IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN PERKOWSKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,579

PETITIONER'S INITIAL BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
Florida Bar No. 114460
15th Judicial Circuit
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

Florida Statutes

PRELIMINARY STATEMENT

Petitioner, James Allen Perkowski, was the defendant in the trial court. He was the appellant in the district court of appeal. He will be referred to by name and as petitioner in this brief.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

Appellant, JAMES ALLEN PERKOWSKI, was tried and convicted by a jury in Broward County on two counts of armed kidnapping, two counts of armed robbery and one count of armed burglary **(R-548,554-558).**

The trial court declared appellant a violent habitual offender under the **1988** amendment to the Habitual Offender Act, Section **775.084,** Fla. Stat. **(1988) (R-535-546,563).** The court based the habitual offender classification on convictions entered in Pennsylvania **1990,** two years after the commission of the present offenses **(R-539-541).**

The court imposed sentences of **40** years imprisonment on the two armed kidnapping counts (R-565-570). The court imposed life sentences under the habitual violent offender statute on the three remaining counts, consecutively to the **40** year sentences and consecutively with each other **(R-571-579).**

A timely appeal was taken to the Fourth District Court of Appeal in which the classification as violent habitual offender was challenged on the basis that under the 1988 version of the statute

the petitioner could not classify for habitual offender status, and since petitioner could not be classified an a habitual offender the habitual violent offender classification was improper. Additionally, petitioner challenged the classification because the predicate prior offenses were committed after the offenses for which habitual offender sentences were imposed.

The court below rejected these claims and affirmed. The court certified a question of law to the Court, viz.: whether a predicate offense must predate the offense for which a habitual offender sentence is imposed.

A timely notice of review was filed, and on October 9, 1992, this Court ordered briefs on the merits while postponing a decision on jurisdiction.

STATEMENT OF THE FACTS

The facts upon which the convictions were based, while not directly relevant to the legality of the issues raised concerning sentences under the violent habitual offender act, are that petitioner along with two other men waited at the residence of the victims until the victims returned from dinner in December of 1988 (R-267-274,358-363). The men were wearing ski masks, and Mrs. Downie was bound and taken to a bedroom where she was kept while another man took her husband to the jewelry store they operated (R-277-280,283,285-286,291). Mr. Downie was held at gunpoint while he disarmed the alarm to the jewelry store and opened the safe (R-365-375). After the items were taken out of the store, Mr. Downie was returned to the residence where he was placed on the bed next

to his wife while the robbers took a safe from the garage and three guns that the Downies kept in the house (R-365-377). After waiting several minutes after the men left, the Downies were able to get loose and telephone the police (R-378).

SUMMARY OF *ARGUMENT*

The district court of appeal certified an issue of law concerning whether the habitual offender act as worded in 1988 permitted such classification when the predicate prior offenses were committed after the commission of the offense for which the habitual offender sentences are to be imposed.

The second issue is whether the classification of habitual violent felony offender, as the statute was written in 1988, permitted a person to be classified a habitual violent felony offender when that person could not be classified a habitual felony offender because of a lack of prior Florida convictions.

On both of these issues, the petitioner relies on the rule of statutory construction that a penal statute must be given a strict construction when its meaning admits of two differing interpretations. Petitioner therefore requests the Court to quash the decision below and give the statute a limiting construction that resolves the ambiguities in favor of the accused, life and liberty. The Court is requested to remand with instructions that petitioner be resentenced.

ARGUMENT

POINT I

WHETHER THE 1988 HABITUAL OFFENDER ACT REQUIRES THE PRIOR OFFENSES UPON WHICH HABITUAL OFFENDER STATUS IS PREDICATED TO PREDATE THE OFFENSES FOR WHICH HABITUAL OFFENDER SENTENCES ARE TO BE IMPOSED?

The court below decided that the decision of this Court in State v. Barnes, 595 So.2d 22 (Fla. 1992), while inapposite, governed this issue as follows, but certified the question of law to this Court (Opinion below, page 4 of slip):

> Carrying the Barnes reasoning a step further, we conclude that under the present wording of the statute the defendant can be sentenced as a habitual offender even if he committed the present offense before the crime serving as a basis for the present habitualization. Therefore, the trial court did not err in sentencing the appellant as a violent habitual felony offender. Notwithstanding the foregoing, we recognize that Barnes is factually inapposite in that it did not address circumstances in which the prior predicate crime was committed after the subject offense. Therefore, we certify the following question to the supreme court:
>
> IS HABITUAL OFFENDER CLASSIFICATION PERMITTED WHERE THE PREDICATE OFFENSE FOR WHICH APPELLANT WAS PREVIOUSLY CONVICTED OCCURRED SUBSEQUENT TO THE COMMISSION OF THE SUBJECT OFFENSE?

Sub judice, after petitioner committed the instant offenses he later committed the offenses in Pennsylvania which were relied on for sentencing as a habitual violent offender under the 1988 version of the habitual offender statute. Section 775.084(1)(b)1, Fla. Stat. (1988).

Petitioner contends that this classification is erroneous because the statute by its terms contemplates prior convictions not simply other convictions. Specifically sub-section (1)(b)2 to section 775.084 contains the following wording that precludes the construction given to the statute by the court below:

> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior enumerated felony or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later;

The above sub-section refers to the new felony being "committed within 5 years of the date of the conviction of the last prior enumerated felony" or, alternatively within 5 years of release from a sentence or other commitment for the "prior conviction for an enumerated felony, whichever is later."

The wording does not permit construction other than that the prior conviction must predate the offense for which a habitual violent offender sentence is to be imposed. The words "within 5 years of the date of the conviction of the last prior enumerated felony" can mean nothing other than that the new felony must occur after the prior conviction.

Even if the phrase "within five years" were to be considered as permitting the habitual crime to be committed within 5 years on either side of the present offense, the same sub-section contains the additional words "prior enumerated felony." These words serve to prevent such a liberal construction of the criteria for habitual violent offender classification.

Petitioner urges the rule of strict construction of penal statutes must be used to ascertain the meaning of this statute where differing constructions could be given to its terms regarding whether the prior convictions must predate the offense. Earnest v. State, 351 So.2d 957 (Fla. 1977), 958-959:

> In Wershow [State v. Wershow, 343 So.2d 605 (Fla. 1977)] we reiterated the principle expressed in Ex Parte *Amos*, 93 Fla. 5, 112 Sa. 289 (1927):
>
> > "The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms...."

A strict construction must be given to a penal statute when the ambiguity involves the degree of punishment. Watson v. State, 148 Fla. 516, 4 So.2d 700 (1941). Statutes prescribing punishment and penalties should not be extended further than their terms reasonably justify. Rogers v. Cunningham, 117 Fla. 760, 158 So. 430 (1934). Whenever there is doubt about the extent of application of a criminal statute, the doubt must be resolved in favor of life and liberty. City of Leesburg v. Ware, et al., 113 Fla. 760, 153 So. 7 (1934).

A strict construction ends the matter since by giving a strict construction, no violence is done to the statute, and it is not eviscerated of meaning. A strict constructian simply limits its area of ambiguity without destroying it as a rational penal

statute.

The question of whether the Legislature intended mare should be left for unambiguous wording, if so desired, in a further revision or amendment. It is a well-established rule of construction that a penal statute will be strictly construed. The court below improperly extended the terms of the statute beyond that which may be done when alternative constructions are possible of the scope of a penal statute.

POINT II

WHETHER THE 1988 HABITUAL OFFENDER STATUTE'S REQUIREMENT OF PRIOR FLORIDA CONVICTIONS PERTAINS TO THAT STATUTE'S HABITUAL VIOLENT OFFENDER CLASSIFICATION?

The offenses in this case were committed December 3, 1988. The court below found that petitioner "could not have been convicted as a habitual felony offender under section 775.084(1)(a)" because "a prerequisite to such status is that the required convictions under (1)(a), prior to its amendment in 1989, must have been committed in Florida." (Opinion below, slip 2).

Petitioner argued that since he could not be classified as a habitual offender, he likewise could not be classified a habitual violent offender. The court rejected this position based on its finding that "[n]o statutory provision or case supports appellant's contention that a defendant must meet all of the criteria for the classification as a habitual felony offender under subsection (a) before he can be classified as a habitual violent felony offender under subsection (b)." (Opinion below, slip 3).

The 1988 amendment eliminated the misdemeanor classification of habitual offenders and inserted a new category of habitual violent felony offenders. The general classification of habitual offenders was not changed until 1989, after the instant offenses were committed, to encompass those without a prior Florida felony conviction.

Thus, the question is whether a person can be classified a habitual violent felony offender based solely on out-of-state convictions at a time when the statute required two prior Florida felony convictions for classification as a habitual offender? Petitioner believes that the 1988 version of the statute separates habitual offenders into two categories, but that the general classification was carried forward that before a person can be classified into the special category of more serious habitual offenders, the habitual violent category, the person must be shown to meet the criteria for habitual offender classification. Under this formulation, petitioner could not be sentenced as a habitual felony offender or a habitual violent felony offender.

The 1988 amendment contained a definition of "qualified offense" that was defined to encompass out-of-state convictions. Yet, the only portion of the statute to which this definition would apply was the habitual offender definition, and that portion was not amended to effectuate that category until 1989 when out-of-state convictions were permitted to qualify an offender to habitual status.

Accordingly, the statute leaves room for interpretation whether the separate categories of habitual and habitual violent

felony offenders were totally separate or whether the latter is a further narrowing of the more general habitual felony group. Petitioner submits that this ambiguity must be resolved in favor of the accused on the authority of the same law cited in POINT I of this brief. Rather than simply re-cite those authorities, petitioner relies on the principle that the statute should be construed on this question, as in the first question, in favor of life **and** libertywhentwo alternative constructions of the language of the statute remain possible.

In 1989 the Legislature expressed its unambiguous intent to permit both categories of habitual offenders to received enhanced penalties without prior Florida convictions. That is where, and when, the "qualified offense" definition was given its application. But, the Legislature did not clarify and conform these portions of the statute to achieve that result until after petitioner's offenses were committed.

The intent of the Legislature to have a single criteria vis a vis out-of-state convictions supports petitioner's view that the Legislature simply had not finalized and completed its work in revising this area of criminal sanctions in 1988 when it left the statute incomplete. Therefore, the section creating a category of habitual violent felony offenders should be interpreted in light of both its ambiguity, requiring a strict construction, and in light of the Legislature's expressed intent the following year to have a single overall qualifying criteria for both habitual and habitual violent offenders. To construe the statute as written in 1988, as petitioner suggests, to erect a single criteria from which

a more severe group is then culled is consistent with the intent of the Legislature to have not two but only one qualifying criteria for all habitual felony offenders, and only from that group would those with violent prior convictions be separately subject to special enhanced sentencing.

In conclusion, the petitioner urges the Court to limit the application of the 1988 version of the statute to a uniform criteria consistent with its overall purpose of creating a category of habitual felony offenders. Since petitioner did not meet the criteria for that group, he should not have been sentenced under the more rigorous sentencing provisions of the sub-category of habitual violent felony offenders.

CONCLUSION

WHEREFORE, petitioner requests the Court to review the decision below on both points decided by the district court of appeal. It is prayed the Court will reverse the classification of petitioner as a habitual violent felony offender based an the construction of the wording of the statute according to the authorities relied upon herein and remand with instructions that petitioner be resentenced.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
Florida Bar No. **114460**
15th Judicial Circuit
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida **33401**
(407) 355-7600

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to MELVINA RACEY FLAHERTY, Assistant Attorney General, Elisha Newton Dimick Building, Room **204, 111** Georgia Avenue, West Palm Beach, Florida **33401**, this 3rd **day** of **NOVEMBER**, 1992.

LOUIS G. CARRES
Assistant Public Defender

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

JAMES ALLEN PERKOWSKI,

Appellant,

v. CASE NO. 91-3208.

STATE OF FLORIDA,

Appellee.

Opinion filed September 2, 1992

Appeal from the Circuit Court for Broward County; Robert Carney, Judge.

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

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melvina Racey Flaherty, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We affirm appellant's sentence as a habitual offender but reverse as to the mandatory minimum provisions in the sentence.

Perkowski was tried for crimes committed in December, 1988 and was convicted of those crimes in September, 1991. In 1990, he was convicted of several other felonies in Pennsylvania. Appellant argued at sentencing that the court could not use those offenses as a basis upon which to find that he is a habitual violent felony offender because they were committed after the date he committed the crimes for which he was being sentenced.

The trial court determined that the date appellant committed the offenses was irrelevant under the present statute, and that appellant could be convicted as a habitual violent felony offender so long as there were the requisite prior convictions.

Appellant asserts that the trial court erred sentencing him as a habitual violent felony offender unc Florida Statute Section 775.084(1)(since he could not have been convicted as a habitual felony offender under secti 775.084(1)(a Appellant could not have been convicted as a habitual felony offender under (1)(a) because a prerequisite to such status is that the required convictions under (1)(a), prior to its amendment in 1989, must have been committed in Florida. [1]

Florida Statute Section 775.084 (1988) provided:

> (1) As used in this act:
>
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of two or more felonies in this state; (emphasis added)....
>
> (b) "Habitual violent felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or

[1] In 1989, the act was amended extending the classification to offenders with prior convictions in other states. However, the statute as so amended is inapplicable here.

more of such convictions was for:...[listed offenses].

No statutory provision or case supports appellant's contention that a defendant must meet all of the criteria for the classification as a habitual felony offender under subsection (a) before he can be classified as a habitual violent felony offender under subsection (b).

A more difficult issue concerns the relative dates on which the crimes were committed. Under earlier habitual offender provisions, sections 775.09, 775.10, Florida Statutes (1947), in order to be sentenced as a habitual felony offender, the conviction for which the defendant was being sentenced had to be for an offense committed after a prior conviction. See Joyner v. State, 158 Fla. 806, 30 So.2d 304 (1947). However, the Florida Supreme Court has held that the plain language of the 1988 habitual felony offender statute, no longer requires sequential convictions. State v. Barnes, 595 So.2d 22 (Fla. 1992). Therefore, a defendant convicted of a crime can be sentenced as a habitual offender under the 1988 statute, even if he committed the offense for which he is being sentenced before the prior conviction serving as the basis of the habitualization. Id.

The state correctly points out that the language of the habitual violent felony offender statute requires only that the trial court find that the defendant was "convicted" of the prior offense before his sentencing as a habitual offender. s 775.084(1)(b)1, Fla. Stat. (1988). The statute does not specify a prerequisite that a defendant commit the offense forming the basis of his habitual violent felony offender status prior to

committing the offense for which he is being sentenced. We note that the question addressed involves only an issue of statutory interpretation.

Carrying the Barnes reasoning a step further, we conclude that under the present wording of the statute the defendant can be sentenced as a habitual offender even if he committed the present offense before the crime serving as a basis for the present habitualization. Therefore, the trial court did not err in sentencing the appellant as a violent habitual felony offender. Notwithstanding the foregoing, we recognize that Barnes is factually inapposite in that it did not address circumstances in which the prior predicate crime was committed after the subject offense. Therefore, we certify the following question to the supreme court:

> **IS HABITUAL OFFENDER CLASSIFICATION PERMITTED WHERE THE PREDICATE OFFENSE FOR WHICH APPELLANT WAS PREVIOUSLY CONVICTED OCCURRED SUBSEQUENT TO THE COMMISSION OF THE SUBJECT OFFENSE?**

The trial court did, however, err in imposing consecutive mandatory sentences under the habitual offender act. In Daniels v. State, 595 So.2d 952 (Fla. 1992), the Florida Supreme Court held that a trial court may not impose consecutive mandatory minimum sentences under section 775.084, when the offenses arose from the same criminal incident. Therefore, we vacate appellant's sentence and remand for resentencing.

STONE, WARNER and POLEN, JJ., concur.