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FILED
SID J. WHITE
JUL 23 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

8/14

IN THE SUPREME COURT OF FLORIDA

BOBBY MURRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,201

INITIAL BRIEF ON JURISDICTION

On Discretionary Review of a Decision of the District Court of Appeal, Fourth District of Florida.

RICHARD L. JORANDBY
Public Defender
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Gary Caldwell
Assistant Public Defender
Florida Bar No. 256919

Counsel far Appellant

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AUTHORITIES CITED

STATEMENT OF THE CASE

Bobby Murray was found guilty of grand theft at a non-jury trial in the Fifteenth Judicial Circuit. The trial court found him to be an habitual offender and sentenced him to five years of imprisonment to be followed by two years of service in an community control program. The trial court failed to make specific findings on the record pursuantto sections 775.084(1)(a) and 775.084(3)(d), Florida Statutes (1989) to support the habitual offender sentence.

On appeal, the District Court of Appeal, Fourth District of Florida, reversed the sentence on June 17, 1992:

> We affirm appellant's conviction but reverse the sentence. On remand, the trial court shall make specific findings on the record pursuant to sections 775.084(1)(a) and 775.084(3)(d), Florid Statutes (1989), to support the habitual offender sentence. See Walker v. State, 462 So.2d 452 (Fla.1985) (failure to object in trial court to habitual offender sentence without statutory findings does not bar defendant from raising issue on direct appeal from sentence); King v. State, 580 So.2d 169 (Fla. 4th DCA 1991) (en banc) (upon remand from defective habitual offender sentence, trial court is free to re-impose habitual offender sentence upon compliance with requirement for statutory findings); Van Bryant v. State, no. 91-2057 (Fla. 4th DCA May 27, 1992) (same).

Appendix, 1.

Judge Farmer dissented, writing that the result was contrary to Shull v. Dugger, 515 So.2d 748 (Fla.1987) and Pope v. State, 561 So.2d 554 (Fla.1990).

Mr. Murray timely filed his notice of intent to seek discretionary review, and this cause follows.

SUMMARY OF THE ARGUMENT

The decision of the lower court expressly and directly conflicts with decisions of this Court and another district court of appeal on the same questions of law.

ARGUMENT

Article 5, section 3 (b) (3) of the constitution gives this Court discretionary power to review decisions of district courts of appeal that expressly and directly conflict with decisions of other district courts of appeal or of this Court on the same question of law.

Mr. Murray contends that this Court should review the decision below in the exercise of its conflict jurisdiction because it conflicts expressly and directly with Robinson v. State, 519 So.2d 703 (Fla. 2d DCA 1988) and Shull v. Dugger, 515 So.2d 748 (Fla.1987),

In Robinson, the Second District found error where the trial court failed to make written findings supporting its determination that Carl Robinson was an habitual offender, and failed to give written reasons for sentencing him outside the recommended guidelines range. The court remanded for sentencing within the recommended guidelines range pursuant to Shull.

In Shull, this Court held that, where the trial court has failed to render contemporaneous written reasons for a guidelines departure sentence, the sentence must be reversed and the defendant sentenced within the recommended guidelines range.

At bar, the Fourth District's decision giving the state a "second bite at the apple" is contrary to Robinson and Shull. Hence, this Court should review and reverse its decision in the exercise of its discretionary jurisdiction.

CONCLUSION

The decision of the lower court expressly and directly conflicts with decisions of this Court or of another district court of appeal. Hence, this Court should accept jurisdiction over this cause.

Respectfully submitted,

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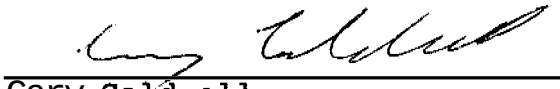

Gary Caldwell
Assistant Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier on July 20, 1992.

Of Counsel

A P P E N D I X

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

BOBBY MURRAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-1450.

Opinion filed June 17, 1992

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

Appeal from the Circuit Court for Palm Beach County, Walter N. Colbath, Judge.

Richard L. Jorandby, Public Defender, and Gary Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melynda Melear, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We affirm appellant's conviction but reverse the sentence. On remand, the trial court shall make specific findings on the record pursuant to sections 775.084(1)(a) and 775.084(3)(d), Florida Statutes (1989), to support the habitual offender sentence. See Walker v. State, 462 So.2d 452 (Fla. 1985) (failure to object in trial court to habitual offender sentence without statutory findings does not bar defendant from raising issue on direct appeal from sentence); King v. State, 580 So.2d 169 (Fla. 4th DCA 1991) (en banc) (upon remand from defective habitual offender sentence, trial court is free to re-impose habitual offender sentence upon compliance with requirement for statutory findings); Van Bryant v. State, no. 91-2057 (Fla. 4th DCA May 27, 1992) (same).

We also adopt the question certified in Van Bryant as one of great public importance.

CONVICTION AFFIRMED; SENTENCE REVERSED AND **REMANDED WITH DIRECTIONS.**

ANSTEAD and **WARNER, JJ,,** concur.
FARMER, J., specially concurs with opinion.

FARMER, J., specially concurring.

If I were writing on a clean slate, and I recognize that I am not, **I** would instruct the trial court on remand that appellant's sentence must be limited to one within the guidelines and in no event greater than the one provided by law for his conviction. I thus disagree with our decision in King v. State, ***580*** **So.2d** 169 **(Fla.** 4th DCA 1991) (en banc), in which we held that, after an invalid attempt to impose a habitual offender sentence, the trial court is free to reimpose the same habitual offender sentence so long as it complies with the statutory requirements for express findings as to two previous qualifying offenses, one of which was final within the preceding ***5*** years, and which **were** not pardoned or set aside later.

To reach the result in King, we had to recede from our decision in Pollard **v.** State, 561 So.2d 29 (Fla. 4th DCA 1990). Pollard was based on Shull v. **Duqger,** 515 So.2d 748 **(Fla.** 1987), where the court **held** that, after a habitual offender sentence had been reversed because it was based on invalid reasons, the resentencing is limited to the guidelines. More recently, in Pope v. State, **561 So.2d** 554 (Fla. 1990), the court held that resentencing after a defective guidelines departure is also limited to a sentence within the guidelines.

In Shull, the court explained:

> We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons for the original departure sentence have been reversed by an appellate court.

515 So.2d at 750. This reasoning is no less applicable to a departure through habitual offender treatment. Although the universe of factual reasons for habitual offender departure is smaller than for simple guidelines departure, it is not the pure number of available reasons for departure that governs, so much as it is the rejection of seriatim appeals from defective sentences until the state finally gets it right.

Our King decision, like Van Bryant, is based on the premise that habitual offender departure sentences are qualitatively different from guidelines departure sentences, at least for purposes of resentencing after a defective attempt to impose a departure sentence. Even if that conclusion were possible as a matter of first impression, and I don't believe it is, surely it is impossible on grounds of stare decisis after Shull. It was precisely a failed habitual offender sentence that was reversed on appeal in Shull.

Because King was an en banc decision, reconsideration of the same issue en banc is pointless. I am bound to follow it, so I concur with the majority, both as to that issue and the affirmance of the conviction. I write this opinion only to

suggest the need for supreme court review to correct our en banc error.