IN THE SUPREME COURT OF FLORIDA

JAMES ALLEN PERKOWSKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,579

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, 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.

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 respondent has, like the district court, relied upon Barnes v. State, 595 So.2d 22 (Fla. 1992), to control this distinct issue. In Barnes the Court was concerned with new language in the 1988 amended habitual offender act which eliminated any reference to a requirement of sequential convictions. In Jovner v. State, 158 Fla. 806, 30 So.2d 304 (1947), the statute, section 775.09, specifically applied an enhanced term of imprisonment to a person "who, after having been convicted of a felony [or attempted felony ...," commits any felony within this state.

In Barnes this Court considered the effect of a change in the wording of the statute that totally eliminated any reference to one offense occurring after conviction of a prior offense. It was held that under the revised wording of the statute the two requisite prior convictions need not be sequential because the wording "after

having been convicted" had been changed to simply require being "convicted of two or more" felonies. Therefore, two prior convictions entered on the same day were a valid basis for habitual felony offender sentencing. Id.

In the present case the first issue is whether the specific wording of the statute, as amended in 1988, requires the "prior" offense to be committed prior to the offense for which enhanced punishment is to be imposed. The respondent's position is that since there is no sequential requirement there can be no requirement that the prior offense predate the one to be enhanced. Respondent argued that a multiple offender would be a multiple offender regardless of the order in which the crimes were committed. This would be a good argument if it were not for specific use of the words "prior" and "previously" in the statute. Section 775.084 twice uses this terminology. Once in defining a habitual felony offender and again in the sub-section listing the criteria for classifying a habitual violent felony offender. Section 775.084(1)(a)1, in defining a "habitual felony offender" specifies that it means a defendant who "has previously been convicted of two or more felonies in this state." Emphasis added.

This Court in Tillman v. State, 17 F.L.W. S707 (Fla. Nov. 19, 1992), stated that: "By imposing mandatory minimum sentences under the habitual violent felony offender provisions in section 775.084(4)(b), the legislature clearly intended to provide longer sentences for criminals who commit felonies and have previously been convicted of a violent felony." While the Court was considering a question whether the present offense need be violent, the

Court nevertheless gave a reasonable reading to the provisions which imply strongly a prior crime to the one being sentenced. Only by such interpretation can the person be given an opportunity to reform after the commission of the predicate offense.

The issue sub iudice arises from a transposition where commission of the "prior" offenses occurred after the offense for which enhanced punishment as a habitual felony offender was imposed. This raises a different issue of legal interpretation from the issue decided in Barnes.

The statute under which Petitioner has been sentenced states in section 775.084(1)(b)2 (Supp. 1988):

> 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.

While the respondent has argued that "within 5 years" can mean in either direction, another pertinent indication of intent is found in the sub-section's words "last prior enumerated felony" that the legislature chose to include when defining what qualifies a defendant for habitual violent felony offender status.

The statute thus seems to unambiguously require a prior felony not simply a prior conviction. The phrase "within 5 years" should be construed consistently with the very specific words "last prior enumerated felony" to leave no doubt that the statute requires the qualifying felony to be before the offense for which a habitual violent felony offender sentence can be imposed. The legislature

could have written "within 5 years" of the "last enumerated felony" but it did not. Instead it wrote, "last prior enumerated felony," and consistently with the phrase "within 5 years" it should equate with a requirement that there be a previous qualifying felony.

As Petitioner has argued, with citations of authority in his initial brief on the merits, any uncertainty that remains from the wording about what the statute means, must be resolved in favor of life and liberty. There is very strong support in the statute for the interpretation Petitioner seeks that the offense far which a habitual offender sentence is to be imposed must come after the prior conviction that qualifies the defendant for habitual felony offender status.

But if some other construction of the statute is possible, the doubt must be resolved in favor of the citizen and against the state. Earnest v. State, 351 So.2d 957 (Fla. 1977); State v. Wershow, 343 So.2d 605 (Fla. 1977).

POINT 11

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

The second issue presented in the case involves another controversy of interpretation that is limited to the 1988 version of the act. In that year, the statute required two prior Florida convictions for a defendant to be declared a habitual felony offender. See, section 775.084(1)(a) (Supp. 1988):

> (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:
>
> * * *

The statute was changed the following year regarding the requirement of two prior Florida convictions when the qualified offenses were included in this section to serve as a possible substitute. See, section 775.084(1)(a)1 (F.S. 1989):

> (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 any combination of two or more felonies in this state or other qualified offenses:
>
> * * *

While "qualified offenses" were defined in the statute in 1988, "qualified offenses" were not made a substitute in section 775.084(1)(a) for prior Florida convictions to qualify a defendant as a habitual felony offender until 1989. Therefore, out of state convictions could not have been used to satisfy the prior conviction requirement for classification as a habitual felony offender under the 1988 version of the statute that Petitioner was sentenced under.

It is Petitioner's position that there is grave doubt upon reading the entire statute about whether the legislature intended to create two classificatians where a person could be classified a habitual violent felony offender who could not be classified a habitual felony offender. It seems more consistent with the

overall scheme of the statute, and consistent with the amendment made in 1989, that the legislature intended to define one group of habitual felony offenders from which these with violent prior convictions would receive severe punishment. The classifications are not totally separate since they are within the same statute. The construction given to the statute below treats the two categories as separate and unrelated. We argue that among the habitual offenders those persons who may additionally be classified as habitual violent felony offenders may be sentenced to the mare stringent punishments applicable to them.

Respondent on the other hand has contended that there are two, separate and independent classifications of habitual offenders and that one may be a habitual violent felony offender without ever qualifying as a habitual felony offender in the first place.

The Court is urged to interpret the statute consistently with the manifested intent of the legislature the following year to have a single qualifying criterion and to quash the decision below and remand with instructions that Petitioner be sentenced without regard to the habitual offender statute.

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 on the wording of the statute according to the authorities relied upon herein and remand with instructions that petitioner be resentenced.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true capy 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 2nd day of DECEMBER, 1992.

LOUIS G. CARRES
Assistant Public Defender