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IN THE SUPREME COURT OF FLORIDA

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

Case No. 79,878

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

# BRIEF OF RESPONDENT ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts but would add the following for further accuracy regarding the issue raised before this Court: On May 4, 1990 Petitioner was found to be a habitual offender and was sentenced to community control. He neither prosecuted an appeal of that judgment and sentence, nor did he include as part of the record before the Second District Court of Appeal or this Honorable Court transcripts of that original sentencing hearing.

## SUMMARY OF THE ARGUMENT

Issue I: The procedures utilized by the trial court in sentencing Petitioner were proper. If this Court should determine that when placing Petitioner on community control the court did not declare that it was not necessary to protect the public and finds the ensuing sentence improper,[1] Respondent asserts that any improper sentence inured to Petitioner's benefit and he has no right to complain.

Issue II: Habitual offender sentencing is a collateral consequence of a plea. If Petitioner is seeking to withdraw his plea, he should first move to withdraw it before the trial court, and the Petitioner's sentence does not render his plea involuntary. Further, the Second District Court of Appeal reversed the habitual offender sentence in Case No. 90-12918 and remanded for a guideline sentence for lack of notice pursuant to §775.084(3)(b).

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[1] Without the record of the original sentencing where Petitioner, after notice, was found to be a habitual offender, it cannot be determined what the court did or did not declare.

## ARGUMENT

### ISSUE I

PETITIONER'S ASSERTED ERROR IN THE TRIAL COURT'S SENTENCING HIM AS A HABITUAL FELONY OFFENDER TO COMMUNITY CONTROL IS NOT PROPERLY BEFORE THIS COURT AS HE NEVER APPEALED FROM HIS JUDGMENT AND SENTENCE OF COMMUNITY CONTROL. ADDITIONALLY SINCE PETITIONER COULD HAVE BEEN SENTENCED TO A HABITUAL OFFENDER PRISON SENTENCE ORIGINALLY, HE CANNOT NOW BE HEARD TO COMPLAIN OF A COMMUNITY CONTROL SENTENCE WHICH INURED TO HIS BENEFIT.

Petitioner attacks his conviction and sentence on three grounds. First, he alleges that his initial sentence of community control as a habitual offender was illegal. Petitioner then asserts that since the initial sentence was illegal, he may challenge that sentence after having accepted the allegedly illegal sentence. Finally, petitioner challenges the procedure by which the trial court initially found him to be a habitual offender. None of the arguments raised in the district court were presented to the trial court, and one of the arguments raised in this court was not argued in the district court.[2] Unless this Court finds that the error was fundamental, the issues are not properly preserved for review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

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[2] Although the state's answer brief in the district court primarily raised a waiver defense, petitioner did not file a reply brief. By not filing a reply brief, petitioner failed to address the issue of whether he waived his right to object to the initial sentence.

In the district court, petitioner alleged that his sentence of "habitualized community control" constituted an illegal application of section 775.084 and chapter 948. (App. Brief at 3, 4-5). In this Court, petitioner alleges that his original sentence of habitualized community control was illegal. (Petitioner's brief at 5). Unless petitioner's initial sentence was illegal, petitioner has no grounds to complain. Petitioner's entire argument concerning the alleged illegality of his initial sentence has no statutory support. Instead, petitioner argues that the probation statute and habitual offender statute are mutually exclusive. In Ch. 88-131, Laws of Florida, the legislature amended section 775.084(4)(e), Florida Statutes. That amendment removed the habitual offender sentence from the sentencing guidelines provision; it removed habitual offenders from consideration for parole; and it removed them from consideration for gain time. It had no effect on section 775.084(4)(c), but extended the possible prison terms that may be imposed while making sure that defendants would serve more time in prison by reducing the possibility of early release.

The defendant in Williams v. State, 581 So. 2d 144 (Fla. 1991), argued that the trial court could not depart from the sentencing guidelines after revocation of probation because by placing him on probation, the court necessarily had to find that he was not likely again to engage in a criminal course of

conduct. This Court rejected that argument based on the possible deterrent effect on probation. Id. at 146.

Petitioner's argument is essentially the same as Williams' argument. Petitioner asserts that by placing a defendant on probation or community control, the court necessarily found that he was not likely to engage in criminal conduct and therefore, habitual offender sentencing was inappropriate. Based on petitioner's argument, if a defendant meets the criteria for habitualization under section 775.084, Florida Statutes, neither probation or community control is a proper disposition. That interpretation is inconsistent with section 775.084(4)(c), Florida Statutes. Section 775.084(4)(c), Florida Statutes (1989), gives the trial court discretion to determine whether to sentence a defendant as a habitual offender. Petitioner's argument would completely negate that section since he claims that defendants found to be habitual offenders must be sentenced to a "term of years" under section 775.084(4)(a). In construing statutes, court must, to the extent possible, give effect to all its parts. Kepner v. State, 571 So. 2d 576 (Fla. 1991). To give effect to subsection 4(c), the trial courts must have the discretion not to impose a habitual offender sentence, otherwise, that subsection would be meaningless.

The analysis employed in King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), most accurately reflects the options available to a

trial court where a defendant is found to be a habitual offender. In King, the court emphasized the fact that section 775.084(4)(c), Florida Statutes, clearly gives a judge the discretion as to whether to sentence a defendant as a habitual offender. Although making a finding that one qualifies as a habitual offender is but a ministerial act. Id. at 314. Although petitioner points out that the legislature provided that the most severe sanction should be pursued by the prosecution (petitioner's brief at 6), that does not mandate that the court impose the most severe sanction possible. Otherwise, subsection 4(c) is meaningless.

In Burdick v. State, 594 So. 2d 267 (Fla. 1992), the defendant argued that the trial court is not required to impose the maximum penalty provided in the statute, but rather can sentence the defendant anywhere up to the maximum sanction. The Court held sentencing under section 775.084 (4)(a), Florida Statutes (1989), is permissive, not mandatory. The Court noted that the trial judge regains all the discretion the guidelines were intended to reduce by simply classifying a defendant as a habitual offender. Id. at 270. Therefore, persons found to be habitual felony offenders may be sentenced as habitual felony offenders under subsections 775.084(4)(a)(1),(2), or (3), Fla. Statutes. King, supra, at 316. If the court decides that sentencing as a habitual offender is not necessary for the

protection of the public, the defendant is to be sentenced under the guidelines. Id.; section 775.084(4)(c), Fla. Stat. (1989).

Section 948.06(1), Florida Statutes (1989), provides that upon revocation of probation or community control, the court may impose any sentence that it might have originally imposed before placing the defendant on probation or community control. In Williams, supra this Court upheld a departure sentence imposed after revocation of probation. This Court recognized that trial courts might be less willing to give defendant's another chance by putting them on probation if the court was forbidden from exercising its authority under section 948.06(1), in the event probation was violated. The Court approved the trial court's application of section 948.06(1) to defendants after revocation of probation and permitted the trial courts to impose a departure sentence based on conditions which the trial court could have provided at the initial sentencing. Based on section 948.06(1), after revocation of community control petitioner was subject to ten years imprisonment as a habitual offender. That is the sentence that was imposed upon revocation of his community control. Therefore, Petitioner has no grounds to complain.

Petitioner's dissatisfaction is with the time period within which the trial court may impose a sentence as a habitual offender. The state believes that the procedure employed here, and that employed in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA

1992), are proper methods for imposing habitual offender sentences. In both cases, the defendants were initially spared from a harsh prison sentence. After revocation of probation and community control, the trial courts exercised their authority to impose any sentence which they might have imposed originally. This procedure is consistent with the policy of giving the defendant another chance. See, Williams, supra.

In State v. Kendricks, 596 S.2d 1153 (5th DCA 1992), the trial court determined that imposition of a habitual offender sentence was necessary for the protection of the public. Therefore, under King, the defendant should have been sentenced pursuant to section 775.084(4)(a)(2), Florida Statutes (1989). The sanction imposed in Kendricks by the trial court was not within the terms of the statute. Accordingly, the sentence was improper. By placing the defendant on probation, the trial court withheld sentencing. If the court had found that it was not necessary for the protection of the public that the defendant be sentenced as a habitual offender, then the defendant would be required to be sentenced under the guidelines. King, supra, at 315. In Kendricks, the sentencing guidelines indicated a permissible range of 2 ½ to 5 ½ years incarceration. By imposing probation, the court imposed a downward departure without providing written reasons which caused the sentence to have been imposed improper. But the analysis utilized in Kendricks is consistent with the court's ruling in King, supra.

Assuming arguendo that the original sentence constituted an illegal application of section 775.084, petitioner is estopped from challenging the sentence after he has enjoyed its benefits. Gaskins v. State, 17 F.L.W. D 2371 (1st DCA Oct. 12, 1992). All five of the district courts of appeal have applied an estoppel policy when defendants tried to attack sentences (which they initially accepted) after revocation of probation or community control. See King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979); Bradley v. State, 17 F.L.W. 1697 (Fla. 3d DCA July 14, 1992); McCarthy v. State, 382 So. 2d 408 (Fla. 4th DCA 1980); Clem v. State, 462 So. 2d 1136 (Fla. 4th DCA 1984); Pollock v. State, 450 So. 2d 1183 (Fla. 2d DCA 1984); Wolfson v. State, 437 So. 2d 174 (Fla. 2d DCA 1983); Gallagher v. State, 421 So. 2d 581 (Fla. 5th DCA 1982); Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991); and McPhee v. State, 254 So. 2d 406 (Fla. 1st DCA 1971). The rationale for preventing defendants from attacking the legality of a sentence is based on fairness. No defendant should be able to enjoy the benefits of a probation sentence which is allegedly illegal, and then, after revocation of probation, attack the original probation. Since petitioner had the right to challenge the sentence when it was originally imposed but failed to do so, his inaction results in a waiver of the improper sentence.

Absent some jurisdictional flaw, Florida courts have repeatedly held that sentences imposed in violation of statutory requirements may not be challenged after the defendant has accepted the benefits but failed to carry out the conditions imposed on him. Bashlor, supra, at 489. Once the defendant has entered a guilty plea, the state will not keep in touch with its witness nor maintain the evidence, especially in cases involving narcotics. If the defendant is allowed to challenge his original sentence, which was the basis for the bargain, the state is at a severe disadvantage. In recognition of the very real danger of prejudice to the state, the district courts have not permitted defendants to attack sentences which they bargained for and benefitted from, in the absence of a jurisdictional flaw. This Court should uphold that policy. To do otherwise diminishes the incentive for the state or trial court to enter negotiated pleas. In this case, there is no dispute that the circuit court had jurisdiction to sentence petitioner. Therefore, petitioner should not be heard to complain about a sentence from which he benefitted.

In McCloud v. State, 335 So. 2d 257 (Fla. 1976), this Court ruled that a defendant is not in a position to complain about a lesser sentence. Petitioner was not sentenced as a habitual offender even though the trial court did not find that imposition of sentence as a habitual offender was not necessary. This was

error. See King v. State, 597 So.2d 309 (Fla. 2d DCA 1992). Had the trial court made such a finding, petitioner was then subject to sentencing under the guidelines. Id. Therefore, the sentence initially imposed was a lesser sentence than that which was required by law. Petitioner, like Kendricks, received an improper, lenient sentence. However, the state, not Petitioner, was disadvantaged because at the time of Petitioner's original sentence, the state was not allowed to appeal the "habitual probation" or "habitual community control" sentences. See State v. Davis, 559 So. 2d 1279 (Fla. 2d DCA 1990), receding from King v. State, 597 So. 2d at 317. Therefore, petitioner has benefitted from the improper sentence with resulting prejudice to the state. Accordingly, he has no grounds to complain. McCloud, supra.

Clark v. State, 579 So. 2d 109 (Fla. 1991), does not help petitioner's case. In Clark, the trial court lacked jurisdiction to change the conditions of probation because no formal charges had been filed under section 948.06. The defendant in Larson v. State, 572 So. 2d 1368 (Fla. 1991), filed a direct appeal challenging the original order of probation. Both Clark and Larson are consistent with the districts courts policy of allowing challenges to sentences imposed in violation of statutory requirements only if there is a jurisdictional flaw, after revocation of probation or community control. If a

defendant enters into a plea bargain for a specific sentence and he later challenges the sentence, the state will not receive its benefit from the bargain and therefore, the state should be allowed to seek vacation of the plea. That way, all parties are back to square one and either a new plea bargain can be reached or the matter may be set for trial. A plea bargain is essentially a contract by which both parties are bound. Neither party has the right to excise one portion of the deal and force the remaining party to be stuck with what's left. That is essentially what a defendant does when they enter into a plea agreement and later challenge the terms of the plea after they have violated the conditions of probation. The state, like the defendant, is entitled to justice.

Finally, petitioner challenges the procedure employed to sentence him as a habitual offender. First and foremost, petitioner should not be heard to complain about the procedures used to habitualize him. Petitioner has not made a part of the record on appeal any transcript of the hearing wherein he was found to be a habitual offender and he has thereby waived any objection he might have to his status just as clearly as the defendant in Robinson v. State, 17 F.L.W. D2054 (1st DCA Sept. 2, 1992). The findings and judgment of the trial court comes to the appellate court with a presumption of correctness. Boylan v. Boylan, 571 So. 2d 580 (Fla. 4th DCA 1990). Petitioner has the

burden of bringing before the appellate court an adequate record to support his appeal. Burau v. State, 353 So.2d 1183 (3rd DCA 1978). He has failed to do so.[3]

Petitioner alleges that the trial court failed to make a record at the revocation proceedings of any evidence to support his habitual offender findings. Petitioner was not found to be a habitual offender at his revocation hearing. (See footnote 2 herein) The record on appeal shows that petitioner was found to be a habitual offender at his original sentencing hearing on Case Number 89-14000 on May 4, 1990. The judgment for petitioner's conviction was entered on May 4, 1990, and the special conditions contain the habitual offender notation. (R17,21) Petitioner did not make the transcript of the May 4, 1990, hearing a part of the record on appeal. Petitioner did not direct the clerk to include

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[3] Here, it cannot be determined whether a finding was made regarding the necessity for the protection of the public or not, because, as argued below, Petitioner failed to include the record of his original sentencing at which time he was declared a habitual offender and sentenced to community control. However, the instant record does shed some light in this regard. The trial court had the clerk read a part of that original sentencing at the revocation hearing regarding the length of time Petitioner could have potentially received, and the court said (at the original sentencing) "Well, you are absolutely right in everything you say, but I am not inclined to give him that kind of time when he admits it and he comes up here and admits his problem." (R133) Later at the revocation hearing, the Assistant State Attorney said " ... When the court sentenced him to two years community control, at that point in time you had notified him as a subsequent felony offender and you put him on probation because of the fact that it was one gram and he had an admitted drug problem." (R134)

a copy of that hearing, nor did he direct the court reporter to transcribe the hearing. (R73,80) Even after Respondent, as Appellee below argued the absence of the original sentencing hearing precluded review (See brief of Appellee on direct appeal at page 3) Petitioner (as Appellant) made no effort to provide it. Since petitioner has the burden of bringing before the appellate court an adequate record to support his appeal, his failure to include the transcript of May 4, 1990, hearing prohibits this court from reviewing his claim regarding the factual findings required under Section 775.084(1)(a)(1-4), Florida Statute (1989).[4]

Respondent asserts that even if the transcript had been provided, petitioner's failure to raise any challenge to the factual findings on direct appeal from his original sentence or in the trial court precludes relief. Since the issue could have been raised on direct appeal from the original sentence and was not presented to the trial court at either the original

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[4] In the instant case, the record reflects that defendant was noticed of habitual offender sentencing in Case Number 89-14000, delivery of cocaine, on January 12, 1990. (R70) This notice does not distinguish which case it is for but it was apparently only for Case Number 89-14000 because the clerk informed the court that defendant was only noticed for the delivery charge, (R142), and because defendant was not charged with uttering and petit theft until September of 1990. (R50-52) Since there is no proof that petitioner was prejudiced or that he objected, his failure to raise the timeliness issue on direct appeal constitutes a waiver. See Ashley v. State, 590 So. 2d 27 (Fla. 5th DCA 1991); Chalk v. State, 17 F.L.W. 1751 (Fla. 4th DCA July 22, 1992); and Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991).

sentencing hearing nor the revocation hearing, petitioner has waived his right to review. Johnson v. State, 541 So. 2d 661 (Fla. 1st DCA 1989); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989). The findings required by section 775.084 (1)(a) (1-4), Florida Statute (1989), are all factual matters to be resolved by the trial court. In the absence of any objection below, errors that are not apparent and determinable from the record which involved factual matters are precluded from appellate review.[5] Dailey v. State, 488 So. 2d 532 (Fla. 1986). Since there is no evidence that shows that petitioner objected to or disputed the trial court's findings of fact, he cannot be heard to complain.

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[5] In its opinion in this case, the Second District Court of Appeal adopted these factual findings: "Bogush however had been properly habitualized at his original sentencing."

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN IMPOSING A HABITUAL FELONY OFFENDER SENTENCE WHICH EXCEEDED THE STATUTORY MAXIMUM THE PETITIONER WAS INFORMED HE COULD RECEIVE, BUT IMPOSED SUCH SENTENCE ONLY AFTER THE PETITIONER WAS NOTICED AS A HABITUAL FELONY OFFENDER.

The trial court did not err in sentencing Petitioner to enhanced terms of imprisonment as a habitual offender even though these terms of imprisonment exceeded the periods on the plea agreement and those he was informed of when he plead to these crimes.

First, Petitioner has not moved to withdraw his plea with the trial court but rather contended on direct appeal and again before this Court that his pleas were involuntary because the plea negotiation forms reflected the statutory maximum sentences for his crimes but did not reflect the sentence he could and did receive as a habitual offender. A motion to withdraw a plea is a prerequisite to a direct appeal challenging the voluntariness of that plea. Counts v. State, 376 So.2d 59 (Fla. 2d 1979). Because Petitioner has not moved the trial court to withdraw his plea, this Court does not have jurisdiction to hear this issue. Further, the Second District Court of Appeal vacated the enhanced sentence on Case Number 90-12918 for failure to notice Petitioner as a habitual offender on that case, and remanded it for a guideline sentence. However, Petitioner was clearly on

notice as to the potential for enhancement as he was properly noticed on Case Number 89-14000, as the Second District Court of Appeal also found, in its opinion. Therefore, Petitioner has no ground for complaint regarding the length of that sentence.

Alternatively, as to Petitioner's claim that his pleas were involuntary, habitual offender status is a collateral consequence of a plea and as such, a court's failure to advise a defendant of habitual offender sentencing, does not render the plea involuntary. Zambuto, infra, cited with approval but without opinion in Gainer v. State, 458 So.2d 5 (Fla. 2d DCA 1984). Also see Glover v. State, 474 So.2d 886 (Fla. 1 DCA 1985) and Jones v. State, 459 So.2d 1151 (Fla. 1 DCA 1984), pet. for rev. denied 467 So.2d 999, where the failure to advise the defendant before his plea that election of the sentencing guidelines made defendant ineligible for parole did not render the plea involuntary. Under Zambuto, whether something is a direct or collateral consequence of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of a defendant's punishment. Though Zambuto was decided under the prior habitual offender statute which required a finding by the trial court that enhanced sentencing was necessary for the protection of the public and was therefore, more subjective than the instant statute, habitual offender sentencing is still not automatic even when a defendant qualifies as a habitual offender.

Particularly since this Court has held that habitual offender sentencing is permissive rather than mandatory. Burdick v. State, 594 So.2d 267 (Fla.1992). If the trial court made an affirmative finding that enhanced sentencing is not necessary for the protection of the public, the defendant is sentenced without regard to habitual status. Zambuto addressed whether the trial court had to inform the defendant of possible habitual offender sentencing AFTER a probation violation when the defendant initially plead to probation. The case it relied on, however, was State v. Barton, 609 P.2d 1353 (Wash. 1980), which addressed a case where the defendant plead in exchange for the prosecutor's agreement to recommend probation if the defendant had no prior felonies and more than three prior misdemeanors. In accepting the plea, the trial judge advised the defendant of the possible maximum penalties under the statute but did not discuss the possible application of the habitual offender statute. Later, the prosecutor discovered that defendant had three prior felonies. The prosecutor then filed notice to seek habitual offender sentencing. Upon the proper habitual offender findings, the trial court adjudicated defendant as a habitual offender and sentenced him to life. The Washington Supreme Court found that any enhancement of defendant's sentence is a collateral consequence of his plea rather than a direct result of his guilty plea and therefore, defendant need not be advised of the possibility of a habitual offender proceeding.

The same analysis applies to this case. It was not necessary for the court to inform defendant of possible habitual offender sentencing in the plea forms when Defendant plead to these crimes. Furthermore, defendant had notice as of January 12, 1990 of possible habitual offender sentencing in Case Number 89-14000.[6]

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[6] In the instant case, the record reflects that defendant was noticed of habitual offender sentencing in Case Number 89-14000, delivery of cocaine, on January 12, 1990. (R70) This notice does not distinguish which case it is for but it was apparently only for Case Number 89-14000 because the clerk informed the court that defendant was only noticed for the delivery charge, (R142) and because defendant was not charged with uttering and petit theft until September of 1990. (R50-52) Defendant entered his plea in that case on April 9, 1990. (R14-15) Therefore, defendant cannot contend that his plea was entered without knowledge of the consequences that he may receive habitual offender sentencing. As to the uttering and petit theft charges of Case Number 90-12918, the record does not reflect that defendant was noticed in that case, and the Second District Court of Appeal vacated the enhanced sentence in Case Number 90-12918 and remanded for imposition of a guideline sentence.

## CONCLUSION

Based on the foregoing argument, citations of authority and references to the record, the judgment and sentence of the trial court should be affirmed.

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 10th day of November, 1992.

COUNSEL FOR RESPONDENT