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FILED
SID J. WHITE
OCT 23 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STEVE ALAN BAMBERG, :

Petitioner, :

vs. : Case No. 80,019

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

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JENNIFER Y. FOGLE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 628204

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, Steve Alan Bamberg, 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

By amended information filed March 22, 1991, the State Attorney of the Tenth Judicial Circuit for Polk County charged the Petitioner, Steve Alan Bamberg, with burglary contrary to section 810.02, Florida Statutes (1989), grand theft contrary to section 812.014(2)(c), Florida Statutes (1989), and resisting an officer without violence contrary to section 843.02, Florida Statutes (1989). All offenses allegedly occurred on December 5, 1990. (R5-8)[1] Previously, on February 15, 1991, the State Attorney filed notice of intention to seek an extended prison sentence as a habitual felony offender. (R4)

On July 16, 1991, Mr. Bamberg entered a plea of guilty as charged before the Honorable E. Randolph Bentley, Circuit Judge. (R11-18) On August 30, 1991, the court found Mr. Bamberg to be a habitual felony offender (R24-30) based on prior convictions occurring on December 12, 1986, (R60-68) January 28, 1988, (R69-73) and May 23, 1988. (R55-60, 74-78, 79-83)

On the burglary charge, a second degree felony, the court imposed a sentence of fifteen years in prison as a habitual felony offender. On the charge of grand theft, a third degree felony, the court imposed a sanction of ten years on probation. (R40-41, 44-47, 50-52)[2] Mr. Bamberg's guidelines scoresheet reflected a recom-

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[1] An original information was filed on December 27, 1990. (R1-3)

[2] The court severed the misdemeanor offense of resisting arrest. (R48)

mended sentence of five-and-one-half to seven years in prison or a permitted sentence of four-and-one-half to nine years in prison. (R48-49) Mr. Bamberg timely filed pro se notice of appeal on September 12, 1991. (R85)

On appeal to the Second District Court of Appeal Mr. Bamberg asserted that the ten year term of "habitualized probation" imposed on the grand theft charge constituted an illegal sentence. On June 5, 1992, the appellate court affirmed Petitioner's judgment and sentence on the basis of King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), and noted conflict with State v. Kendrick, 596 So. 2d 1153 (Fla. 5th DCA 1992). This Court granted review of Petitioner's cause on September 30, 1992.

SUMMARY OF THE ARGUMENT

The ten year sanction of habitualized probation imposed on the charge of grand theft is an illegal sentence requiring reversal.

ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO TEN YEARS ON PROBATION AS A HABITUAL OFFENDER.

The instant case involves a finding by the trial court that, based on evidence presented, the Petitioner qualified for sentencing as a habitual felony offender. The court sentenced the Petitioner to a habitualized prison term on Count I, burglary, a second-degree felony; however, on Count II, grand theft, a third-degree felony, the court imposed an extended probationary term of ten years. The Petitioner contends that his sanction of "habitualized probation" on the charge of grand theft is illegal.

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 criminal offenders. Ch. 71-136, § 5, Laws of Fla. (emphasis added). In 1975, references to subsequent offenders and the state penitentiary were deleted by amendments which provided for extended terms of imprisonment for habitual felony offenders. Ch.75-116, § 1, Laws of Fla. (emphasis added). The definition of habitual felony offender then, and now, is "a defendant for whom the court may impose an extended term of imprisonment . . . " §775.084, Fla. Stat (1975); §775.084, Fla. Stat. (1989) (emphasis added).

In State v. Kendrick, 596 So. 2d 1153 (Fla. 5th DCA 1992),[3] the defendant entered a plea to a second degree felony carrying a statutory maximum punishment of fifteen years incarceration. The trial court determined that it was necessary for the protection of the public that he be sentenced as a habitual offender, and placed him on straight probation for 15 years. The appellate court reversed, holding that because the habitual felony offender statute mandates a "sentence" of "a term of years," the placing of a defendant on straight probation in lieu of sentence constitutes an unauthorized and "illegal" sentence which the state was entitled to appeal. Kendrick, 596 So. 2d at 1154. Contra King v. State, 597 So. 2d 309, 313 (Fla. 2d DCA 1992).[4] There the court held habitualized community control is not per se illegal. The court went on to state that under section 775.084, absent a decision that sentencing as a habitual felony offender is not necessary, any sentence of such an habitualized defendant must be a prison sentence for a term of years. To properly impose probation or community control, the court would first have to find that a sentence as a habitual offender was not necessary and then impose sentence pursuant to the guidelines, finding proper reasons for a downward departure when necessary. King, 597 So. 2d at 314-317.

In the instant case, in reliance on King, the Second District held that the trial court may impose probation even when the court

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[3] Kendrick v. State, Case No. 79,953, is pending before this Court with oral argument scheduled for April 8, 1993.

[4] Review of King, Case No. 79,805, was denied by this Court.

has made a finding that the defendant is a habitual offender, and consequently held there is nothing improper or illegal in doubling the probationary term.

Kendrick is the correct holding. The terms habitual offender and probation are mutually exclusive. Certainly the two sentencing alternatives are in opposition. In placing a defendant on probation under section 948.01(3), Florida Statutes (1989), the trial court judge finds that:

> the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. . . .

In finding a defendant to be a habitual offender, however, the trial court judge is determining that the defendant's prior conduct is indicative of future criminal conduct and that he is inherently a danger to society. § 775.084, Fla. Stat. (1989).

As to the incongruity of the statutory schemes, the court in Scott v. State, 550 So.2d 111, 112 (Fla. 4th DCA 1989), rev. dismissed, 560 So.2d 235 (1990), stated that the probation and habitual offender statutes require opposite, inconsistent findings which are mutually exclusive. The court noted:

> . . . the findings required to order probation are precisely opposite to the findings required to invoke the habitual offender statute. The purpose of habitualization is to protect society against habitual offenders. . . . Probation, on the other hand, may only be imposed if it appears to the court that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law.

See also, Shead v. State, 367 So. 2d 264, 267 (Fla. 3d DCA 1979) (It is seriously questionable whether probation in any form can be imposed under the habitual criminal statute; the required findings under the habitual criminal statute and the probation statute are inconsistent and mutually exclusive).

The Fifth District, subsequent to the King and Kendrick decisions, has again held that a sentence of habitualized probation is invalid. When a court chooses to impose sentence under the Habitual Offender Act, it must sentence a defendant for a term of years. The logic behind having a habitual offender classification in order to enhance punishment is totally frustrated if the court has the discretion to sentence such offender under its provisions to probation. Lowe v. State, 17 F.L.W. D2082, 2083 (Fla. 5th DCA September 4, 1992), State v. Manning, 17 F.L.W. 2083, 2084 (Fla. 5th DCA September 4, 1992) (and COWART, J., specially concurring).

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, 472 So.2d 464, 465 (Fla. 1985), citing Fine v. Moran, 74 Fla. 417, 77 So. 533, 536 (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, 1312-1313, (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 probation. The statute, as plainly worded, means a defendant is to be sentenced to a term of years in 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). 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).

Based on the foregoing authorities, the trial court erred in imposing a ten year term on probation as a habitual offender. Additionally, Mr. Bamberg's sentence on the grand theft charge can not be increased. Section 775.048(4)(d), Florida Statutes (1989), provides that "a sentence imposed under this section shall not be increased after such imposition."[5] See also, North Carolina

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[5]Petitioner is aware of the holding in Hicks v. State, 595 So.2d 976 (Fla. 1st DCA 1992), which says the statute does not mean what it says and really means exactly the opposite -- that a "sentence imposed under this section [may] be increased after such imposition." Hicks overlooks the unambiguous meaning of the statute, however, and the principle of strict construction. Graham, (continued...)

v.Pearce, 395 U.S. 711, 725-726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Particularly in this instance where the charges arose out of one criminal episode, the habitualized probation sanction should be stricken.

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[5](...continued)
472 So. 2d at 465; Perkins, 576 So.2d at 1310; § 775.021 (1), Fla. Stat. (1989).

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the sanction of habitualized probation.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STEVE ALAN BAMBERG,

Appellant,

v. Case No. 91-03267

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed June 5, 1992.

Appeal from the Circuit
Court for Polk County;
E. Randolph Bentley, Judge.

James Marion Moorman, Public
Defender, and Jennifer Y.
Fogle, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Davis
G. Anderson, Jr., Assistant
Attorney General, Tampa, for
Appellee.

PER CURIAM.

Appellant Bamberg pled guilty to various charges including burglary and grand theft. He was sentenced as a habitual offender to a prison term for the burglary, but on the grand theft charge he was given 10 years probation only.

Appellant contends that the 10 years probation was improper in light of the habitual offender finding, relying on the concurring opinion in Steiner v. State, 591 So.2d 1070 (Fla. 2d DCA 1991). However, this court has since held in an en banc opinion that the trial court may impose probation even when the court has made a finding that the defendant is a habitual offender. King v. State, 17 F.L.W. D662 (Fla. 2d DCA Mar. 4, 1992). We note that the Fifth District Court of Appeal has recently held to the contrary in State v. Kendrick, 17 F.L.W. D812 (Fla. 5th DCA Mar. 27, 1992).

Affirmed.

SCHOONOVER, C.J., LEHAN and FRANK, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis G. Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of October, 1992.

Respectfully submitted,

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