IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,579

JAMES ALLEN PERKOWSKI

Appellant/Petitioner

vs.

STATE OF FLORIDA

Appellee/Respondent.

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record on Appeal

All emphasis has been added by Appellee.

STATEMENT OF THE CASE AND FACTS

The State accepts the Statement of the Case and Facts as set forth in Petitioner's Initial Brief to the extent that it presents an accurate nonargumentative recitation of the trial court proceedings, with the following additions and/or corrections:

Petitioner also argued below that the trial court erroneously imposed consecutive mandatory minimum sentences under the Habitual Violent Felony Offender Act. The State conceded error on this ground. The Fourth District Court of Appeals reversed Petitioner's sentence on the basis of Daniels v. State, 595 So.2d 952 (Fla. 1992), and remanded for resentencing.

SUMMARY OF THE ARGUMENT

POINT I:

The clear and unambiguous language of §775.084(b)(1), Fla. Stat. (Supp. 1988), requires only that the defendant have "been previously convicted of a felony or an attempt or conspiracy to commit a felony...." Thus, the Fourth District Court of Appeal correctly affirmed the trial court's use of Petitioner's Pennsylvania convictions as grounds for sentencing Petitioner as a Habitual Violent Felony Offender.

POINT II:

It is clear from the language of §775.084, Fla. Stat. (Supp. 1988), that the legislature intended to create two distinct types of habitual felons. Thus, one need not satisfy the habitual felony offender criteria before being sentenced as a habitual violent felony offender.

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 Fourth District Court of Appeal correctly affirmed Petitioner's habitual violent felony offender based upon Petitioner's two Pennsylvania convictions. In so ruling, the Fourth District relied upon this Court's decision in State v. Barnes, 595 So.2d 22, 24 (Fla. 1992), wherein this Court held that the plain language of the 1988 habitual felony offender statute no longer requires sequential convictions. Perkowski V. State, 17 Fla. L. Weekly D2048 (Fla. 4th DCA Sept. **2, 1992).**

As applied to the instant case, the clear and unambiguous language of the habitual violent felony statute requires only that the defendant have "been previously convicted of a felony or an attempt or conspiracy to commit, a felony..." §775.084(1)(b)(1), Fla. Stat. (Supp. 1988). Petitioner's argument would permit a defendant who committed a subsequent offense, but who had the good fortune to be convicted on the subsequent offense first, to escape habitualization.

In arguing that habitualization was improper, Petitioner relies upon §775.084(1)(b)2, Fla. Stat. (Supp. 1988), which provides:

> 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.

According to Petitioner, 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 (Petitioner's Initial Brief on the Merits, p. 5). However, in Smith v. State, 584 So.2d 1107, 1108 (Fla. 2d DCA 1991), rev. denied, 595 So.2d 557 (Fla. 1992), the Second District concluded that the word "within" as used in the statute means "no later than." This is interpretation is consistent with the language of subsection §775.084(1)(b)(1), which focuses upon the existence of a previous conviction. contrary to Petitioner's assertions, the term "prior enumerated felony" is only to distinguish between the offense for which the defendant is being sentenced and the felony which is relied upon for habitualization. Accordingly, the Fourth District correctly concluded that, carrying the Barnes reasoning a step further, 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. Perkowski, 17 Fla. L. Weekly at 2049. Accordingly, the certified question should be answered in the affirmative.

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

Petitioner incorrectly asserts that he must first meet th criteria for classification as a habitual felony offender before h may be classified as a habitual violent felony offender. It is clear from the language of the statute that the legislature intended to create two distinct types of habitual felons. Thus, one need not satisfy the habitual felony offender criteria before being sentenced as a habitual violent felony offender.

Nowhere in 5775.084, Fla. Stat. (Supp. 1988), does the statute require that the habitual felony offender criteria be satisfied as a prerequisite to sentencing as a habitual violent felony offender. Section 775.084(a), Fla. Stat. (Supp. 1988), defines a habitual felony offender as a defendant who has previously been convicted of two or more felonies in this state. Subsection (a) then goes on to provide that the instant felony must have been committed within five years of the date of the defendant's last prior felony or qualified offense or date of release and must not have been pardoned or his convictions set aside for these prior felonies or "qualified offenses". Subsection (c) of the statute defines a qualified offense as an out-of-state offense punishable by imprisonment in excess of one year. §775.084(c), Fla. Stat. (Supp. 1988).

In contrast, §775.084(b) defines a habitual violent felony offender as a defendant who has been convicted of one or more

specifically enumerated violent felony offenses. There is no requirement that the prior violent felony be committed in Florida. §775.084(b), Fla. Stat. (Supp. 1988). The statute then reiterates, similar to the felony offender definition, that the instant felony must have been committed within five years of the date of the defendant's last prior felony or date of release and must not have been the pardoned or the conviction set aside.' However, the statute omits the "qualified offense" language, indicating that *any* previous violent felony committed within five years, wherever committed, is grounds for an enhanced penalty as a habitual violent felony offender. See, §775.084(b)(2), Fla. Stat. (Supp. **1988);** Canales v. State, 571 So.2d **87, 89** (Fla. 5th DCA 1990). So long as the defendant has the required one prior violent felony under **§775.084(b),** Fla. Stat. (Supp. 1988), the trial court may sentence him as habitual violent felony offender, notwithstanding the absence of the two Florida convictions required for habitual felony offender status. Since Petitioner satisfied the criteria of **the** habitual violent felony offender, he was correctly sentences **as** such. The Fourth District's correctly rejected Petitioner's arguments to the contrary.

'Under Petitioner's interpretation of the statute, it would have been unnecessary for the legislature to set these provisions out separately in both the habitual and habitual violent felony offender sections of the statute.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests that the certified question be answered in the AFFIRMATIVE and the decision of the Fourth District Court of Appeal be AFFIRMED.

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: LOUIS G. CARRES, Counsel for Defendant, Fifteenth Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 20th day of November, 1992.

Of Counsel