097

11-23

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,201

BOBBY MURRAY,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

****

RESPONDENT'S BRIEF OF THE MERITS

.....

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. #765570
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Appellee/Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: **PAGE**

TABLE OF CITATIONS (Continued)

FLORIDA STATUTES:

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.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement *of* the Case and Facts set out in Petitioner's Brief on the Merits to the extent that it presents an accurate nonargumentative recitation of the proceedings below.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly remanded the instant case for resentencing in accordance with the habitual offender statute. The sentencing guidelines procedures do not apply to sentences imposed under the habitual offender statute.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY REMANDED THE INSTANT CASE FOR RESENTENCING IN ACCORDANCE WITH THE HABITUAL OFFENDER STATUTE.

Petitioner argues that the district court erred in holding that the trial court could resentence him pursuant to the habitual offender statue. Respondent disagrees. The majority opinion is consistent both with the Fourth District's en banc precedent, see King v. State, 580 So.2d 169 (Fla. 4th DCA 1991), and 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).

Shull v. Dugger, 515 So.2d 748 (Fla. 1987) and Robinson v. State, 519 So.2d 703 (Fla. 2d DCA 1988), cited by Petitioner, 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 statuses. 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 curt 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 resentencing 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. Unlike with a guidelines departure sentence, the habitual offender statute does not give a trial court the discretion to give a severe sentence 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. In Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980), this court made that clear:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism. The enhanced punishment, however, is only an incident to the last offense. The act does not create a new substantive offense. It merely prescribes a longer sentence for the subsequent offenses which triqqers the operation of the act. . .

(emphasis supplied).

Under the habitual offender statute, 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 sentence. Compare Shull, **515** So.2d at **750.**

The lack of proper findings under Section 775.084(1)(a), affects the declaration of a defendant as a habitual offender. Petitioner has yet to dispute that he qualifies as a habitual offender under the language of section 775.084; he has only claimed that the trial court failed to follow the procedure set out in the statute. A trial court is not required to sentence a defendant declared to be a habitual offender within the terms of the statute. See e.g., Burdick v. State, **594** So.2d 267 (Fla. 1992); Williams v. State, 581 So.2d **144** (Fla. 1991). Here, Petitioner disputes the appropriateness of the trial court getting a second chance at determining whether he comes within the statute. What he is really contesting, therefore, is the trial court's ability to declare him a habitual offender.

Because Shull only addressed the appropriateness of sentencing on remand, Petitioner's reliance on Shull is faulty. After all, a decision that a defendant must be resentenced within the sentencing guidelines would not say whether he could be redeclared a habitual offender nonetheless. As it was, the

original sentence did not even come close to exceeding the recommended guidelines range.

The legislature must have realized the differences between a guideline departure sentence and a habitual offender sentence, for 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 a sentence under the habitual offender statute from the sentencing guidelines procedures set out in Section 921.001, Florida Statutes. See Roberts v. State, 559 So.2d 289, 291 (Fla. 2d DCA) cause dismissed, 564 So.2d 488 (Fla. 1990) (subsection (4)(e) does not violate due process or equal protection).

Christopher v. State, 583 So.2d 642 (Fla. 1991), also cited by Petitioner, is equally inapplicable to this case. Christopher deals with the death penalty. Section 921.141(3), Florida statutes, specifically requires that if written findings in support of the sentence are not made, a life sentence must be imposed. Id. at 646. Again, 775.084(4)(e) explicitly provides that a habitual offender statute is not subject to the guidelines procedures of Chapter 921. Furthermore, in Christopher, precedent from this court required that written findings in support of the death penalty be made at the time of sentencing. In this case, Petitioner has not cited controlling precedent on point with the facts of this case. Additionally, where the death penalty is concerned, a trial court has to involve itself in a

"weighing process," whereby it considers the aggravating and mitigating factors of a case. Like with a guideline departure reason, an aggravating or mitigating factor could entail many different circumstances not precisely set out by statute. As stated above, that is not so with a habitual offender sentence.

Finally, Respondent notes that this court in Christopher did not require the trial court to resentence the defendant within the guidelines. Rather, it directed the trial court to impose a sentence of life without the possibility of parole for twenty-five years. Id. at 647. Hence, Petitioner's reliance on Christopher is misplaced. That is especially true since the habitual offender statute has no bearing on life felonies. Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991), approved, 594 So.2d 306 (Fla. 1992).

CONCLUSION

Based an the foregoing argument and authorities, Respondent respectfully request this Court to approve the majority opinion of the Fourth District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to: **GARY CALDWELL, ESQUIRE,** Assistant Public Defender, The Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, Florida 33401 this 29th day of October, 1992.

Of Counsel

/mmc