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IN THE SUPREME COURT OF FLORIDA

WILLIAM C. SNEAD,
Appellant,

vs. CASE NO. 80,067

STATE OF FLORIDA,
Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUBIA COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
SUMMARY OF THE ARGUMENT	1
ARGUMENT	
THE FIFTH DISTRICT COURT'S DECISION IN SNEAD V. STATE, 598 SO. 2D 316 (FLA. 5TH DCA 1992), SHOULD BE REVERSED WITH DIRECTIONS TO VACATE SNEAD'S HABITUAL OFFENDER SENTENCE WHERE THE STATE DID NOT SEEK THE ENHANCED PENALTIES UNDER THE HABITUAL OFFENDER STATUTE UNTIL AFTER SNEAD WAS CHARGED WITH A VIOLATION OF PROBATION.	3
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

CASES CITED	PAGE NO.
Bilyou v. State 404 So.2d 744 (Fla. 1981)	5
Brown v. State 585 So.2d 350 (Fla. 4th DCA 1991)	6
Duval County School Board v. Florida Public Emp. Relations Commission 346 So.2d 1087 (Fla. 1st DCA 1977)	4
Segarra v. State 388 So.2d 1017 (Fla. 1980)	5
Scott v. State 550 So.2d 111 (Fla. 4th DCA 1989)	3,5
Snead v. State 598 So.2d 316 (Fla. 5th DCA 1992)	3,7
State v. Jackson 526 So.2d 58 (Fla. 1988)	6
Williams v. state 581 So.2d 144 (Fla. 1991)	1,7
Zambuto v. State 413 So.2d 461 (Fla. 4th DCA 1982)	5

OTHER AUTHORITIES:

Section 775.084(4)(e), Florida Statutes	3,4,6
Rule 3.701(d)(14), Florida Rules *of* Crim. Proc.	3
Rule 3.712(c)(i), Florida Rules of Crim. Proc.	6
Rule 3.988(g), Florida Rules of Crim. Proc.	6,7

IN THE SUPREME COURT OF FLORIDA

WILLIAM C. SNEAD,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

S. CT. CASE NO. 90,067

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests that this Honorable Court reverse the opinion of the District Court of Appeal, Fifth District, in the instant case. Although the notice of intent to seek an enhanced sentence was not filed until after Petitioner served a good portion of his probationary term, the district court reasoned that the habitual offender sentence was one which could have been imposed originally, relying on Williams v. State, 581 So. 2d 144 (Fla. 1991). Snead, however, could not have been originally subject to the statute where the State did not file a notice or seek enhancement until after Snead was charged with violating his probation. Moreover, Snead's plea agreement did not contemplate a habitual offender sentence. The district court's opinion permits an overly expansive application of Williams, where Williams only dealt with a departure sentence, and not a habitual offender sentence. The decision must not be upheld, as it would result in a clear violation of the rules set forth regulating sentencing recidivists under the habitual

offender statute, and permit defendants to be "habitualized" for offenses which occurred years before a violation of probation. Petitioner Snead requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal.

ARGUMENT

THE FIFTH DISTRICT COURT'S DECISION IN SNEAD v. STATE, 598 so. 2D 316 (Fla. 5th DCA 1992), SHOULD BE REVERSED WITH DIRECTIONS TO VACATE SNEAD'S HABITUAL OFFENDER SENTENCE WHERE THE STATE DID NOT SEEK THE ENHANCED PENALTIES UNDER THE HABITUAL OFFENDER STATUTE UNTIL AFTER SNEAD WAS CHARGED WITH A VIOLATION OF PROBATION.

As argued in Petitioner's merit brief, the decision of the Fifth District Court of Appeal expressly and directly conflicts with Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied, 560 So. 2d 235 (Fla. 1990), and should be reversed. The district court in Snead upheld a habitual offender sentence which was imposed after Petitioner Snead was charged with violating his probation, even though the State did not seek the enhanced penalties prior to Snead's plea agreement or prior to Snead being placed on probation. Petitioner Snead requests that this Honorable Court follow the reasoning set forth in Scott, supra, and quash the Fifth District Court of Appeal's decision in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992).

Respondent submits that "The State acknowledges that Rule 3.701(d)(14), Florida Rules of Criminal Procedure, states without qualification that: '[s]entenced imposed after revocation of probation or community control must be in accordance with the guidelines.'" Respondent then notes that Florida Statute § 775.084(4)(e), provides that sentences pursuant to the habitual offender statute are not subject to the sentencing guidelines, and contends that "to the extent the statute conflicts with

3.701(d)(14), the statute controls" (Respondent's merits brief, pg. 6).

It is well established, however that in a case of conflict between a statute and a court in respect to practice and procedure, the rule controls. § 25.371, Fla. Stat. (1989); Duval County School Board v. Florida Public Emp. Relations Commission, 346 So. 2d 1087 (Fla. 1st DCA 1977). Therefore, Florida Rule of Criminal Procedure 3.701(d)(14), which provides that "sentences imposed after revocation of probation must be in accordance with the guidelines," would control over a conflicting statute in the instant case. Furthermore, it is unclear what support § 775.084(4)(e) lends to Respondent's position. It is Petitioner's position that the trial court erred in imposing a habitual offender sentence after a violation of probation, where this was not an available option at the time Snead originally entered a plea to the charged offense. The fact that the guidelines to not apply to a habitual offender sentence does not hinder Petitioner's argument.

Respondent also states, "The record of this case does not show whether the petitioner was on actual notice, at the time of the original plea, that he could be habitualized if he violated probation" (Respondent's merits brief, pg 7). Petitioner takes exception with the statement. The plea agreement specifically provided that Petitioner understood that his "sentence will be imposed under the Sentencing Guidelines" (R6). Similarly, the order placing Petitioner on probation does not contain any

provisions informing Petitioner that he could be habitualized if the terms of the probation were violated (R7-8).

The cases relied upon by Respondent, namely Seaarra v. State, 388 So. 2d 1017 (Fla. 1980), and Bilyou v. State, 404 So. 2d 744 (Fla. 1981), are not on point. In both cases, this Court upheld the imposition of an increased sentence upon a violation of probation, where the plea agreement provided for a cap on the sentence to be recommended. These cases involve a situation quite distinct from the case sub judice, where the sentence imposed was not merely an extended term, but a sentence subject to the harsh sanctions of the habitual offender statute. Once a defendant is classified as a habitual offender, he or she remains subject to its provisions even in subsequent cases. Branding a criminal in this fashion not only precludes eligibility for gain-time, but prohibits the inmate from qualifying for a conditional release program, control release, parole, or community control as a special condition of parole. § 775.084(4)(e); Ch. 947, Fla. Stat. (1989).

The case of Zambuto v. State, 413 So. 2d 461 (Fla. 4th DCA 1982), does not provide authority for Respondent's position, as the Fourth District clearly receded from its position in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), in holding that the trial court could not sentence the defendant as a habitual offender upon a violation of probation. The statute the defendant was sentenced under in Zambuto, Florida Statute § 775.084 (1979), was an earlier version of the habitual offender

statute. This earlier version included other requirements to be met before a defendant qualified as a habitual offender, including a specific finding that the classification was necessary for the protection of the public. § 775.084(3), Fla. Stat. (1979). The district court found in a separate hearing that Zambuto fit the criteria.

Florida Statute § 775.084(3)(b) (1989), provides:

> (b) Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence to as to allow the preparation of a submission on behalf of the defendant (emphasis added).

As noted in Petitioner's initial brief to this court, this provision should have prevented the State from seeking the habitual offender penalties in this case, as the notice was not filed prior to the plea. Any ambiguity in this provision must be resolved in favor of Petitioner. State v. Jackson, 526 So. 2d 58 (Fla. 1988). Additionally, the existing Rules of Criminal Procedure require specific notice of the maximum possible penalty provided by law prior to the court's acceptance of a plea. Brown v. State, 585 So. 2d 350 (Fla. 4th DCA 1991); Fla. R. Crim. P. 3.712(c)(i). This rule was clearly violated in the instant case. The district court's opinion, however, did not even address the fact that the habitual offender sentence may not have been an option the trial court could have considered originally. Petitioner's maximum sentence under the guidelines was to be under "any nonstate prison sanction," even if Snead was sentenced under the top of the permitted range. Fla. R. Crim. P. 3.988(g)

(1989). The trial court instead sentenced Snead to five years probation for possession of cocaine as a habitual offender.

Again, the Fifth District Court of Appeal finding that upon the revocation of probation "the trial court is free to impose any sentence it might have originally imposed, that should include inter alia the imposition of a habitual offender sentence. **See Williams,"** misconstrues the holding in Williams v. **State**, 581 So. 2d i44 (Fla. 1991). Snead v. state, **598** So. 2d 316, 318 (Fla. 5th DCA 1992). Williams, **supra,** sanctioned the use of a pattern of criminality for a **departure** sentence on a violation of probation, where the pattern was proven to exist prior to the defendant being originally placed on probation. Williams, 581 So. 2d at 146. This is not authority for the trial court's action in imposing the imposition of a habitual offender sentence upon a violation of probation where this enhancement was never sought before. Enhancement pursuant to the provisions of the habitual offender statute, and a departure based on valid written reasons are two separate and distinct sentencing provisions. The district court's opinion in Snead, supra, should be quashed as it advocates an overly expansive interpretation of this Court's opinion in Williams, supra.

The decision of the district court of appeal should be reversed, as it conflicts with decisions of this Court and of other district courts. The opinion also permits the State to avoid the notice requirement of the habitual offender statute, and renders a plea agreement in exchange for a probationary

sentence invalid. The opinion in Snead further does not allow for the fact that this enhancement was never contemplated as part of the original plea agreement. The decision must not be upheld, as it would result in a clear violation of the rules set forth regulating sentencing recidivists under the habitual offender statute, and permit defendants to be "habitualized" for offenses which occurred years before a violation of probation. Petitioner Snead requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, Petitioner requests that this Honorable Court reverse the Fifth District Court of Appeal's decision with directions to vacate Petitioner's sentence and remand for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: William C. Snead, No. 614376, Madison C. I., P. O. Box 692, Madison, FL 32340-0692 on this 9th day of February, 1993.

SOPHIA EHRINGER
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