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IN THE SUPREME COURT OF FLORIDA

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ALAN LEONARD BOGUSH,	:	
Petitioner,	:	
vs.	:	Case No. 91-00555
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JULIUS AULISIO
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FLORIDA BAR NUMBER 0561304

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Two cases were consolidated for appeal. In case no. 89-14000 Petitioner was charged with delivery and possession of cocaine. Petitioner entered a plea of guilty to delivery of cocaine on April 9, 1990. Petitioner was informed in writing and signed a plea of guilty form which indicated the maximum sentence for this crime was 15 years in state prison. The possession charge was nolle prossed. Mr. Bogush was sentenced to two years community control as a subsequent felony offender on May 4, 1990.

In Case No. 90-12918, Mr. Bogush was charged with uttering a forged instrument and petit theft. On September 9, 1990, the Petitioner signed a plea of guilty form which indicated the maximum sentence he could receive was five years prison on the uttering a forged instrument and 1 year prison on the petit theft and 15 years prison on the violation of probation in case no. 89-1400.

On October 5, 1990, Mr. Bogush's community control was revoked and he was sentenced to 30 years state prison as a subsequent felony offender. In case no. 90-12918, Mr. 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. There was not written notice nor a separate hearing to determine if habitual felony offender sanctions should apply in case no. 90-12918.

SUMMARY OF THE ARGUMENT

In its opinion, The Second District Court of Appeal held Petitioner was properly habitualized and sentenced to community control. In State v. Kendrick, 17 F.LW. D812 (Fla. 5th DCA Mar. 27, 1992), the Fifth District Court of Appeal held that straight probation is not a sentencing option when a defendant is habitualized. The two district courts are in conflict and this Court should resolve that conflict.

ARGUMENT

ISSUE

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL

In its opinion in the present case, The Second District Court of Appeal held Petitioner was properly habitualized and sentenced to community control. The court followed the holding in its recent opinion in King v. State, 17 F.L.W. D662 (Fla. 2d DCA Mar. 4 1992). In that case the court held that a sentencing judge can find a defendant to be a habitual felony offender and sentence the defendant to probation if that does not constitute an improper downward departure from the sentencing guidelines.

On the other hand , in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992), the Fifth District Court of Appeal held that straight probation is not a sentencing option when a defendant is habitualized. The issue involved concerns the interrelationship of the most important sentencing options available to a trial judge,habitualization, sentencing pursuant to guidelines incarceration and probation. Further, as Judge Lehan stated in his concurring opinion in King, in which he proposed the certification of two questions to this Court, habitualization and probation appear to be as legally inconsistent as oil and water. The two district courts for the Second District and the Fifth District are in direct conflict and this court should resolve that conflict.

CONCLUSION

This court should take conflict jurisdiction of the cause and reverse the decision of the Second District Court of Appeal.

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

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(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 Wendy Buffington, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14 day of May, 1992.

Respectfully submitted,

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