IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RALPH CHAPMAN,

Respondent.

CASE NO. 80-691

RESPONDENT'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Facts set out in the Jurisdictional Brief of Petitioner.

SUMMARY OF ARGUMENT

While the decision in this case does conflict with the Fourth District's opinion in Murphy v. State, this Court should nevertheless decline jurisdiction. The issue raised in the case has already been decided by this Court in Houser v. State, a decision recently reaffirmed in State v. Thompson.

ARGUMENT

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CAUSE.

Respondent agrees that the decision in the instant case is in express and direct conflict with the Fourth District decision in Murphy v. State, 578 So.2d 410 (Fla. 4th DCA 1991). Therefore, Respondent cannot argue that there is no jurisdictional basis for the Court to accept review in this case should it choose to do so. Nevertheless, Respondent contends the Court should deny review.

Review is unnecessary because the Fifth District Court decision merely follows from this Court's earlier decision in Houser v. State, 474 So.2d 1193 (Fla. 1985). The rationale for Houser was not, contrary to the Fourth District's view in Murphy, undermined by the amendment to Section 775.021, Florida Statutes (Supp. 1988). This is true because DUI Manslaughter and Vehicular Homicide are degrees of the same offense within the meaning of Section 775.021(4)(b)2. The two offenses merely allow two different methods of proving a homicide case.

Further, review is unnecessary here because this Court has recently affirmed the continuing validity of Houser in its decision in State v. Thompson, No. 78,728 (Fla. November 12, 1992). In Thompson v. State, 585 So.2d 492 (Fla. 5th DCA 1991), the Court held that the defendant could not be sentenced for both the sale of a counterfeit controlled substance and for felony

petit theft when both offenses were based on the same conduct. The Fifth District held, "The specific theft crimes have become 'degrees' of the generally defined theft crime in Chapter 812, based on the history and current revision of Florida's theft statute." Id., 585 So.2d at 494. This Court affirmed, finding the Fifth District's opinion "consistent with our decision in Houser v. State ...".

The precise questions raised in this case was answered by this Court seven years ago in Houser. Since the Court has recently reaffirmed the continuing validity of Houser there is no need for review in this case.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court decline jurisdiction in this cause.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Ralph Chapman, No. 332791, P. O. Box 1807, Bushnell, FL 33513 on this 24th day of November, 1992.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. RALPH CHAPMAN, Respondent.	)	CASE NO. 80-691

A P P E N D I X

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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