

W00#

091 - BC

FILED 48

SID J. WHITE

FEB 4 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

THOMAS SHEPPARD,

Petitioner,

vs.

CASE NO. 80,418

93 FEB -1 A211

STATE OF FLORIDA,

Respondent.

_____ /

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
Florida Bar No. 0152141
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

✓

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE NO.

STATE OF THE CASE AND FACTS.....iii

SUMMARY OF THE ARGUMENT.....1

ARGUMENT

ISSUE I

WHETHER CHAPTER 89-280, LAWS OF FLORIDA, WHICH
AMENDED SECTION 775.084, FLORIDA STATUTES (1989),
VIOLATES THE SINGLE SUBJECT REQUIREMENT OF THE
FLORIDA CONSTITUTION?.....2

CONCLUSION.....4

CERTIFICATE OF SERVICE.....4

TABLE OF CITATIONS

PAGE NO.

Burton v. State, 1993 W.L. 8930
(~~Fla. No. 80,071~~) (Opinion filed 01/21/93) 3

Johnson v. State,
589 So. 2d. 1370 (Fla. 1st DCA 1991),
review granted, State v. Johnson,
Fla. Nos. 79,150 & 79,204 (Jan. 14, 1993).....2

Savoury v. State,
1993 W.L. 8933 (Fla. 79,715)
(Opinion filed 01/21/93)3

Sheppard v. Casanueva,
Fla. No. 80,265 (Amended Order rendered
11/19/92 denying Emergency Petition
for Writ of Habeas Corpus).....iii

State v. Johnson,
18 Fla. L. Weekly S55 (Fla. Nos. 79,150 & 79,204)
(Opinion filed 01/14/93)..... iii,.2

OTHER AUTHORITIES:

Fla.R.Crim.Pr. 3.8003

Section 775.084, Chapter 89-280, Laws of Florida3

STATEMENT OF THE CASE AND FACTS

Respondent would add that Petitioner has sought collateral review in this Court. See, Sheppard v. Casanueva, Fla. No. 80,265 (Amended Order rendered 11/19/92 denying Emergency Petition for Writ of Habeas Corpus),¹

Additionally, this Court has rendered an opinion in State v. Johnson, 18 Fla. L. Weekly S55 (Fla. Nos. 79,150 & 79,204) (Opinion filed January 14, 1993).

¹ Respondent would point out that the Honorable Darryl C. Casanueva's name is incorrectly spelled as "Cassanueva" in the above Order.

SUMMARY OF THE ARGUMENT

The Second District recognized conflict with Johnson v. State, 589 So. 2d. 1370 (Fla. 1st DCA 1991). This Court has **decided** State v. Johnson, 18 Fla. L. Weekly S55 (Fla. Nos. 79,150 & 79,204)(Opinion filed January 14, 1993). And, the Johnson opinion controls.

The decision of the district court should be quashed. However, Petitioner was not sentenced when the common law certiorari was prosecuted below. This record does not contain a sentence for this Court to review. (R 49) The district court has not reviewed whatever sentence Petitioner may have **received**.

Should there be an illegal sentence [and this record on appeal does not indicate that there is one], there is a remedy. Petitioner has a right to Fla.R.Crim.Pr. 3.800 review in the trial court.

ARGUMENT

ISSUE I

WHETHER CHAPTER 89-280, LAWS OF FLORIDA,
WHICH AMENDED SECTION 775.084, FLORIDA
STATUTES (1989), VIOLATES THE SINGLE SUBJECT
REQUIREMENT OF THE FLORIDA CONSTITUTION?

(As Stated by Petitioner)

Thomas Sheppard was charged with robbery; and, the prosecution alleged that the crime occurred April 6, 1991. Mr. Sheppard was charged with the crime on April 29, 1991. Following a trial by jury, Mr. Sheppard was found guilty as charged. The Respondent announced its intention to seek habitualization. Mr. Sheppard made a timely attack on the amendments to the habitual offender statute. Sentencing was held in abeyance while the "State" prosecuted an application for writ of common law certiorari.

The court below rendered an opinion on August 21, 1992, granting common law certiorari and finding the habitualization statute constitutional. The Second District recognized conflict with Johnson v. State, 589 So. 2d. 1370 (Fla. 1st DCA 1991), review granted, State v. Johnson, Fla. Nos. 79,150 & 79,204 (Jan. 14, 1992). On January 14, 1993, this Court answered the question certified and approved the decision of the First District. See, State v. Johnson, 18 Fla. L. Weekly S55 (Fla. Nos. 79,150 & 79,204) (Opinion filed 01/15/93).

The Second District addressed this same question answered in State v. Johnson, supra. In accordance with this Court's

decision in Johnson, it is appropriate to quash, in part, the decision of the district court in the instant **case**. However, the Johnson decision requires the resentencing of individuals who were sentenced as habitual felony offenders under Section 775.084 as amended by Chapter 89-280 for the period of October 1, 1989, to **May** 2, 1991. At bar, Thomas Sheppard had not been sentenced (R 49); and, the Second District has not reviewed his sentence.


As Mr. Sheppard had not been sentenced during the pendency of the common law certiorari in the district court, Respondent would presume that when Petitioner is sentenced by the trial court none of the prior conviction categories under which Mr. Sheppard is to have been habitualized would have been altered by the amendments contained in Chapter to Section 775,084 contained in Chapter 89-280, Laws of Florida. Thus, Respondent would urge this Court to approve the result of the district court's decision because Mr. Sheppard's sentence is not affected by this Court's decision in Johnson. See, Burton v. State, 1993 W.L. 8930 (Fla. No. 80,071)(Opinion filed 01/21/93); Savoury v. State, 1993 W.L. 8933 (Fla. 79,715)(Opinion filed 01/21/93).

Should Petitioner have received a sentence under which his habitualization was altered by the amendments to Section 775.084 contained in Chapter 89-280, Laws of Florida, then he can bring that claim to **the** trial court's attention by means of a Fla.R.Crim.Pr. 3.800. In this record, there is no sentence for this Court to review. (R 49)

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, this Court should quash the decision of the district court without prejudice for Petitioner to seek Fla.R.Crim.Pr. 3.800 relief in the trial court should his sentence conflict with this Court's opinion in State v. Johnson.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


WILLIAM I. MUNSEY, JR.
Assistant Attorney General
Florida Bar No. 0152141
Westwood Center, Suite 7000
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33830 on this 29th day of January, 1993.


COUNSEL FOR APPELLEE