No request case

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FILED
SID J. WHITE
DEC 7 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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 REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER
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COUNSEL FOR PETITIONER

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SUMMARY OF THE ARGUMENT

A sentence of probation imposed upon a defendant found to be a habitual offender is a proper exercise of judicial discretion as permitted by the language of the habitual offender statute.

ARGUMENT

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

The state's answer brief relies heavily on legislative intent, pointing to staff analysis as support for its contention that probation is inappropriate for a person found to be a habitual offender. As the brief points out, this tack is statutorily mandated. Section 775.0843(2)(d), Florida Statutes (1989), requires prosecutors to attempt to persuade judges to impose the severest sentence permitted.

However, statutes are to be construed according to their plain meaning, which is generally the "best evidence of the intent of the legislature." In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1137 (Fla. 1990). The language of the habitual offender statute clearly directs that a court "may" impose extended terms of imprisonment for certain defendants. It is not required to do so.

In Burdick v. State, 594 So.2d 267, 269 (Fla. 1992), this court noted that "sentencing under the habitual offender statute is entirely discretionary . . . ." Had the legislature intended to limit this discretion, it could have provided a floor as well as a ceiling to the statutory sentences.

Absent such a floor, probation is properly a sentencing choice. See Poore v. State, 531 So.2d 161 (Fla. 1988). Such an interpretation of the statute comports with the principle that

"it is the consideration of the individual that should determine the kind of treatment appropriate to his case." Davis v. State, 123 So.2d 703 (Fla. 1960). See also Greene v. State, 238 So.2d 296, 302 (Fla. 1970) (Ervin, C.J., concurring specially).

CONCLUSION

BASED UPON the argument made and authorities cited herein, and in Petitioner's Merit Brief, 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

ANNE MOORMAN REEVES
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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 2nd day of December, 1992.

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.