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FILED
SID J. WHITE
SEP 21 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80484

BENNIE LEE PEARSON,

Appellant/Petitioner,

vs.

THE STATE OF FLORIDA,

Appellee/Respondent.

ON NOTICE SEEKING DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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JURISDICTIONAL BRIEF OF APPELLANT/PETITIONER WITH APPENDIX

****

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TABLE OF CONTENTS

CITATIONS

INTRODUCTION

Appellant/Petitioner Bennie Lee Pearson, through counsel, seeks a determination that this Court's jurisdictional requirements have been met; and asks this Court to exercise its discretion to accept this case for full review on the merits.

Pursuant to Rule 9.120 (d) of the Florida Rules of Appellate Procedure, we submit this brief limited to the issue of this Court's jurisdiction, with an incorporated appendix containing a copy of the decision of the district court of appeal, This brief is timely filed within ten days of filing the notice seeking discretionary review.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal, Third District in Bennie Lee Pearson **v. State**, Case **No. 90-2148**, August 18, 1992, 17 F.L.W. D1938, affirms the trial court's decision to sentence Bennie Lee Pearson as an habitual violent felony offender fallowing his conviction of second degree murder with a firearm, a life felony.

The Third District Court of Appeal bases its affirmance of the habitual offender sentencing, on its holding in Lamont **v. State**, **597 So.2d 823** (Fla. 3rd DCA 1992).

Every other district court in **Florida** has held that life felonies are not subject to enhancement under the **habitual** offender statute. In Lamont, the **Third** District stands alone in holding **that** life felonies **are** subject to enhancement. Because the Third District relies on Lamont in the instant **case**, its decision of August 18, 1992 expressly and directly conflicts with decisions of the First, Second, Fourth and Fifth District Courts of Appeal of Florida with regard to the issue of whether life felonies are subject to enhancement under the habitual offender statute, Section 775.084, Florida Statutes (1980).

Lamont v. State, is currently pending before this Court in case no. 79,586. This case presents the identical legal issue to that presented in Lamont.

ARGUMENT IN SUPPORT OF JURISDICTION

The decision in Pearson v. State, the subject of these proceedings, reflects that Bennie Lee Pearson was adjudicated guilty of second-degree murder with a firearm and another charge. The trial court found Pearson to be an habitual and violent offender and sentenced him to a term of years in prison well above the sentencing guidelines range.

One of the points raised on Bennie Lee Pearson's appeal, was that life felonies are not subject to enhancement under the habitual offender statute, Florida Statutes Section 775.084. The Third District did not agree:

> . we conclude no error occurred when the trial 'judge ordered defendant's sentence enhanced. Based upon our holding in Lamont v. State, 597 So. 2d 823 (Fla. 3d DCA 1992), life felonies are subject to enhancement under the habitual offender statute, section 775.084, Florida Statutes (1989).

A copy of the decision of August 18, 1992 is included in the appendix at the end of this brief as App. 1 to 6, see slip opinion, page 2, at App. 2.

Lamont V. **State**, an which the Third District relies in affirming the enhancement of Mr. Pearson's sentence, **is** currently pending before this Court on this very same legal issue in case no. 79,586.

We note, and we ask this Court to take note of the concurring opinion in the instant ***case*** at **App,** 5, wherein Judge Hubbart concurs with the opinion and judgment

> **. . .** but with certain reservations. I think the trial court erred in sentencing the defendant as a habitual violent felony offender **. . . because** (1) the defendant was convicted of a life felony, to wit: second-degree murder with a firearm **. . .** and **(2)** Section 775.084 **(4) (a), (b), Florida Statutes (1989)** contains no extended term of imprisonment for a life felony conviction; accordingly, the defendant should have been sentenced under the sentencing guidelines.

Judge Hubbart correctly notes that the decision in this case conflicts with the decisions of the other district courts of appeal. His concurring opinion reflects the views expressed in his dissenting opinion in Lamont v. State, and is in accord with the decisions of every other district court of appeal in Florida, namely the FIRST DISTRICT in Gholston v. State, 589 So.2d 307 (Fla. 1st **DCA** 1991), a mroved, **17** F.L.W. S554 (Fla. July 23, **1992);** Johnson **V. State,** 568 **So.2d 519 (Fla. 1st DCA 1990);** Barber v. State, 564 So.2d

1169 (Fla. 1st DCA), rev. denied, 576 So.2d 284 (Fla. 1990); the SECOND DISTRICT in Ledesma v. State, 528 So.2d 470 (Fla. 2d DCA 1988); the FOURTH DISTRICT in Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991), approved, 594 So.2d 306 (Fla. 1992); Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991), rev. dismissed, 593 So.2d 1049 (Fla. 1992); and the FIFTH DISTRICT in Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990).

Because the opinion of the Third District Court of Appeal in the instant case relies on Lamont v. State, it expressly and directly conflicts with decisions of every other district court of appeal in the state of Florida on the same question of law. The jurisdictional requirement having been met, we ask the Court to accept this case for review on the merits.

CONCLUSION

Accordingly, we respectfully pray that this Honorable Court will determine that its jurisdictional requirements have been met; and will exercise its discretion and accept this case for full review on the merits.

Respectfully submitted,

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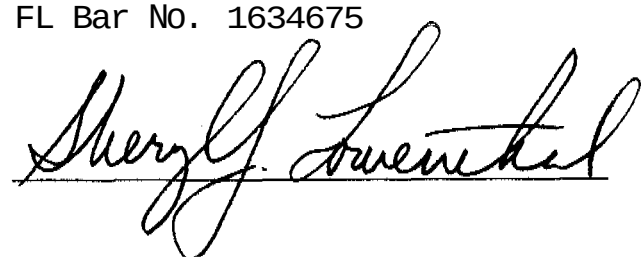

I HEREBY CERTIFY that a copy of this jurisdictional brief with appendix was mailed on September 18th, 1992 to Charles M. Fahlbusch, Assistant Attorney General, Suite 505-S, 4000 Hollywood Boulevard, Hollywood FL 33021.

APPENDIX

Bennie Lee Pearson v. State of Florida
Third DCA No. 90-2148
August 18, 1992
17 FLW D1938

App. 1 to 6

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

BENNIE LEE PEARSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 90-2148

79-46271 B

opinion filed August 18, 1992.

An Appeal *from* the Circuit Court for Dade County, Michael Salmon, Judge.

Bennett H. Brummer, Public Defender, and Sheryl J. Lowenthal, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Charles M. Fahlbusch, Assistant Attorney General, for appellee.

Before BARKDULL, HUBBART, and NESBITT, JJ.

On *Motion* for Rehearing

PER CURIAM.

Upon consideration of the motion of Bennie Lee Pearson this court's previous opinion is withdrawn and the following opinion is substituted:

APP. 1

9/15/92

The trial court in the instant case adjudicated Bennie Lee Pearson guilty of second-degree murder with a firearm and unlawful possession of a firearm during the commission of a felony. The court found Pearson to be an habitual and violent offender, and imposed a sentence *of* fifty years in prison with a mandatory minimum of fifteen years without eligibility for parole. We affirm in part and reverse in part and remand for resentencing.

We agree with defendant's argument that because his conviction for second-degree murder with a firearm and his conviction for unlawful possession *of* a firearm during the commission of a felony arose out of the same act, the doctrine of double jeopardy barred the later conviction. See Cleveland v. State, 587 So.2d 1145 (Fla. 1991); Sessions v. State, 597 So.2d 832 (Fla. 36 DCA 1992): Davis v. State *590* So.2d 496 (Pla. 3d DCA 1991); see also Perez v. State, 528 So.2d 129 (Fla. 3d DCA 1988).

Additionally, we conclude no error occurred when the trial judge ordered defendant's sentence enhanced. Based upon our holding in Lamont v. Slate, *597* So.2d 823 (Pla. 3d DCA 1992), life felonies are subject to enhancement under the habitual offender statute, section 775.084, Florida Statutes (1989). However, reading the habitual offender statute in pari materia with section 775.082(3)(a), we conclude that once the trial court determined defendant should be sentenced to a term of years, forty years was the maximum term of years permitted under the statute. See Ward v. State, *558* So.2d 166 (Fla. 1st DCA 1990);

see also Howe v. State, 596 So.2d 1227 (Fla. 2d DCA 1992). Also, the fifteen-year mandatory minimum cannot be imposed because, as stated in Lamont, subsections 775.084(4)(a) and (b) do not apply to life felonies. Lamont, 597 So.2d at 029.

As to the remaining points raised, first, the trial judge properly denied defendant's motion to suppress his statement. Based upon his co-perpetrator's specific identification of the defendant as a participant in the crimes, the surviving victim's statement to police that he believed two men were involved, and the anonymous tip which had also named the defendant, probable cause existed for all officers' actions and defendant's statement was accordingly admissible. See Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984).

Secondly, the trial judge properly permitted the state to enter a nolle prosequi with respect to a robbery count and proceed on the indictment." Deletion from an indictment of allegations unnecessary to the offense, *or* the withdrawal from the jury's consideration of one of several offenses initially charged does not constitute a forbidden amendment. United States v. Miller, 471 U.S. 130, 144-45, 105 S.Ct. 1811, 1819-20, *85* L.Ed.2d 99 (1985). Narrowing the theory of misconduct alleged in an indictment *by* striking surplus counts does not violate a defendant's right to be prosecuted pursuant to an indictment returned by a grand jury. United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989); see Huene v. State, *570* So.2d 1031 (Fla. 1st DCA 1990), review denied, 581 So.2d 1308 (Fla. 1991).

Accordingly, we reverse defendant's conviction and vacate the sentence entered for his unlawful possession of a firearm the commission of a felony. We affirm defendant's conviction for second-degree murder with a firearm but vacate the sentence ordered as to that conviction and remand for resentencing.

BARKDULL and NESBITT, JJ., concur.

App. 4

HUBBART, judge (concurring)

I concur in the opinion and judgment of the court, but with certain reservations. I think the trial court erred in sentencing the defendant as a habitual violent felony offender under Section 775.084(1)(b),(4)(b)(1), Florida Statutes (1989), because (1) the defendant was convicted of a life felony, to wit: second-degree murder with a firearm, §§ 782.04(2), 775.087(1)(a), Fla. Stat. (1989): and (2) Section 775.084(4)(a),*(b)*, Florida Statutes (1989) contains *no* extended term of imprisonment for a life felony conviction; accordingly, the defendant should have been sentenced under the sentencing guidelines. This result reflects the views which I expressed *in* my dissenting opinion in Lamont v. *State*, 597 So.2d 823, 830-32 (Fla. 3d DCA 1992)(Hubbart, J., dissenting), and is in accord with the decisions of the First, Second, Fourth and Fifth District Courts of Appeal.[1]

Nonetheless, I am obviously bound by the contrary decision of the en banc majority in Lamont, and therefore reluctantly

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[1] FIRST DISTRICT: Gholston v. State, 589 So.2d 307 (Fla. 1st DCA 1991), approved, 17 F.L.W. S554 (Fla. July 23, 1992); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), rev. denied, *576* So.2d 284 (Fla. 1990); SECOND DISTRICT: Ledesma v. Stata, *528* So.2d 470 (Fla. 2d DCA 1988); FOURTH DISTRICT: Newton V. State, 581 So.2d 213 (Fla. 4th DCA 1991), approved, 594 So.2d 306 (Fla. 1992); Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991), rev. dismissed, 593 So.2d 1049 (Fla. 1992); FIFTH DISTRICT: Power v. State, *568* So.2d 511 (Fla. 5th DCA 1990).

concur with the court's decision that the trial court did not err in sentencing the defendant as a habitual violent felony offender. Beyond that, I am somewhat puzzled as to what sentence this court concludes may be imposed on the defendant upon remand as a habitual violent offender based on Lamont; it appears, however, to be a term of years not to exceed forty with apparently no provision for a mandatory minimum as originally imposed. slip op. at 2. It should be noted that there is nothing in the enhanced penalty section of the habitual offender act [§ 775.084(4)(a), (b), Fla. Stat. (1989)] which authorizes such a sentence for either a habitual violent felony offender, as here, or even for a habitual felony offender. I recognize, however, that this result is apparently dictated by Lamont and therefore I cannot dissent therefrom -- except to express the hope that upon further review the Florida Supreme Court will correct this obvious exercise in judicial legislation.