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IN THE SUPREME COURT OF FLORIDA

WILLIE FRANK THOMAS,

Petitioner,

vs. CASE NO. 80,168

STATE OF FLORIDA,

Respondent.

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DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner originally took an appeal in the Second District from the circuit court's denial of his Motion to Correct an Illegal Sentence filed pursuant to Fla. R. Crim. P. 3.800. (R 53-60). The trial court denied the motion in a written order dated May 2, 1991, to which a copy of the plea hearing transcript was attached. (R 61-73). Petitioner's sentence was the result of a written negotiated plea entered an September 18, 1990. Petitioner and his attorney received prior notice of the State's intent to seek habitual felony offender sentencing several months prior to the hearing, (R 20). Petitioner changed his not guilty plea to nolo contendere on the date of the hearing and signed a written agreement in which he acknowledged that he would receive twenty years as an habitual offender in each of the two cases, %hesentences to run concurrent. (R 25-27), The judge originally ordered a presentence investigation report (PSI), but the report is not present in the appellate record. (R 35, 47). Defense counsel, after consultation with Petitioner, repeated the terms of the agreement an the record. (R 65). Petitioner has never challenged the existence or validity of his prior convictions. Moreover, Petitioner raised no constitutional challenges to the habitual offender statute in the trial court.

SUMMARY OF THE ARGUMENT

As to Issue I: Petitioner's habitual offender sentence is unaffected by this Court's recent ruling in State v. Johnson, Nos. 79,150 & 79,204 (Fla., Jan. 14, 1993)[18 Fla. L. Weekly S55] because none of the amendments to section 775.084, Florida Statutes (1991) contained in chapter 89-280, Laws of Florida were applied in this case.

As to Issue II: Petitioner's classification as a habitual offender does not violate equal protection or unconstitutionally punish him for his "status." The limitations on parole or gain-time accrual for habitual offenders is reasonably related to the legislative goal of protecting citizens from repeat offenders.

As to Issue III: Subsections 775.084(1)(a)(3-4) of the habitual offender statute are not unconstitutional because those sections do not exclude the use of prior uncounseled convictions. A defendant may always introduce relevant evidence for consideration at the habitualization hearing, which would include proof that he did not waive his right to counsel for the convictions upon which the court intends to rely in habitualizing him. The habitual offender statute does not affect this right.

ARGUMENT

ISSUE I

WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084(1)(b)(1), FLORJDA STATUTES (1989), WERE UNCONSTITUTIONAL PRIOR TO THEIR REENACTMENT AS PART OF THE FLORIDA STATUTES, BECAUSE IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CORSITUTION?

Respondent acknowledges that this Court has recently held that the amendments to the habitual felony offender statute contained in chapter 89-280, Laws of Florida, violate the single subject requirement of article III, section 6 of the Florida Constitution, State v. Johnson, Nos, 79,150 & 79,204 (Fla., Jan. 14, 1993)[18 Pla. L. Weekly S55]. However, the Johnson decision does not apply to the instant case because Petitioner's sentence was not affected by the amendments to section 775.084 contained in chapter 89-280.

Petitioner was sentenced under section 775.084 because of several prior in-state felony convictions, including delivery of a controlled substance and possession of cocaine with intent to sell. (R 15). None of the prior conviction categories under which Petitioner was habitualized were altered by the amendments to the statute contained in chapter 89-280. Consequently, the sentence in this case is unaffected by Johnson, See McCall v. State, 583 So. 2d 411 (Fla. 4th DCA 1991), as noted in Johnson, 18 Fla. L. Weekly at S57, n. 2,

ISSUE II

WHETHER THE HABITUAL FELONY OFFENDER STATUTE IS FACIALLY UNCONSTITUTIONAL BECAUSE IT PENALIZES DEFENDANTS FOR THEIR STATUS AS HABITUAL FELONY OFFENDERS?

Petitioner appears to claim that he is being unconstitutionally punished by virtue of his statue as an habitual felony offender. This claim is baaed on the warding in section 775.084(4)(e), Florida Statutes (1991), which provides:

> A sentence imposed under this section shall not be subject to the provisions of a. 921.001, The provisions of Chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in s. 944.275(4)(b).

Petitioner alleges the above provision penalizes a person, and "not merely the sentence," for the status of being an habitual offender. As illustration, Petitioner states that if a defendant is serving a sentence other than the one being enhanced, gain-time would be eliminated from the non-habktualized sentence as well as the habitualized sentence under subsection (4)(e). Respondent disagrees.

Granted, a defendant who is found to be a habitual offender is entitled only to limited gain-time on his habitualized sentence according to the above provision. However, any gain-time granted and not forfeited on any earlier imposed sentence, earned in the past or in the future, remains unaffected by the later imposed habitual offender sentence. Section 944.275(3)(b), Florida Statutes (1991). See also, McBride v. State, 601 So. 26 1335, 1337 (Fla. 2d DCA 1992). Petitioner's reliance an Yager v.

State, 437 N.E.2d 454 (Ind. 1982) is misplaced. In Yager, the trial court erroneously treated the habitual criminal charge as an additional charge and imposed a separate thirty year sentence for that charge. No such circumstance exists here.

Petitioner's argument centers around the premise that section 775.084(4)(e) violates the equal protection clause in that the section eliminates the accrual of basic and meritorious gain time for habitual offenders and thereby improperly creates two classes of criminals However, the different treatment of habitual offenders under section 775.084(4)(e) bears a reasonable relationship to the object of the habitual offender legislation, which is to provide additional protection to the public from career criminals. Thus, the constitution is not offended. See, e.g., Arnold v. State, 566 So, 2d 37 (Fla. 2d DCA), rev. denied, 576 So. 2d 284 (Fla. 1990); Roberts v. State, 559 So. 2d 289, 291 (Fla. 2d DCA), cause dismissed, 564 So. 2d 488 (Fla. 1990); King v. State, 557 So. 2d 899, 902 (Fla. 5th DCA), rev. denied, 564 So. 2d 1086 (Fla. 1990). See also, Cross v. State, 96 Fla. 768, 119 So. 380 (1929). It should be noted, as did the district court in Roberts, that habitual offenders are still entitled to incentive gain time under section 775.084(4)(e). Roberts, supra, at 291.

Finally, Respondent points out that Petitioner has never claimed he was prejudiced by his habitual offender classification in the sense that any restrictions have been applied to a non-habitualized sentence. Accordingly, the Second District's decision should be affirmed.

ISSUE III

WHETHER THE HABITUAL FELONY OFFENDER STATUTE IS FACIALLY UNCONSTITUTIONAL IN VIOLATION OF DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION?

Petitioner alleges that the habitual offender statute is facially unconstitutional because subsections 775.084(1)(a)(3-4), which define a habitual offender as a defendant who has not received a pardon for any felony or other qualified offense or whose conviction of a felony or other qualified offense necessary for operation of the habitual offender section has not been set aside in a postconviction proceeding, do not specifically exclude patently unconstitutional uncounseled prior convictions Respondent submits this contention is without merit.

This precise argument was rejected by the Fourth District Court of Appeal in Broderick v. State, 564 So, 2d 622 (Fla. 4th DCA 1990). There, the court stated:

> Under: the sixth amendment to the United States Constitution, when a court is considering whether to sentence a defendant more harshly as a result of the defendant's prior convictions, the court must give the defendant a meaningful opportunity to show that he had a right to counsel for each of those prior offenses and that he did not waive that right. The court cannot consider any conviction for which the defendant did not waive his right to counsel. Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980); Leffew v. State, 518 So. 2d 1376 (Fla. 2d DCA 1988); Pilla v. State, 477 So. 2d 1088 (Fla. 4th DCA 1985).
>
> We do not read section 775.084 as defeating or even affecting this right, A defendant may introduce relevant evidence for consideration at the habitualization hearing, which would include proof that he did not waive his right to counsel for the

> convictions upon which the court intends to rely in habitualizing him.

Id. at 624.

Later, in Crawley v. State, 578 So. 2d 16 (Fla. 4th DCA), the district court held that the section quoted above was dicta. However, the Crawley court adopted the reasoning in Broderick and reaffirmed its conclusion that section 775.084 does not affect a defendant's right to a meaningful opportunity to show both that he had the right to counsel and that he failed to waive that right far each of his prior offenses before the court sentences the defendant more harshly based OR those prior convictions. Id. at 17. Since a defendant may introduce relevant evidence for consideration at the habitualization hearing, the habitual offender statute does not violate due process. Id.

The State relies on the Fourth District's reasoning in the Broderick and Crawley cases in its assertion that subsections 775.084(1)(a)(3-4) do not violate Petitioner's due process rights. It should be noted that at no time has Petitioner claimed that the trial court relied upon a prior uncounseled conviction in habitualizing him.

CONCLUSION

WHEREFORE, based on the above reasons and authorities, the State respectfully requests this Honorable Court to approve the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Wail to WILLIE FRANK THOMAS, DOC #104325, Desoto Correctional Institution, P.O. Drawer 1072, Arcadia, Florida 33821, on this 16th day of February, 1993.

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