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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ALAN LEONARD BOGUSH, :

Petitioner, :

vs. : Case No. 79,878

STATE OF FLORIDA, :

Respondent. :

_______________________________ :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Alan Leonard Bogush, 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

Two cases from the trial court, 89-14000 and 90-12918 were consolidated for appeal under one case number of 91-555. In case number 89-14000, on November 21, 1989, the State Attorney of the Thirteenth Judicial Circuit in and for Hillsborough County filed an information charging Petitioner, Alan Leonard Bogush, with delivery and possession of cocaine in violation of Section 893.13 (1) (f), Florida Statutes (1989). (R6,7) There is a subsequent felony notice in the court file signed by the judge with no case number or certificate of service indicating when the notice was served on Petitioner. (R70) Petitioner entered a plea of guilty to delivery of cocaine on April 9, 1990. (R14,15) Petitioner signed a plea of guilty form which indicated the maximum sentence for this crime was 15 years in state prison. (R14,15) The possession charge was nolle prossed. (R16) The trial court sentenced Mr. Bogush to 2 years community control as a subsequent felony offender on May 4, 1990.(R16,17)

In case number 90-12918, on September 13, 1990, the State Attorney filed an information charging Bogush with uttering a forged instrument in violation of section 831.02, Florida Statutes (1989), and petit theft in violation of section 812.014 (2)(d), Florida Statutes (1989). (R50,51) On September 9, 1990, Bogush signed a plea of guilty form which indicated the maximum sentence he could receive was 5 years prison on the uttering a forged instrument, 1 year prison on the petit theft and 15 years prison on the violation of probation in case number 89-14000. (R62,63)

Bogush scored out to a recommended sentence of 12 to 17 years prison on the sentencing guidelines. (R64)

On October 5, 1990, Petitioner's community control was revoked and he was sentenced to 30 years imprisonment as a subsequent felony offender on the violation of community control in case number 89-14000. (R39,40) In case number 90-12918, Bogush was sentenced to 10 years imprisonment as a subsequent felony offender on the uttering a forged instrument and time served on the petit theft. (R59-61) Petitioner filed his notice of appeal on January 14, 1991. (R71,72) There was some question as to the timeliness of the notice, but on March 1, 1991 the Second District Court of Appeal ordered that this appeal shall proceed forward. (R77).

The Second District Court of Appeal upheld the lower court's imposition of a thirty year habitual offender sentence after Petitioner was violated on habitualized community control. Bogush v. State, 597 So.2d 420 (Fla. 2d DCA 1992). The court did reverse the habitual offender sentence in 90-12918 where Bogush did not receive prior notice of habitualization. ID. at 421.

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.

Petitioner was informed in writing that the maximum sentence he could receive on his second degree felony was 15 years prison. The sentence imposed exceeded the statutory maximum that Petitioner was informed he could receive. Thus, Petitioner's pleas were not freely and voluntarily entered. The court should be bound by the maximum sentence Petitioner was informed he could receive.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO COMMUNITY CONTROL AS A HABITUAL FELONY OFFENDER.

This case involves a sentencing situation, after the entry of a plea, where the trial court found Petitioner to be a habitual offender, but then imposed community control rather than prison. Upon revocation of this "habitualized community control" the trial court then imposed a maximum possible habitual sentence on the basis of the prior finding to habitualize and the fact Petitioner

failed to make community control. The Petitioner here contends that this practice is illegal under Florida's statutory sentencing scheme, that his procedural due process rights were violated and the reversal of his thirty year sentence is required.

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 offenders (emphasis added). Ch. 71-136, §5, Laws of Fla. In 1975 references to subsequent offenders and 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 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).

In the instant case, Petitioner was initially placed on community control as a habitual 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, 474 So.2d 464, 465 (Fla. 1985). The rule of strict construction of criminal statutes is also explicitly codified in Section 775.021 (1), Florida Statutes (1989).

Petitioner asserts this was an illegal sentence and not authorized by law. This issue was not waived by failure to object at the time because the sentence of habitualized community control is unauthorized and illegal. State v. Kendrick, 596 So.2d 1153 (Fla. 5th DCA (1992). The habitual felony offender statute mandates a sentence of a term of years in prison. The sentencing error in this case was fundamental and therefor preserved for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). 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.

The principle of strict construction is based upon due process requirements and the doctrine of separation of powers. Perkins v. State, 576 So.2d 1310 (Fla. 1991) Under 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 community control in lieu of prison. It makes no sense in light of the fact that a sentence imposed as a habitual offender cannot be increased. §775.084 (4) (d) Fla. Stat. (1989). Also sentences imposed after a revocation of community control must be in accordance with the guidelines. Fla.R.Crim.P. 3.701(d)(14).

The statute, as plainly worded, means a defendant is to go to prison when properly found to be a habitual offender. 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). This means the court would be

restricted to the recommended or permitted guidelines sentence, unless a valid reason for departure existed. State v. Jones, 559 So.2d 204 (Fla. 1990). A court cannot use a finding that a person is a habitual offender as a reason for a guidelines departure. Whitehead v. State, 498 So.2d 863 (Fla. 1986).

The community control statutory scheme should not apply to people found to be habitual offenders. The plain language of Chapter 948, dealing with probation and community control, limits applicability of probation to people who are not likely to again engage in a criminal course of conduct. §948.01 (3), Fla. Stat. (1989). Community control is allowed as an alternative to prison when probation is deemed unsuitable. §948.01 (4), Fla. Stat. (1989). Under Florida law, a revocation of probation or community control would allow imposition of a sentence only within the original guidelines cell and the one-cell increase, with no further increase permitted for any reason. Ree v. State, 565 So.2d 1329 (Fla. 1990); Lambert v. State, 545 So.2d 838 (Fla. 1989).

The incongruity of the two statutory schemes for sentencing is recognized in Scott v. State, 550 So.2d 111, 112 (Fla. 4th DCA 1989), rev. dismissed, 560 So.2d 235 (1990). There, the court said it doubted that the legislature ever intended a person to be placed on probation and subsequently habitualized upon a violation of probation. The community control and habitual offender statutes require opposite, inconsistent findings which are mutually exclusive.

The court can use the enhanced penalties under the statute if the court finds that the penalties are necessary for the protection

of the public or disregard them if the defendant is found not to be a danger to the public. §775.084 (4) (c) Fla. Stat. (1989). At the time of sentencing, a defendant cannot be both a danger to the public and allowed to be placed on community control to be among the public once more. By placing petitioner on community control the court was implicitly saying he was disregarding the habitual offender statute even though he declared Petitioner a habitual offender. Actions speak louder than words. It seems the obvious reason for the usage of the "habitualized" community control scheme is to extract pleas out of defendants, and subject them to maximum habitual sentences upon violation while avoiding numerous jury trials by enticing them with the hope of getting only probation or community control. Knowing full well the possibility of these individuals to successfully complete community control is almost non-existent.

In the instant case, the court improperly used two statutes to come up with its own sentencing scheme. By designating Petitioner a habitual offender while initially placing him on community control, the court took petitioner out of the guidelines. Then, upon revocation of community control, the court summarily recalled the habitual offender status and fashioned a sentence double the statutory maximum. Since the court's actions indicated a disregard for sentencing Petitioner to prison as a habitual offender, the proper sentencing procedure would have been to impose a guidelines sentence or community control if there were valid reasons for a

downward departure. Then upon violation, to impose a sentence within the guidelines or permissible one-cell increase.

The court's actions in declaring Bogush a habitual offender violated his procedural due process rights. U.S. Const. amend. XIV, §1; Art. I, §9, Fla. Const. Through Section 775.084, the Florida Legislature established a means of ensuring compliance with procedural due process requirements. These procedures include sufficient written notice to the defendant; consideration by the court and counsel of a presentence investigation prior to the imposition of sentence; a separate proceeding for the receipt of evidence, with full rights of confrontation, cross-examination, and representation by counsel; and a finding by a preponderance of the evidence that the defendant should be sentenced as a habitual offender.

In the instant case, Bogush received a habitual notice only on the first case before he was placed on community control. At the time of his revocation hearing, he was given no prior notice that he would be treated as a habitual offender . The court summarily found him to be a habitual offender without consideration of a pre-sentence investigation.

Furthermore there are public policy reasons that habitualized community control and subsequent revocation should not be sanctioned as permissible sentences. The habitual offender statute contradicts the guidelines. By classifying a defendant as a habitual offender, the trial judge regains all the discretion the sentencing guidelines were intended to limit. The classification

of Bogush as a habitual offender allowed the trial court to thwart the intent of the guidelines and community control statutes.

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 widely disparate results among offenders with similar criminal backgrounds. Habitual Offender and Minimum Mandatory Sentences in Florida. A Focus on Sentencing Practices and Recommendation 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 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, 599 So.2d 132 (Fla. 2d DCA) (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 prisons, 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.

Mr. Bogush's sentence was imposed consecutive to a federal sentence of 21 months imprisonment. In the federal case, Bogush asked for a sentence greater than the prosecutor recommended so he could get drug treatment for his recognized addiction.(R135) None

of Petitioner's crime were violent, but they were all related to his drug dependency. The trial court must have recognized this by being willing to impose community control, a sentence imposed in disregard of the habitual offender statute.

Based on public policy considerations, statutory provision and legislative intent, and the foregoing case authorities and arguments, Mr. Bogush's thirty year habitualized sentence must be vacated. Petitioner should be given a guidelines sentence, with the habitual offender designation deemed void.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY IMPOSING HABITUAL FELONY OFFENDER SANCTIONS WHICH EXCEEDED THE STATUTORY PRISON TIME APPELLANT WAS INFORMED HE COULD RECEIVE.

The thirteenth Judicial Circuit in Hillsborough County uses a plea colloquy form that explains a defendant's rights. The form clearly informs the defendant of his charges and maximum penalties. In case number 89-14000 the plea of guilty form advised Bogush that the maximum sentence he could receive was 15 years in prison for delivery of cocaine. (R14, 15) That form was signed by Petitioner and his attorney and dated April 9, 1990. There is another plea of guilty form pertaining to both cases involved in this appeal. This plea form advised Petitioner the maximum sentence he could receive for uttering a forged instrument was 5 years prison and for the violation of probation on the delivery of cocaine was 15 years

prison. (R62, 63) This form was also signed by Petitioner and his attorney and dated September 19, 1990. (R63)

Petitioner was clearly informed in writing, not once but twice, that the maximum penalties he could receive for his felony charge of delivery of cocaine was 15 years imprisonment. The trial judge far exceeded the statutory maximum and imposed a sentence of 30 years imprisonment as a subsequent felony offender. This is akin to a situation where a defendant enters a plea subsequent to a plea agreement. If for some reason the court is not going to abide by the agreement, the defendant should be allowed to withdraw the plea. Devard v. State, 504 So.2d 28 (Fla. 2d DCA 1987). Although the Petitioner did not move to withdraw his plea at the time the court pronounced sentence, the trial court had an affirmative duty to inform him he could do so. Goldberg v. State, 536 So.2d 364, 365 (Fla. 1st DCA 1988); Perry v. State, 510 So.2d 1083, 1084 (Fla. 2d DCA 1987).

In the instant case the trial court should have adhered to the statutory maximums Petitioner was informed he could receive. In order to insure that a plea is freely and voluntarily entered the court shall determine the defendant understands the maximum penalty provided by law. Fla.R.Crim.P. 3.172(c)(i). Williams v. State, 546 So.2d 56 (Fla. 4th DCA 1989). In Williams the appellant was entitled to an evidentiary hearing where the maximum penalty was not mentioned. In the instant case, Petitioner signed two plea of guilty forms, both of which clearly indicated the maximum penalty he could receive for the offense of delivery of cocaine was 15

years imprisonment. The trial judge was bound to follow the statutory maximums. The appropriate remedy is resentencing within guidelines limited by the statutory maximum of 15 years.

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.

APPENDIX

PAGE NO.

1. Opinion of Second District Court of Appeal issued April 22, 1991 A-1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ALAN LEONARD BOGUSH, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 91-00555

Opinion filed April 22, 1992.

Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge.

James Marion Moorman, Public Defender, and Julius Aulisio, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

PATTERSON, Judge.

The appellant, Alan Leonard Bogush, challenges his habitualized sentences under section 775.084, Florida Statutes

(1989). The appellant does not contest the sufficiency of the prior felony offenses supporting his habitualization. He does argue, however, that the trial judge was bound by the maximum sentence contained in his written plea. We reverse in part and affirm in part.

This appeal involves two cases. On April 9, 1990, the appellant entered a plea of guilty to delivery of cocaine in case No. 89-14000 with a maximum sentence of fifteen years' imprisonment. He received notice he would be treated as a habitual offender under section 775.084. The judge sentenced him to two years' community control.

On September 13, 1990, the state charged the appellant with uttering a forged instrument in violation of section 831.02, Florida Statutes (1989), and with petit theft in violation of section 812.014(2)(d), Florida Statutes (1989). On September 19, 1990, the appellant signed a guilty plea form indicating the maximum sentence he could receive was five years for forgery and one year for petit theft in case No. 90-12918 and fifteen years for violation of probation in case No. 89-14000.

On October 5, 1990, the court revoked the appellant's community control in case No. 89-14000 and sentenced him to thirty years' imprisonment. The court also sentenced him to ten years as a subsequent felony offender for forgery and time served for petit theft in case No. 90-12918. The appellant did not receive written notice or a separate hearing to determine if habitual offender sanctions should apply in case No. 90-12918.

In case No. 89-14000, the written plea form correctly reflected the statutory maximum sentence for delivery of cocaine, without reference to the possible enhanced sentence under the habitual offender statute. Bogush, however, had been properly habitualized at his original sentencing. We conclude that under these circumstances, Bogush was on notice that the statutory maximum sentence could be enhanced at the trial judge's discretion and that therefore the imposition of the sentence of thirty years was not error.

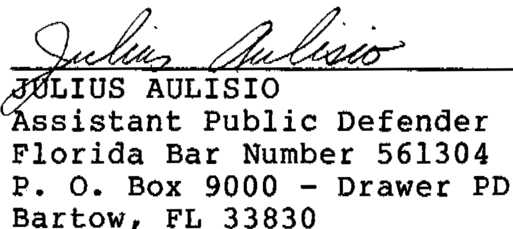
We, however, reverse the appellant's sentence in case No. 90-12918. That case is a separate and distinct criminal episode from case No. 89-14000. The procedural safeguards afforded a defendant by section 775.084 are adequate and are in accordance with the requirements of due process.. Eutsey v. State, 383 So. 2d 219, 224 (Fla. 1980). One such safeguard is the notice requirement of section 775.084(3)(b). Because the defendant did not receive prior notice of habitualization in case No. 90-12918, that sentence is unlawful. We, therefore, reverse the appellant's ten-year sentence for forgery as a habitual offender in case No. 90-12918 and remand for resentencing under the guidelines, and we affirm the appellant's thirty-year sentence in case No. 89-14000.

HALL, A.C.J., and ALTENBERND, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 26 day of October, 1992.

Respectfully submitted,



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