047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80201

BOBBY MURRAY,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

****

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the Appellee in the District Court of Appeal and prosecution in the trial court. Petitioner was the Appellant in the appeal proceedings and the defendant at trial.

The following symbols will be used:

"A" Appendix

STATEMENT OF THE CASE AND FACTS

The State adopts the majority opinion of the Fourth District Court *of* Appeal as its statement of the case and facts (A. 1-2)

SUMMARY OF ARGUMENT

The rule of law applied by the district court below does not expressly and directly conflict with the rule of law articulated in either of the cases cited by Petitioner. Therefore, no basis for conflict certiorari jurisdiction exists.

ARGUMENT

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH EITHER OF THE DECISIONS CITED BY PETITIONER.

Petitioner contends that the Fourth District's decision below conflicts with this court's decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987) and the Second District's opinion in Robinson v. State, 519 So.2d 703 (Fla. 2d DCA 1988). However, that is not so.

In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning to mandatory authority. See generally Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). In Nabcubu v. State, 312 So.2d 732 (Fla. 1975), this Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms 'express' include: 'to represent in words; to give expression to.' "Expressly" is defined: 'in an express

manner.' Websters Third New International Dictionary (1961 ed. unabr.)

See also Reaves v. State, 485 So.2d 829 (Fla. 1985). See generally Withlacoochee River Electric Co-op v. Tampa Electric Co., 158 So.2d 136 (Fla. 1963); Ansin v. Thurston, 101 So.2d 808 (Fla. 1958).

This Court has in general granted conflict certiorari review over decisions in which the conflict has been acknowledged in the opinion of the district court. See, e.g., Barnes v. State, 426 So.2d 1274 (Fla. 1st DCA 1982), reversed and remanded, State v. Barnes, 441 So.2d 626 (Fla. 1983). While the district court cannot thoroughly misapply a precedent of this Court and then escape conflict certiorari review of its decision, see Ancesion v. State, 497 So.2d 640 (Fla. 1986); Gibson v. Avis Rent-a-Car System, 386 So.2d 520 (Fla. 1980), that is not what happened here. "Obviously two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring, affirmed 428 So.2d 220 (Fla. 1982).

In deciding the instant case, the majority indicated that the trial court could properly declare Petitioner a habitual felony offender on remand (A. 1). The majority's position is not only consistent with the Fourth District's en banc precedent, see King v. State, 580 So.2d 169 (Fla. 4th DCA 1991), but it also consistent with the precedent of every other district court of appeal in Florida, see, e.g., Anderson v. State, 592 So.2d 1119

(Fla. 1st DCA 1991); Rodger v. State, 583 So.2d 429 (Fla. 3d DCA 1991); Johnson v. State, 576 So.2d 916 (Fla. 2d DCA 1991); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990).

Both Shull v. Dugger, 515 So.2d 748 (Fla. 1987) and Robinson v. State, 519 So.2d 703 (Fla. 2d DCA 1988) are factually dissimilar to the instant case. In Shull and Robinson, the trial courts departed from the sentencing guidelines based on the defendants' habitual offender statutes. The sentences in Shull and Robinson were remanded for resentencing within the guidelines based on precedent requiring appellate courts to do the same, when the reasons given for departure have been determined invalid. See William v. State, 492 So.2d 1308 (Fla. 1986). See also Whitehead v. State, 498 So.2d 863 (Fla. 1987) (habitual offender status is an invalid reason for a guidelines departure sentence). This Court in Shull reasoned that the "better policy" requires a trial court to articulate all of the reasons for departure in an original order because "to hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results", i.e. "numerous resentencings as , one by one, reasons are rejected in multiple appeals." 515 So.2d at 750.

This Court's concerns in Shull are not present here. Petitioner was sentenced pursuant to the habitual offender statute. After Shull, the legislature added subsection (4)(e) to the habitual offender statute, Section 775.084, Florida Statutes. See Owens v. State, 560 So.2d 1260 (Fla. 1st DCA 1990). Section

775.084(4)(e) specifically exempts sentences under the habitual offender statute from the sentencing guidelines procedures set out in Section 921.001, Florida Statutes. Moreover, Petitioner's sentence does not even come close to exceeding the recommended guidelines range. Accordingly, the trial court permissibly utilitized the habitual offender statute to enhance the statutory maximum for grand theft notwithstanding the October 1, 1988 amendment to Section 775.084. See State v. Kersey, 524 So.2d 1011 (Fla. 1988); Winter v. State, 522 So.2d 816 (Fla. 1988).

Unlike with a guidelines departure sentence, the habitual offender statute does not give a trial court the discretion to give a severe based on reasons that have not already been taken into account by the statute or sentencing guidelines. Hence, there is no danger that a trial court will persist in attempting to justify a harsh sentence when prior attempts have failed. A defendant either did or did not qualify for habitual offender status at the time of sentencing, and that fact cannot change after the sentencing. For that reason, the only task of a trial court on remand is to determine, in accordance with the procedural requirements of the habitual offender statute, whether the defendant actually met the criteria of the statute at the time he was originally sentenced. A trial court, therefore, is not free to make "unwarranted efforts" to justify an enhanced sentenced. Compare Shull, 515 So.2d at 750.

CONCLUSION

Since no conflict between the decision at bar and other appellate decisions has been established, Respondent would ask this Court to decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of **the** foregoing Brief has been furnished by Courier to: **GARY** CALDWELL, **Assistant Public Defender,** 421 Third Street, West Palm Beach, Florida **33401,** on **this** 28th day of August, 1992.

Of Counsel

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IN THE SUPREME COURT OF FLORIDA

CASE NO.

BOBBY MURRAY,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

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****

A P P E N D I X

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CERTIFICATE OF SERVICE

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 bane) (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. Dugger, 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.

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by Courier to: GARY CALDWELL, Assistant Public Defender, 421 Third Street, West Palm Beach, Florida 33401, on this 28th day of August, 1992.

Of Counsel

baa