).

During the trial, Deputy Nunn testified that at approximately 3:00 a.m. he heard a radio dispatch on an attempted theft at a Circle K convenience store (R 6). The dispatch described a vehicle and its occupants (R 6, 7). The vehicle was maroon or red and contained four occupants, three white and one black (R 7, 24). Nunn testified that he was approximately two miles away from the convenience store, but close to a second Circle K convenience store (R 7). Nunn parked in a dark area were he could watch the parking lot and the store front (R 7).

About the time Nunn got his vehicle into position, a dark vehicle pulled into the far south corner of the parking lot (R 7). The vehicle was parked where it could not be seen by the store clerk (R 7). Nunn believed the vehicle matched the description of the vehicle given in the radio dispatch (R 7, 12). Three of the occupants got out of the vehicle and went into the store (R 8). They were in the store for a very short time and drove off (R 8). It did not appear that they had bought anything (R 9).

Based on the dispatch and what he observed, Nunn stopped the vehicle in order to identify the occupants (R 8, 10). Nunn had the four occupants exit the vehicle (R 10). Petitioner was a back seat passenger (R 11). Nunn explained why he stopped them (R 10). Nunn asked two of the other occupants what petitioner's name was (R 13). They told Nunn they did not know (R 13). Nunn then asked petitioner his name and petitioner refused to give it to him (R 14).[4] Nunn asked petitioner his name again and again petitioner refused (R 14). Nunn then told petitioner he was under arrest for obstruction of justice (R 14). Nunn turned petitioner around and went to handcuff him (R 15). Petitioner then turned back around and pushed Nunn (R 15). Nunn was knocked off balance (R 15). Petitioner ran into the darkness (R 15).

Deputy McCroskey testified that he heard the radio dispatch (R 24). McCroskey responded as backup to Nunn (R 24). When McCroskey arrived, Nunn had already stopped the vehicle and the occupants of the vehicle were out (R 25). According to McCroskey, petitioner was being belligerent (R 25, 26). McCroskey talked to the other three occupants and Nunn spoke with petitioner (R 25, 26). McCroskey heard Nunn tell petitioner he was under arrest for obstruction (R 27). McCroskey then saw Nunn turn petitioner around (R 27). McCroskey saw Nunn stagger and petitioner take off running (R 29). McCroskey did not see petitioner make any contact with Nunn (R 29).

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[4] Specifically, petitioner said "Fuck you. I'm not giving you shit." (R 14).

After the state rested, petitioner moved for a judgment of acquittal (JOA). The trial judge denied the motion (R 34). Petitioner presented two witnesses.

Joseph Civille has been petitioner's friend for 33-4 years (R 37). On July 17, 1990, he along with petitioner and two others went to the Circle K to get some food (R 27). They parked right in front of the store (R 38). They bought food, sodas, potato chips and sandwiches (R 38). They were in the store 5-10 minutes (R 42). On their way back to the house they were stopped by Nunn (R 38). Nunn told them to get out of the vehicle and they did (R 38). Nunn asked them what they had been doing at the Circle K and they said buying some stuff (R 38). Nunn also asked them if they had been at another Circle K and they said no (R 39). According to Civille, Nunn then got back into his patrol car and talked on the radio (R 38). When Nunn got out he told petitioner to put his hands on the wall (R 38, 39). As Nunn was going to handcuff petitioner, petitioner pulled to the right and ran (R 40). Civille never heard Nunn tell petitioner he was under arrest (R 41). Civille never heard petitioner use any obscenities (R 41).

Petitioner testified that he went to the Circle K (R 44). According to petitioner, they did park a little to the left of the front of the store but not where they could not be seen (R 44). They went into the store, bought food and drinks and went out to car (R 44). As he was getting into the car, petitioner saw a police car to the left (R 45). Petitioner told the driver of the vehicle that there was a police car and to be cool so they

did not get pulled over (R 45). Petitioner was in the back of the vehicle (R 45). They were pulled over (R 45). Petitioner asked what they had done wrong (R 46). Nunn asked petitioner what his name was (R 46). Petitioner responded that first he wanted to know what he had done wrong (R 46). Nunn asked petitioner a few more times for his name (R 46). Nunn then told petitioner to get up against the wall (R 46). Nunn grabbed petitioner's hand and put it behind his back (R 46). When petitioner heard the handcuffs he shook his hand loose and ran (R 46). Petitioner ran because he would rather run to his house and have a good nights sleep than a bad nights sleep in jail (R 47). According to petitioner, he did not push Nunn (R 49, 53-54). Petitioner wiggled his hand away from Nunn and then ran (R 54). Petitioner used no force, just a little wiggling (R 55).

Petitioner then rested (R 57). Petitioner renewed his motion for JOA (R 58). The motion was denied (R 60). Petitioner was found guilty of the lesser offense of resisting an officer without violence (R 73, 106).

Petitioner now argues, as he argued on direct appeal, that the trial judge erred in denying the motion for JOA. Respondent asserts that the motion was properly denied.

When moving for a JOA a defendant admits the facts adduced at trial, as well as every conclusion which may be inferred from the evidence which is favorable to the state. State v. Law, 559 So.2d 187 (Fla. 1989). A JOA should be granted only if the state fails to produce evidence from which the jury could exclude every reasonable hypothesis except that of guilt. Id. Where the state

produced competent substantial evidence from which the jury could have reasonably rejected the defendant's hypothesis of innocence, the JOA should be denied. Id.

> The state is not required to "rebut conclusively every possible variation" (footnote omitted) of events which could be inferred from the evidence which is consistent with the defendant's theory of events. (Citations omitted).

Id., at 189. The concern on appeal is whether, after all conflicts in the evidence and all reasonable inferences from the evidence have been resolved in favor of the verdict, there is competent substantial evidence to support the verdict and judgment. Holton v. State, 573 So.2d 284, 289 (Fla. 1990). "Where facts and inferences [from a prosecution for resisting an officer] are in dispute, the trial court should not take away from the jury the right to determine whether or not the officer was in the lawful performance of a legal duty." Williams v. State, 511 So.2d 740, 742 (Fla. 5th DCA 1987); see also Smith v. State, 399 So.2d 70 (Fla. 5th DCA 1981).

Petitioner argues that the deputy was not justified in stopping the vehicle in which petitioner was a passenger. Respondent asserts that the deputy was justified in stopping the vehicle. At 3:00 a.m., Nunn heard a radio dispatch concerning an attempted theft at a Circle K approximately two miles from where he was located. The dispatch described the vehicle as maroon or red, Also, that there were four occupants in the vehicle, three white and one black. Nunn was near a second Circle K and parked so he could observe the parking lot and the front of the store.

A vehicle matching the description given in the dispatch pulled to the far side of the parking lot, as Nunn was finishing parking his vehicle. Three of the occupants went into the store. They were in the store for a very short time and did not appear to have bought anything. Nunn stopped the vehicle.

Nunn had a founded suspicion sufficient to justify stopping the vehicle in which petitioner was a passenger. The vehicle and its occupants matched a description of suspects in an attempted theft at a Circle K approximately 2 miles away. The vehicle showed up within minutes of the dispatch. Whenever a law enforcement officer encounters a person under circumstances which reasonably indicate that that person has committed, is committing or is about to commit a crime, he may temporarily detain such person in order to ascertain his identity. 901.151(2), Fla. Stat. (1991). While petitioner and his witness testified that they had not been at another Circle K, this testimony was in dispute with Nunn's. According to Nunn, the vehicle petitioner was in and the occupants matched the description of the suspects in an attempted theft at the Circle K. The trial judge properly left the issue of whether the officer was in the lawful performance of a legal duty to be decided by the jury. Williams, supra; Smith, supra. The judgment and sentence should be affirmed.

POINT IV

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE REQUESTED JURY INSTRUCTION.

During the trial, petitioner submitted a written special jury instruction (R 105). Petitioner wanted the jury to be instructed that "Defendant's flight standing alone does not support a charge of resisting [an] officer without violence to his person" (R 105). The trial judge denied the request (R 105).[5] After the trial judge instructed the jury, petitioner objected to the failure to instruct that flight alone does not support a charge of resisting without violence (R 71). Petitioner also objected to instructing the jury on the offense of resisting without violence (R 72). Petitioner was found guilty of the lesser offense of resisting an officer without violence (R 73, 106).

Petitioner argues that the trial judge committed reversible error in denying the requested jury instruction. Respondent asserts that petitioner has failed to sustain a showing of abuse of discretion in denying the requested instruction. The requested charge was inapplicable to the facts in the instant case. Petitioner had been charged by information with one count of resisting an officer with violence. The violence was not petitioner's running away but petitioner's pushing of the officer. Only after the petitioner pushed the officer did he flee. The same is true for the offense for which petitioner was

[5] It is not clear from the record on appeal why the trial judge denied the request. The charge conference was not transcribed and made a part of the record on appeal.

actually convicted, resisting an officer without violence, The resisting was not petitioner's flight alone, but was also petitioner's wriggling or pulling away of his hand.

In Nelson v. State, 543 So.2d 1308 (Fla. 2d DCA 1989), upon which petitioner relies, the defendant ran when he saw a police vehicle. The defendant was then pursued. Prior to the defendant running, there had been no contact between the defendant and the police. There was nothing for the defendant to resist. Id., at 1309.

As set forth above, the instant case is distinguishable from Nelson. Petitioner did resist the deputy. Only after petitioner resisted did he run. The trial judge did not abuse his discretion in denying the requested jury instruction. The requested instruction was inapplicable to the facts of petitioner's case. The judgment and sentence should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable court affirm the decision of the Fifth District Court of Appeal and petitioner's judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits ha5 been furnished by delivery to Brynn Newton, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 9th day of June, 1992.

Bonnie Jean Parrish
Of Counsel

be corrected on remand. (PETERSON and GRIFFIN, JJ., concur.)

[1]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. Cart 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., Assistant 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 tbe 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. Stare*, 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.), *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