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FILED
SID J. WHITE
JUN 22 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,
a/k/a DERICK ACRES,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 80036

DCA CASE NO. 91-1364

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

PAOLO G. ANNINO
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE

In the instant case, Mr. Ackers appealed two separate cases to the Fifth District Court of Appeal: Circuit Court Case Numbers CR90-9660 and CR90-10389. (R592,593)

In Case Number CR90-9660, the State filed an Information charging Mr. Ackers with Count I, Robbery With a Firearm, in violation of Section 812.13(2)(a), Florida Statutes (1989); with Count II, Robbery With a Firearm, in violation of Section 812.13(2)(a), Florida Statutes (1989); and with Count III, Aggravated Battery, in violation of Section 784.045(1)(b), Florida Statutes (1989). (R461-462)

In Case Number CR90-9660, a jury trial was held on March 6, 7 and 8, 1991. As to Count I, the jury found Mr. Ackers guilty of Robbery With a Firearm as charged. In a special verdict, the jury found that Mr. Ackers did not carry a firearm. (R551) As to Count II, the jury found Mr. Ackers guilty of Robbery With a Firearm as charged. (R552) In a special verdict, the jury found that Mr. Ackers did not carry a firearm to Count II. (R553) As to Count III, the jury found Mr. Ackers guilty of Aggravated Battery as charged. (R554)

At the May 23, 1991 Sentencing Hearing, the trial court adjudicated Mr. Ackers guilty as to Count I, II and III, in Case Number CR90-9660. (R55) As to Count I, Robbery With a Firearm, the trial court imposed a ten year term of probation. (R605) As to Count II, Robbery With a Firearm, the trial court imposed a ten year term of probation. (R607) As to Count III, the trial

court sentenced Mr. Ackers to ten years in the Department of Corrections as an Habitual Felony Offender. Count I and Count II are to run concurrent, and consecutive to Count III, and consecutive to Case Number CR90-10389. (R607)

In Case Number CR90-9660, Mr. Ackers filed timely Notice of Appeal to the Fifth District Court of Appeal. (R592,603-604)

On June 20, 1991, the State filed Notice of Cross Appeal in Case Number CR90-9660. (R601)

In Case Number CR90-10389, the State filed an amended Information charging Mr. Ackers with Count I, Resisting an Officer With Violence, in violation of Section 843.01, Florida Statutes (1989); and with Count II, Resisting an Officer With Violence, in violation of Section 843.01, Florida Statutes (1989). (R499)

On May 23, 1992, in Case Number CR90-10389, the State filed a nolle prosequi as to Count II, Resisting an Officer With Violence. (R576)

In Case Number CR90-10389, the trial court adjudicated Mr. Ackers guilty of Count I, Resisting an Officer With Violence. (R587) As to Count I, the trial court sentenced Mr. Ackers to ten years in the Department of Corrections as an Habitual Felony Offender, which sentence is to run concurrent with Count III, in Case Number CR90-9660.

On December 23, 1991, Appellant filed an Anders brief on his direct appeal.

On March 24, 1992, the Fifth District Court of Appeal issued

a Per Curiam Affirmed decision.

On April 7, 1992, the State, Appellee-Cross Appellant, filed a Motion for Rehearing.

On May 22, 1992, the Fifth District Court of Appeal in the instant case, granted Appellee-Cross Appellant's Motion for Rehearing, reversing the trial court's order granting probation for Counts I and II, in Case Number CR90-9660.

Petitioner is appealing the Fifth District Court of Appeal's rehearing order.

STATEMENT OF THE FACTS

Petitioner is appealing the Fifth District Court of Appeal's decision reversing his terms of probation. The issue on appeal is whether the imposition of probation in the case of an Habitual Felony Offender is a legal sentence. The facts in the instant case are not at issue on this appeal. In a summary fashion, a Kentucky Fried Chicken Restaurant was robbed on August 18, 1990. Two robbers, wearing masks, entered the restaurant through the front door, after the restaurant was closed for business. Mr. Ackers denied being one of the robbers. The identity of the robbers was the key factual issue at trial. The jury found Mr. Ackers guilty of this robbery.

SUMMARY OF THE ARGUMENT

The law is well-established that where a District Court of Appeal in a decision cites a case as controlling, which case is currently pending review before the Florida Supreme Court, this Court has the discretion to accept jurisdiction to review the decision. See Jollie v. State, 405 So.2d 418 (Fla. 1981). In the instant case, the Fifth District Court of Appeal in its decision cited State v. Kendrick, 17 F.L.W. 812 (Fla. 5th DCA March 27, 1992), as dispositive in the instant case. The Fifth District Court of Appeal stated: "We also agree with the State that probation is not a proper sentence for an adjudicated Habitual Offender as we said in Kendrick." See Appendix A. The Kendrick decision is presently pending before this Honorable Court. See Kendrick v. State, Supreme Court Case No. 79,953.

ARGUMENT

THIS HONORABLE COURT HAS JURISDICTION WHERE THE INSTANT DECISION WAS AFFIRMED ON THE AUTHORITY OF A CASE WHICH IS CURRENTLY PENDING REVIEW BEFORE THIS COURT.

In the instant case, the Fifth District Court of Appeal granted the State's, Cross-Appellant's, Motion for Rehearing and reversed the trial court's order granting probation in the instant case, based on the authority of State v. Kendrick, 17 F.L.W. 812 (Fla. 5th DCA March 27, 1992). The Kendrick case is currently pending before this Honorable Court in Kendrick v. State, Supreme Court Case No. 79,953.

It is well-established that where a District Court of Appeal cites a decision as controlling, which decision is currently pending review before the Florida Supreme Court, this Court automatically has discretionary jurisdiction to review the case. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

In the instant case, the Fifth District Court of Appeal reversed the trial court's order imposing probation for Counts I and II, in Case Number CR90-9660. The Fifth District Court of Appeal held, based on Kendrick, that "probation is not a proper sentence for an adjudicated Habitual Offender ..." See Appendix A. The instant decision, directly conflicts with King v. State, 17 F.L.W. D662 (Fla. 2d DCA March 4, 1992), and Staten v. State, 17 F.L.W. D870 (Fla. 2d DCA April 3, 1992). In Staten, the Second District Court of Appeal stated: "Moreover, the Court did not err in placing Staten on probation despite the fact that he is also declared an Habitual Offender." Id.

In conclusion, the Petitioner respectfully requests this Honorable Court to accept jurisdiction, based on Jollie, supra, and based on the express and direct conflict with King, supra, and Staten, supra.[1]

[1] In addition, this Honorable Court should exercise its discretionary jurisdiction, because the issue on appeal goes to the heart of the trial court's authority, i.e. whether a trial court has the sentencing discretion to impose probation on a Habitual Felony Offender.

CONCLUSION

BASED ON the argument contained herein, and authorities cited in support thereof, Petitioner requests that this Honorable Court accept jurisdiction.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Derrick Ackers, Inmate No. A-334558, #F217L, Jackson Corr. Inst., P.O. Box 4900, Malone, Fla. 32445, on this 19th day of June, 1992.

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS, a/k/a DERICK ACRES, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	SUPREME COURT CASE NO.

A P P E N D I X

91-739
PA

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

DERRICK ACKERS,

Appellant/Cross-Appellee,

v. CASE NO. 91-1364

STATE OF FLORIDA,

Appellee/Cross-Appellant.

Opinion filed May 22, 1992

Appeal from the Circuit Court
for Orange County,
Gary L. Formet, Sr., Judge.

James B. Gibson, Public Defender,
and Paolo G. Annino, Assistant
Public Defender, Daytona Beach,
for Appellant/Cross-Appellee.

Robert A. Butterworth, Attorney General,
Tallahassee, and Nancy Ryan, Assistant
Attorney General, Daytona Beach,
for Appellee/Cross-Appellant.

COBB, J.

ON MOTION FOR REHEARING

The State, as cross-appellant, contends that the trial court erred in finding that section 775.084, Florida Statutes (the habitual offender statute), does not apply to first-degree felonies punishable by life imprisonment, in this instance two counts of robbery with a firearm. The trial court had found Ackers to be a habitual offender in regard to a third count in that case (aggravated battery) and in regard to a companion case (resisting an officer with violence) and sentenced him accordingly for those

offenses. However, on the two robbery counts, the trial court imposed ten-year terms of straight probation.

As to the probation, the state relies on our opinion in *State v. Kendrick*, 17 F.L.W. 812 (Fla. 5th DCA March 27, 1992), and urges that a grant of straight probation is an illegal sentence when imposed on a defendant who has been determined to be a habitual felony offender. In *Kendrick*, we held that section 775.084 by its terms mandates a sentence "for a term of years." Probation is not a sentence. *Kendrick* at 813. Moreover, says the State, the orders granting probation represent downward departures from the sentencing guidelines without written reasons therefor.

We hold that a first-degree felony punishable by a term of years not exceeding life imprisonment is subject to an enhanced sentence of life imprisonment pursuant to the provisions of the habitual felony offender statute. *See Burdick v. State*, 594 So.2d 267 (Fla. 1992). We also agree with the state that probation is not a proper sentence for an adjudicated habitual offender, as we said in *Kendrick*.

Accordingly, we grant rehearing, reverse the trial court's orders granting probation for Counts I and II of Case No. 90-9660, and remand for the imposition of legal sentences in respect to those counts.

REVERSED and REMANDED.

DAUKSCH and PETERSON, JJ., concur.