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JUN 8 1992

CLERK, SUPREME COURT

By _____
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IN THE SUPREME COURT OF FLORIDA

ALAN LEONARD BOGUSH,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

79,878
Case No. 91-00555

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

BRIEF OF RESPONDENT ON JURISDICTION

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SUMMARY OF THE ARGUMENT

There is no conflict presented between the instant case and that in State v. Kendrick, infra because the two courts were discussing different versions of the habitual offender provisions, and the court in Kendrick was obviously addressing, and the opinion is based on the pre 1988 amendments to the habitual offender statute.

ARGUMENT

ISSUE I

THE OPINION OF THE THE SECOND DISTRICT
COURT OF APPEAL IN BOGUSH V. STATE DOES
NOT CONFLICT WITH THE OPINION OF THE
FIFTH DISTRICT COURT OF APPEAL IN
STATE V. HENDRICK, SUPRA.

It is apparent that in State v. Kendrick, 17 FLW D812 (5th DCA March 27, 1992) the trial court sentenced the defendant under the old habitual offender provision. In that case, the Fifth District Court of Appeal, omitting the year, and merely citing to §775.082(3)(c) Fla. Stat. in footnote 2 of the opinion said, "the trial court determined that it was necessary for the protection of the public that the defendant be sentenced as an habitual offender." Id. at D812.

As the Second District Court of Appeal pointed out in King v. State, 17 FLW D662 (2nd DCA March 4, 1992), in previous versions of the statute "findings" were necessary to impose a sentence under the statute, whereas only a "decision" not to impose such a sentence is now required." It is no longer required that the court find that a habitual offender sentence is necessary for the protection of the public as the court in Kendrick did pursuant to the previous statute.

The present statutory scheme is clearly permissive as this Court held in Burdick v. State, 17 FLW S88 (Feb. 6, 1992), and it is obvious that the Fifth District Court of Appeal's review of

Mr. Kendrick's sentence was based on the pre 1988 amendment. As such, there are two different statutory schemes involved and no conflict between the instant case and the opinion in State v. Kendrick, supra has been or could be established. Further the issue addressed by the Second District Court of Appeal in the instant case was not whether probation was an appropriate sentence or not. Mr. Bogush had already been habitualized and sentenced to community control. This case concerned the adequacy of notice to Mr. Bogush of his habitualization at the time he received community control so that the enhanced sentence of 30 years imposed upon revocation of that community control would be lawful.

Further strengthening Respondent's assertion of no conflict is the fact that this court issued its opinion in Burdick v. State, supra on February 6, 1992 holding that sentencing under the present habitual offender provision is permissive, not mandatory. Since the Fifth District Court of Appeal is bound by the decisions of this Court and their opinion in State v. Kendrick was issued almost two months after this Court's decision in Burdick, it is obvious the opinion addresses the prior habitual offender statute.

CONCLUSION

WHEREFORE based on the foregoing argument, citations of authority and references to the record, Respondent requests that this Court decline to exercise its jurisdiction over the instant case.

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 JULIUS AULISIO, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830 this 2nd day of June, 1992.


COUNSEL FOR RESPONDENT