047

IN THE SUPREME COURT OF FLORIDA

DENNIS GARLAND BAXTER,

Petitioner,

vs. :

STATE OF FLORIDA,

Respondent.

Case No. 79,993
District Court
of Appeal,
2nd District -
No. 91-1311

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Dennis Garland Baxter, 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.

STATEMENT OF THE CASE

On November 2, 1990, the State Attorney for the Thirteenth Judicial Circuit, in and for Hillsborough County, filed an information charging Appellant, Dennis Garland Baxter, with vehicular homicide in violation of section 782.071, Florida Statutes (1989). (R254-255) The State Attorney filed a habitual felony offender notice on January 18, 1991. (R257)

The jury trial was conducted on March 4 and 5, 1991. (R1-227) The jury returned a verdict of guilty as charged. (R55, 278) Baxter was sentenced on April 5, 1991 to four years imprisonment followed by six years probation as a habitual felony offender. (R283, 284) Petitioner timely filed his notice of appeal on April 25, 1991. (R301,302) On appeal, Petitioner argued that he should not have been sentenced as a habitual felony offender. The Second District Court of Appeal affirmed the lower court but certified conflict with Hodges v. State, 17 F.L.W. D787 (Fla. 1st DCA Mar. 24, 1992) and Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991) on the question of whether the court must make findings that the prior qualifying felonies were neither pardoned nor set aside in a post conviction proceeding. The opinion also cited certified conflict with State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA 1992) on the issue of whether probation as a habitual offender is a proper sentence.

STATEMENT OF THE FACTS

Mario Matos was driving north on 1-275 in Tampa, Florida, at about 3 a.m. on October 13, 1991. (94-95) At that time a red Mustang, driven by Petitioner, passed Matos at a high rate of speed. (R96,97,151) Matos was going about 50-55 m.p.h. and estimated the Mustang to be travelling 85-90 m.p.h. (R97-98)

Traffic was stopped on I-275 at the bottom of a hill when the Mustang hit a truck. (R98) The passenger in the car was ejected and flew through the windshield. (R99) It was stipulated that John David Brown died on October 20, 1990, as a result of injuries received in the crash of the car driven by Dennis Baxter. (R171)

Officer Caplinger was called to the scene at about 3 a.m. on October 13, 1990, to reconstruct the accident. (R109) Caplinger was qualified as an expert in accident reconstruction. (R111) The red Mustang laid skidmarks 457' 1" in length on the inside curb lane of northbound I-275. (R114) Caplinger described the photos of the scene depicting the skidmarks and the resulting damage. (R118) Caplinger made a determination that the minimum speed the Mustang could have been travelling was 94 m.p.h. (R136) He estimated the actual speed of the Mustang to have been between 108 and 110 m.p.h. (R137) Caplinger did not compare the tires from the Mustang with the skidmarks to determine if they were a match. (R140) Detective Jerry Pohl, a traffic homicide investigator, concurred with the results of Caplinger. (R158)

Officer Juan Serrano of the Tampa Police Department was working an accident at the bottom of the hill on I-275. (R174) That

accident had traffic backed up about a quarter of a mile. (R175) The accident Baxter was involved in occurred shortly after Serrano arrived on the scene where there was a traffic jam. (R175)

James Baxter, Petitioner's brother" was driving a Camaro behind the red Mustang at the time of the accident. (179) James was going 65 m.p.h. and was driving at the same rate of speed as Petitioner. (R179) James had done mechanic work on the Mustang and he said the top speed for the Mustang was between 65 and 80 m.p.h. (R181) As they came to the top of the hill, a truck, without functioning brake lights slowly pulled in front of Petitioner. (R182)

Terrence Veltman was in the car with James Baxter. (R206) He was dozing off while in the car, but the car did not feel like it was travelling at 100 m.p.h. (R207) Veltman was familiar with the scary feeling of going 100 m.p.h. from past experience. (R207)

Gene Lovins, Petitioner's step-father had also done mechanic work on the red Mustang. (R214) The car had carburetion problems and a front end shimmy that would affect the car's ability to go fast, (R215,216) Lovins said the car would shake terribly at 70 m.p.h. (R218)

SUMMARY OF THE ARGUMENT

The trial court failed to comply with section 775.084 (1) (a) 1-4 Florida Statutes which sets out the requirements that must exist in order to impose a habitual sentence. There was no record evidence to support the fact that Petitioner's prior offenses had not been pardoned or set aside in any post conviction proceedings.

The habitual offender statute was enacted to allow for extended periods of incarceration and probation is an improper sentence to impose upon a habitual offender.

The habitual offender statute that was in effect from October 1, 1989, to May 2, 1991, was unconstitutional because it violated the single subject rule. Petitioner was thus not eligible to be habitualized.

ARGUMENT

ISSUE I

THE TRIAL COURT FAILED TO MAKE FINDINGS BASED ON EVIDENCE THAT PETITIONER QUALIFIED AS A HABITUAL OFFENDER AS REQUIRED BY SECTION 775.084 (1) (a) 1-4 FLORIDA STATUTES (1989).

Appellant was convicted of vehicular homicide, athird degree felony. The trial court failed to comply with the requirements of section 775.084 (1) (a) 1-4 Florida Statutes (1989). There is no evidence in the record to support the finding that the prior qualifying felonies were neither pardoned nor set aside in a post conviction proceeding. The Second District Court of Appeal relied on Eutsev V. State, 383 So. 2d 219 (Fla. 1989), to affirm the lower court's ruling. In Eutsey the court held that the defendant must raise as an affirmative defense the fact his prior convictions were set aside or pardoned.

Petitioner contends that since habitualization is such a harsh sentencing sanction the trial court must strictly comply with the statute. This is the holding in Hodges v. State, 17 F.L.W. D787 (Fla. 1st DCA March 24, 1992) that the Second District Court of Appeal recognized when it certified conflict.

The trial court did not comply with section 775.084 (3) (c), Florida Statutes (1989) which requires, "all evidence presented shall be presented in open court with full rights of confrontation, cross examination and representation by counsel." Certified copies of convictions were not produced in open court. The requirement

that the convictions be produced in open court and filed in evidence as a prerequisite to a habitual felony offender sentence derives support from Grimmet v. State, 357 So.2d 461 (Fla. 2d DCA 1978) and Thomas v. State, 575 So.2d 308 (Fla. 2d DCA 1991). Without certified copies of convictions and dates of release from incarceration it is impossible to determine if Appellant even qualifies to be habitualized.

ISSUE II

THE TRIAL COURT ERRED BY IMPOSING PROBATION AS A HABITUAL FELONY OFFENDER

The definition of habitual felony offender is "a defendant for whom the court may impose an extended term of imprisonment..." (emphasis added). §775.084 Fla. Stat. (1989). The sentencing scheme applied to Petitioner, four years imprisonment followed by six years probation as a habitual offender, was an application not contemplated by the habitualization or probation 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), citing Fine v. Moran, 74 Fla. 417, 77 So. 533 (1917).

Graham stands for the proposition that penal statutes are to be strictly construed and neither the state nor the court can rely on another statute to extend the meaning of the applicable statute.

This fundamental principle was emphasized in Perkins V. State, 576 So.2d 1310 (Fla. 1991) where the court said words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute. The rule of strict construction of criminal statutes is also explicitly codified in Section 775.021 (1), Florida Statutes (1989).

Here, under the authorities cited and 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 an extended term of probation above the normal statutory maximum. The statute, **as** plainly worded, means a defendant is to *go* to prison when properly found to be a habitual offender and is to suffer a more extended term of imprisonment. If a court decides that a sentence **as** a habitual offender is not proper OK necessary, sentence is to be imposed without regard to the statute. 5775.084 **(4)** ***(c)***, Fla. Stat. (1989). Clearly this means that the court would be restricted to the statutory maximum or guidelines sentence, unless a valid reason for departure existed. State **v.** Jones, 559 So.2d **204** (Fla. 1990).

Probation is an improper sanction when a defendant has been habitualized. The Second District Court of Appeal certified conflict with State V. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. **27**, 1992) on this issue. The Second District Court of Appeal relied on King v. State, 17 F.L.W. D662 (Fla. **2d** DCA Mar. **4**, 1992) to uphold the sentence of probation as a habitual offender. The incongruity of the probation and habitual offender statutes **was**

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

There is no legal justification to impose consecutive probation as a habitual offender. In essence it would be an unenforceable sanction because Section 775.084 (4) (d), Florida Statutes (1989), provides: "A sentence imposed under this section shall not be increased after such imposition." This section does not go on to say "unless the defendant violates probation." Because of this subsection, it is clear that probation was not contemplated to be part of the habitual offender scheme. Either a person can be rehabilitated and should be afforded an opportunity to complete probation or he should be sentenced to prison as a habitual felony offender. It cannot be both ways. If the court deems probation necessary for restitution and rehabilitation it must be imposed within the framework of the sentencing guidelines and statutory maximum sentence.

ISSUE III

SECTION 775.084, FLORIDA STATUTES (1989), CHAPTER 89-280, LAWS OF FLORIDA, VIOLATES THE ONE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

Petitioner's offense date was October 13, 1990, which was after the effective date of Section **775.084** Florida Statutes (1989), Ch. **89-280,** Laws of Florida and before the re-enactment of that statute which was effective on May 2, 1991. Section **775.084,** Florida Statutes (1989), Ch **89-280,** Laws of Florida violates the one subject rule of Article III, Section 6, of the Florida Constitution. Johnson **v.** State, 589 So.2d 1370 (Fla. 1st DCA 1991). Article 111, Section 6 of the Florida Constitution provides that:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the **Legis-** lature of the State of Florida."

Chapter **89-280** embraces two subjects: habitual felony offenders or habitual violent felony offenders, and the repossession of motor vehicles. The first three sections of Chapter: 89-280 amended sections **775.084** (habitual offender statute), **775.0842** (career criminal statute). and **775.0843** (policies for career criminals), Florida Statutes. Section four of Chapter **89-280** created section 493.30 (16), Florida Statutes, defining repossession. Section 493.306(6), added license requirements for repossessors. Section six created section **493.317** (7) and **(8)** Florida Statutes, prohibiting repossessors from failing to remit money or deliver negotiable instruments. Section seven created section 493.3175 Florida Statutes, regarding the sale of property by

repossessors. Section eight amended Section 493.318(2) Florida Statutes, requiring repossessors to prepare and maintain inventory. Section nine amended Section **493.3176** Florida Statutes, requiring certain information to be displayed on vehicles used by repossessors.

The different targets of the act must be naturally and logically connected Blankenship v. State, **545 So.2d** 908 (Fla. **2d DCA** 1990). There in no natural and logical connection between habitual felony offenders and repossessors of cars and boats. **Half** of Chapter 89-280 addresses the prosecution and sentencing of recidivists, while the other half addresses the regulation of a lawful occupation. It is therefore, clear that the law covers more than one subject and is designed to accomplish separate legislative goals.

In State v. Burch, 558 So.2d 1 (Fla. 1990), the Florida Supreme Court upheld Chapter **87-243.** In doing **so,** however, the Burch Court distinguished Bunnell v. State, **453** So.2d **808 (Fla. 1984):**

> In Bunnell this court addressed chapter 82-150, Laws of Florida, which contained two separate topics: the creation of a statute prohibiting the obstruction of justice by false information and the reduction in the membership of the Florida Criminal Justice Council. The relationship between these two subjects was so tenuous that this court concluded that the single-subject provision of the constitution had been violated. **Unlike** Bunnell, chapter 87-243 is a comprehensive law in which all of its parts are directed toward meeting the crisis of increased crime.

Burch, at 3.

Like the law in Bunnell, Chapter 89-280 is a two-subject law; it is not a comprehensive one. The relationship between recidivists and repossessors of cars and boats is even more tenuous than the relationship between the obstruction of justice by providing false information and reduction in the membership of the Florida Criminal Justice Council. The inescapable conclusion is that Chapter **89-280** violates the one-subject rule and is unconstitutional, To hold otherwise would ignore the single subject requirement under the Florida Constitution. If Article III, Section *6* of the Florida Constitution is to have any meaning, whatsoever, then Chapter 89-**280** should be declared unconstitutional.

There was not a constitutionally valid habitual offender statute, any time prior to May 1, 1991, that allowed the use of out of state convictions to qualify **as** prior convictions. Therefore Petitioner **did** not have the requisite number of prior convictions and **as** *a* result he does not qualify to be sentenced **as** a habitual felony offender.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court and remand the case for resentencing under the guidelines.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of July, 1992.

Respectfully submitted,

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