IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 80,691
5DCA NO. 92-336

RALPH CHAPMAN,

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was convicted of both DUI manslaughter and vehicular homicide. Chapman v. State, 17 F.L.W. 2225 (Fla. 5th DCA September 25, 1992). "Both offenses resulted from a single automobile accident." Id. The Fifth District Court of Appeal vacated the conviction and sentence for vehicular homicide and affirmed the conviction for DUI manslaughter. Id. The Fifth District based its decision upon Houser, infra, and Logan, infra. Id.

SUMMARY OF ARGUMENT

The decision in the instant case is in express and direct conflict with the Fourth District's decision in Murphy, infra. The decision in the instant case also construes a provision of the state or federal constitution, namely the double jeopardy clause. Due to this conflict and construction of the double jeopardy clause, this court should exercise its discretionary jurisdiction.

ARGUMENT

WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH MURPHY V. STATE, INFRA, AND EXPRESSLY CONSTRUES A PROVISION OF THE STATE OR FEDERAL CONSTITUTION.

Petitioner asserts that the decision in the instant case is in express and direct conflict with the Fourth District's decision in Murphy v. State, 578 So.2d 410 (Fla. 4th DCA 1991). In Murphy, the defendant was convicted and sentenced for one count of DUI manslaughter and one count of vehicular homicide. The Fourth District concluded "that because none of the exceptions listed in section 775.021(4)[, Fla. Stat. (Supp. 1988),] is applicable in the case at bar, and because each of the offenses contains elements which the other does not, Murphy could be convicted of both DUI manslaughter and vehicular homicide." Murphy, at 411. The defendant's convictions for both DUI manslaughter and vehicular homicide were affirmed. Id.

In the instant case, the Fifth District held that petitioner could not be convicted and sentenced for both DUI manslaughter and vehicular homicide. The Fifth District relied upon this court's decision in Houser v. State, 474 So.2d 1193 (Fla. 1985), and its own decision in Logan v. State, 592 So.2d 295 (Fla. 5th DCA 1991), dismissed, 599 So.2d 656 (Fla. 1992), in reversing respondent's conviction and sentence for vehicular homicide. Houser, supra, was decided prior to the amendment of §775.021(4), Fla. Stat. (1991). In Logan, the Fifth District acknowledged Murphy, supra, but disagreed. Thus, petitioner asserts that the

Fifth District's decision in Chapman is in express and direct conflict with the Fourth District's decision in Murphy.

As additional grounds for this court exercising its discretionary jurisdiction, in determining that respondent could not be convicted of both DUI manslaughter and vehicular homicide the Fifth District found that the convictions and sentences for both violated double jeopardy prohibitions. The Fifth District therefore construed a provision of the state or federal constitution.

The Fifth District's decision in the instant case is in express and direct conflict with the Fourth District's decision in Murphy, supra. The decision in the instant case also construed a provision of the state or federal constitution, namely the double jeopardy clause. This honorable court should exercise its jurisdiction in this case and resolve the conflict between the decision in this case and the decision in Murphy, supra, and address the construction of the double jeopardy clause.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully requests this honorable court exercise its jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Petitioner has been furnished by delivery to Daniel J. Schafer, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 5th day of November, 1992.

Bonnie Jean Parrish
Of Counsel

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_____/

APPENDIX

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INSTRUMENT

means to protect itself from those who disregard its authority or disobey its orders. I suggest that the legislature immediately address the problem and return to the judiciary in juvenile proceedings this important and necessary power.

PETITION GRANTED and WRIT ISSUED. (COBB, COWART and HARRIS, JJ., concur.)

* * *

Criminal law—Sentencing—Sentence of fifteen years suspended after completion of probation constitutes a conditional suspended sentence and is an unauthorized sentencing alternative—Habitual felony offender statute mandates sentence of term of years and does not allow imposition of straight probation

GREGORY LEE BRIDGES, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-2592. Opinion filed September 25, 1992. Appeal from the Circuit Court for Orange County, Gary L. Formet, Sr., Judge. James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David G. Mersch, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Appellant was tried and convicted of two counts of delivery of cocaine[1] and two counts of possession of cocaine.[2] The trial court found that appellant was an habitual felony offender and sentenced him to two concurrent eight year terms of incarceration for the two counts of possession (counts 2 and 4) and two concurrent fifteen year terms of incarceration for the two counts of delivery (counts 1 and 3), to be served consecutive to the eight year terms. However, the fifteen year terms were suspended upon appellant successfully completing five years probation. We affirm appellant's convictions and sentences for the two counts of possession, but reverse the sentences for the two counts of delivery (counts 1 and 3) and remand for resentencing.

The sentence of fifteen years suspended after completion of probation constitutes a "conditional suspended sentence" as in *Bryant v. State*, 591 So.2d 1102 (Fla. 5th DCA 1992) and is an unauthorized sentencing alternative. Even if construed as a straight term of probation, the penalty is improper because in *State v. Kendrick*, 596 So.2d 1153 (Fla. 5th DCA 1992), *review pending*, No. 79,953, this court held that the habitual felony offender statute mandates a sentence of a term of years and does not allow imposition of straight probation. Therefore, appellant's sentences for counts 1 and 3 are reversed and remanded for imposition of legal sentences.

AFFIRMED in part, REVERSED in part and REMANDED. (DAUKSCH, SHARP, W. and HARRIS, JJ., concur.)

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[1] § 893.13(1)(a)(1), Fla. Stat. (1991).
[2] § 893.13(1)(f), Fla. Stat. (1991).

* * *

Criminal law—Appeal of summary denial of motion for post conviction relief—Provision of copy of record on appeal free of charge—Petition for writ of mandamus

PAUL R. HOLSTROM, Petitioner, v. HON. JAMES C. WATKINS, CIRCUIT COURT CLERK, etc., Respondent. 5th District. Case No. 92-1556. September 21, 1992.

[Original Opinion at 17 F.L.W. D1828]

BY ORDER OF THE COURT:

Upon consideration of Petitioner's MOTION FOR REHEARING OF PETITION FOR WRIT OF MANDAMUS, filed August 10, 1992, it is

ORDERED that the July 31, 1992, Opinion of this Court is withdrawn. Further, the above-styled cause will be considered by an alternate panel of this Court.

* * *

Criminal law—Separate convictions for both DUI manslaughter and vehicular homicide arising out of single automobile accident improper

RALPH CHAPMAN, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-336. Opinion filed September 25, 1992. Appeal from the Circuit Court for Orange County, Michael F. Cycmanick, Judge. James B. Gibson, Public Defender, and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Chapman was convicted of both DUI manslaughter and vehicular homicide, sections 316.193 and 782.071, Florida Statutes (1991). Both offenses resulted from a single automobile accident. We must vacate the conviction and sentence for vehicular homicide based upon the decisions in *Houser v. State*, 474 So. 2d 1193 (Fla. 1985), and *Logan v. State*, 592 So. 2d 295 (Fla. 5th DCA 1991), *dismissed*, 599 So. 2d 656 (Fla. 1992). We affirm the conviction for DUI manslaughter and remand for resentencing.

VACATED in part; AFFIRMED in part; REMANDED. (GOSHORN, C.J., SHARP, W., and PETERSON, JJ., concur.)

* * *

Criminal law—Statewide prosecutor has authority to prosecute offenses involving criminal fraud—Statute, as clarified by subsequent legislation, includes in definition of fraud odometer tampering, forgery, vehicle title violations, and notary public violations

STATE OF FLORIDA, Appellant, v. WILLIAM STARLING NUCKOLLS, III, et al., Appellees. 5th District. Case No. 91-1670. Opinion filed September 25, 1992. Appeal from the Circuit Court for Orange County, James C. Hauser, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and David S. Morgan, Assistant Attorney General, Daytona Beach, for Appellant. Robert A. Leventhal of Leventhal & Slaughter, P.A., Orlando, for Appellee, William Starling Nuckolls III. John L. Woodard, III, Orlando for Appellees, Delores Gunter and Sharon Gibbs. Gregory M. Wilson, Orlando, for Appellee, Jeanelle Nuckolls Rivers.

ON MOTION FOR REHEARING
[Original Opinion at 17 F.L.W. D1666]

(GOSHORN, C.J.) We grant the parties' motions for rehearing, withdraw our opinion dated July 10, 1992, and substitute the following opinion.

The State appeals from the order granting a motion to dismiss[1] the 75 counts of a 182 count fourth amended information charging the defendants with odometer tampering,[2] forgery,[3] vehicle title violations,[4] and notary public violations[5] for lack of subject matter jurisdiction by the statewide prosecutor to prosecute the specified charges. The State contends all the crimes charged are fraudulent in nature and fall within the broad constitutional[6] and statutory[7] grants of subject matter jurisdiction to the statewide prosecutor. Specifically, the State argues that the dismissed charges fall within the category of "criminal fraud" which section 16.56, Florida Statutes (1991) specifically authorizes the statewide prosecutor to prosecute.[8] The defendants answer that only those crimes covered in Chapter 817, Florida Statutes (1991) entitled "Fraudulent Practices" can be prosecuted by the statewide prosecutor under the legislative grant of power to prosecute "criminal fraud." We agree with the State's argument and reverse.

Section 16.56(1)(a), Florida Statutes (1991) provided that the office of the statewide prosecutor may:

> Investigate and prosecute the offenses of bribery, burglary, *criminal fraud*, criminal usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, and robbery; of crimes involving narcotic or other dangerous drugs; of any violation of the provisions of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act, including any offense comprising part of a pattern of racketeering activity in any RICO offense as charged; of any violation of the provisions of the Florida Anti-Fencing Act; of any violation of the provisions of the Florida Antitrust Act of 1980, as amended; or of any attempt, solicitation, or conspiracy to commit any of the crimes specifically enumerated above. The office shall have such power only when