IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS,
a/k/a DERICK ACRES,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 80,036

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANNE MOORMAN REEVES
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COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The petitioner, Derrick Ackers, was found to be a habitual offender according to section 775.084, Florida Statutes (1989), after being adjudicated guilty of three crimes. The trial court imposed a term of probation on two of the crimes.

On cross-appeal, the state challenged the imposition of probationary terms as inconsistent with the plain language of the habitual offender statute. The Fifth District Court of Appeal reversed the probation orders and remanded for "legal sentences" (Appendix A).

The petitioner filed his notice to invoke the discretionary jurisdiction of this court, and jurisdiction was accepted (Appendix B).

SUMMARY OF THE ARGUMENT

Section 775.084, Florida Statutes (1989), the "Habitual Offender" statute, does not by its terms mandate that any defendant found to meet the criteria for designation as a habitual offender and sentenced thereunder must necessarily be sentenced to a term of incarceration.

ARGUMENT

SECTION 775.084, FLORIDA STATUTES (1989), PERMITS A COURT TO SENTENCE A HABITUAL OFFENDER TO PROBATION.

The question here--the propriety of placing a person found to meet the statutory criteria identifying him as a habitual felony offender on probation instead of sentencing him to a term of years in prison--is a matter of what legal conclusion the language of section 775.084, Florida Statutes (1989), compels. The petitioner maintains that probation is not proscribed by the language of the statute. The state holds the opposite view, in which the Fifth District Court of Appeal joins. The gravamen of the latter position is that probation is by definition not a "sentence." While accurate as a statement of the law, it is inadequate as a summary of the meaning of this section.

Section 775.084 cannot be understood merely as a rule allowing more onerous terms of incarceration. It does allow such sentences; but it also describes a context of judicial discretion within which these sentences may--or may not--arise.

A linguistic analysis of the section would take shape thus: First, the foundation of the law is language conferring a twofold discretion upon the courts. A judge may thus decide whether or not to make certain findings, and if so, whether or not to sentence in a certain way. Subsection (1)(a) states that a

> "[h]abitual felony offender" means a defendant for whom the court <u>may</u> impose an extended term of imprisonment, as provided in this section, <u>if</u> it finds that [the defendant meets certain criteria].

(Emphasis added.) The analysis is the same for subsection (1)(b), defining a violent offender.

Second, two rules limit the exercise of the discretion thus conferred. First, once a judge decides that a defendant is not one whom the statute was meant to embrace, enhanced sentencing is proscribed. And second, to find that a defendant is such a one, a given procedure is required. Subsection (4)(c) states that

> [i]f the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3).

This language clearly permits the court to choose a guidelines sentence over a habitual offender sentence. There is no requirement to sentence under this section; the only requirement is not to sentence when "not necessary for the protection of the public," as decided by the court.

Finally, this court has harmonized the errant "shall" in subsection (4)(a) with the logical construction of the section as a whole, Burdick v. State, 17 F.L.W. 88 (Fla. February 6, 1992). The remaining mandatory language serves either to set out due process considerations (subsections (3), (4)(c), and (4)(d)) or to provide definitions (subsections (2), (4)(b), and (4)(e)).[1]

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[1] Subsection (e) would lose nothing of its force if written as a definition: "'Gaintime' for those sentenced under this section means only incentive time as provided for in s. 944.275(4)(b)." The same is true for the other definitional subsections expressed in mandatory terms.

No mandatory language demands the imposition of sentence.

Both the First and the Second District Courts of Appeal have recognized that habitual offender findings do not necessitate a habitual offender sentence. In Donald v. State, 562 So.2d 792, 795 (Fla. 1st DCA 1990), the court determined that a finding of habitual offender status need not necessarily invoke punishment as a habitual offender. But once the trial court decides to sentence a defendant under that section, it must "impose sentence in conformity with sections 775.084(4)(a) or 775.084(4)(b)."

Further, in King v. State, 597 So.2d 309 (Fla. 2d DCA 1992), the court examined the language of the statute minutely, and concluded that "there is nothing inherently or per se illegal about a sentence of community control coupled with a determination that a defendant is an habitual felony offender." Id. at 313.

The opposing view makes much of the meaning of the word "sentence." See Ackers v. State, 17 F.L.W. 1293 (Fla. 5th DCA May 22, 1992); Kendrick v. State, 17 F.L.W. 812 (Fla. 5th DCA March 27, 1992). In essence, the argument is that "sentence" and "probation" are mutually exclusive categories, and so reference in a law to sentencing must necessarily omit the possibility of probation. But this argument is chop logic, not borne out by sense or usage. Consider, for example, the "sentencing" guidelines, which embrace probation. Consider, indeed, section 775.084(4)(c), instructing the court on non-habitual imposition of sentence, where "sentence" comprehends probation. A

presentence investigation, under Rule of Criminal Procedure 3.710, must precede any "sentence" other than probation for the first-time felony offender. Without question, the word "sentence" may properly operate as a generic term referring to punishment.

The logical outgrowth of the case law construing section 775.084, both of this court in Burdick and of two district courts in Donald and King, is a rule that may be summarized as follows:

(1) A defendant may be, but need not be, found to be a habitual offender if he has the appropriate past convictions.

(2) For a defendant not found to be a habitual offender, sentence according to the guidelines is required.

(3) For a defendant found to be a habitual offender, sentence may be according to the guidelines if the community need not be otherwise protected, or according to this section as a habitual offender.

(4) For a defendant sentenced as a habitual offender, the sentence may include any punishment from probation through community control up to the maximum terms of years set out in subsections (4)(a) and (4)(b).

For these reasons, the petitioner respectfully suggests that the correct interpretation of section 775.084, Florida Statutes (1989), permits the imposition of probation upon a defendant found to be a habitual offender.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, petitioner respectfully requests that this honorable court reinstate the trial court's order granting probation.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, 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, #F-217L, Jackson Corr. Inst., P.O. Box 4900, Malone, Florida 32245, on this 23rd day of October, 1992.

Anne Moorman Reeves

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DERRICK ACKERS, a/k/a DERICK ACRES, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	COURT CASE NO. 80,036

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.

91-739 PA

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

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

DERRICK ACKERS,

Appellant/Cross-Appellee,

v.

CASE NO.: 91-1364

STATE OF FLORIDA,

Appellee/Cross-Appellant.

Decision filed March 24, 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.

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

PER CURIAM.

AFFIRMED.

DAUKSCH, COBB and PETERSON, JJ., concur.

92-529 AR

Supreme Court of Florida

FRIDAY, SEPTEMBER 18, 1992

DERRICK ACKERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER ACCEPTING JURISDICTION AND DISPENSING WITH ORAL ARGUMENT

CASE NO. 80,036

DISTRICT COURT OF APPEAL, 5TH DISTRICT NO. 91-1364

The Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner's brief on the merits shall be served on or before October 13, 1992; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs.

The Clerk of the District Court of Appeal, Fifth District, shall file the original record on or before November 17, 1992.

OVERTON, MCDONALD, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

cc: Hon. Frank J. Habershaw, Clerk

Paolo G. Annino, Esquire
Nancy Ryan, Esquire
Derrick Ackers, Malone

APPENDIX C