047 1-15

FILED
SID J. WHITE
DEC 21 1992
CLERK, SUPREME COURT
By ____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CLARENCE BROOKS,

Petitioner,

v. CASE NO. 80,768

STATE OF FLORIDA,

Respondent.

______________________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF, CRIMINAL APPEALS
FLORIDA BAR NO. 325791

LAURA RUSH
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 613959

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
ISSUE I	
CONSECUTIVE SENTENCES ARE AUTHORIZED UNDER SECTION 775.084, FLORIDA STATUTES (1989) FOR CRIMES ARISING OUT OF A SINGLE CRIMINAL EPISODE.	5
ISSUE II	
THE TRIAL COURT'S MISSTATEMENT, IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT.	10
CONCLUSION	13
CERTIFICATE OF SERVICE	13

TABLE OF CITATIONS

CASES	PAGE(S)
Carawan v. State, 515 So.2d 161 (Fla. 1987)	7
Daniels v. State, 595 So.2d 952 (Fla. 1992)	Passim
Downs v. State, Case No. 79,322	4
Knickerbocker v. State, 604 So.2d 876 (Fla. 1st DCA 1992)	6
Marshall v. State, 596 So.2d 114 (Fla. 2d DCA 1992)	5
Palmer v. State, 438 So.2d 1 (Fla. 1983)	Passim
State v. Boatwright, 559 So.2d 210 (Fla. 1990)	5
Stephens v. State, 572 So.2d 1387 (Fla. 1991)	10

OTHER AUTHORITIES	
Merriam-Webster's Third New International Dictionary 345 (1981)	8
Section 775.021, Florida Statutes (1989)	Passim
Section 775.084, Florida Statutes (1989)	Passim

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CLARENCE BROOKS,

Petitioner,

v. CASE NO. 80,768

STATE OF FLORIDA,

Respondent.

_____________________/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Clarence Brooks, defendant and appellant in the tribunals below, will be referred to herein as "petitioner." Respondent, the State of Florida, prosecuting authority and appellee in the tribunals below, will be referred to herein as "the State" or "Respondent." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

I. This court in Daniels v. State, infra, implicitly ruled that section 775.084, Florida Statutes (1989) authorizes consecutive habitual offender sentences for crimes arising out of a single criminal episode. See e.g., Marshall v. State, infra; Knickerbocker v. State, infra. Section 775.021, Florida Statutes (1989) provides that separate offenses shall be sentenced separately, and that the trial court in its unfettered discretion may order the sentences to be served either consecutively or concurrently. A common sense reading of section 775.084 demonstrates that the term "case" referenced in section 775.084(4)(a) refers not to a defendant's particular criminal "case," as petitioner argues, but rather to a particular instance or a particular circumstance. Merriam-Webster's Third New International Dictionary 345 (1981).

II. The record clearly establishes that the trial court relied exclusively upon petitioner's prior record in imposing habitual violent felony offender sentencing. The context of the trial court's misstatement also shows with unmistakable clarity that the trial court correctly and accurately sought to advise petitioner that, due to the 30-year minimum mandatory terms imposed, petitioner would not be eligible for release from prison until the minimum mandatory time had expired.

ARGUMENT

ISSUE I

CONSECUTIVE SENTENCES ARE AUTHORIZED UNDER SECTION 775.084, FLORIDA STATUTES (1989) FOR CRIMES ARISING OUT OF A SINGLE CRIMINAL EPISODE.

This case is before the court on a certified question which asks as follows:

> May consecutive enhanced sentences be imposed under section 775.084, Florida Statutes, for crimes growing out of a single criminal episode?[1]

Petitioner relies upon this court's decision in Daniels v. State, 595 So.2d 952 (Fla. 1992) in asserting that consecutive sentences are prohibited by section 775.084. However, in Daniels this court, by affirming the consecutive habitual offender sentences imposed, at least implicitly ruled that consecutive sentences are entirely permissible under section 775.084. In Marshall v. State, 596 So.2d 114 (Fla. 2d DCA 1992), the court also rejected the argument made here by petitioner, noting that "[u]nder the rule of Palmer v. State, 438 So.2d 1 (Fla. 1983)], whether the crimes arose from a single episode [footnote omitted] is not dispositive here because there is no issue of consecutive minimum mandatory terms in the appellant's habitual offender sentence. The imposition of consecutive habitual offender sentences without minimum mandatory terms is not error. See

---

[1] An aspect of this issue is present in Downs v. State, Case No. 79,322, scheduled for oral argument on January 6, 1993.

Daniels v. State, 595 So.2d 952 (Fla. 1992)(citing State v. Boatwright, 559 So.2d 210,213 (Fla. 1990), citing Palmer v. State, 438 So.2d at 4)." Id., 596 So.2d at 115. See also Knickerbocker v. State, 604 So.2d 876 (Fla. 1st DCA 1992), holding that the "trial court clearly possessed the power to impose consecutive sentences, notwithstanding the fact that all of the convictions arose out of the same criminal episode." Id., 604 So.2d at 878.

Section 775.021 provides rules of construction for determining whether offenses are separate, whether separate offenses are separately sentenced, and whether separate sentences are imposed concurrently or consecutively. Because it is central to the certified question it is important that its full content be kept firmly in mind.

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.
>
> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
>
> (3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decrees.
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitutes one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each

> criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof;
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

It is clear from the plain language of subsection (4)(a) that separate offenses, as defined therein, shall be separately sentenced. It is also clear that the trial court possesses unfettered discretion to impose separate sentences either concurrently or consecutively.[2] Section 775.021(2) makes clear that the rules of construction set forth in that statute are applicable to all other sections of the criminal code unless specifically exempted by the particular section.

The court in Daniels rejected the state's argument that consecutive minimum mandatory sentences under section 775.084 were authorized by section 775.021(4), relying upon Palmer and the fact that amendments to that subsection were

---

[2] Section 921.16, Florida Statutes, also leaves it to the discretion of the trial court as to whether sentences are concurrent or consecutive.

designed to overrule Carawan v. State, 515 So.2d 161 (Fla. 1987). Since no minimum mandatory provision is at issue here, neither Palmer nor this language from Daniels can diminish the clarity of the plain language of section 775.021 authorizing consecutive sentencing at the trial court's discretion. Contrary to petitioner's argument that section 775.021(4) "does no more than state a general requirement of separate sentences," that provision authorizes both separate sentences and, in the trial court's discretion, consecutive sentences.

Petitioner relies upon language in section 775.084(4)(a)(1)(2) and (3), providing that "in the case of a felony" of a particular degree, the court may sentence a habitual offender to a particular term.[3] Petitioner argues that use of the word "case" rather than "offense" or "crime" indicates a legislative intent to impose only a single, enhanced punishment in each "case." What is unmistakably clear from the context in which the term "case" is used in this portion of the statute, however, is that the word refers not to a defendant's particular criminal "case," but instead to "a special set of circumstances or conditions: a peculiar situation or series of developments; esp: the circumstances and situation of a particular person, thing or action <he lost not a single life in any [case] where the

---

[3] The language preceding this portion of the statute states, "The court, in conformity with the procedure established in subsection (3), shall sentence the habitual offender as follows...." This language does not support petitioner's argument.

men were under his personal control - W.J. Ghent>" Merriam-Webster's Third New International Dictionary 345 (1981).

Although petitioner seeks to use Daniels as a "polestar" to argue that the court's reasoning as to minimum mandatory terms is equally applicable to habitual offender sentencing for multiple crimes arising from a single criminal episode, the court's reasoning with respect to minimum mandatory terms simply does not translate into a prohibition against consecutive habitual offender sentences regardless of how the crimes arise.

For the above reasons, this court should answer the certified question in the affirmative to find that consecutive enhanced sentences may be imposed pursuant to section 775.084, Florida Statutes, for crimes arising out of a single criminal episode.

ISSUE II

THE TRIAL COURT'S MISSTATEMENT, IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner asserts that the validity of his sentence must be questioned because the trial court imposed the maximum sentences available under a mistaken belief that petitioner would be eligible for parole after 30 years. In that this case is before the court on a certified question, the court need not address this additional issue, which is not encompassed within the certified question. See Stephens v. State, 572 So.2d 1387 (Fla. 1991)(declining to reach issue not encompassed within certified question.).

The record belies any contention that the above misstatement had any impact upon the trial court's sentencing of petitioner. In a lengthy statement addressed to petitioner, the trial court expressed outrage at the extent and severity of petitioner's prior record, stating as follows:

> I'm not trying to embarrass the gentleman. He's age nineteen and he has three pages of record anywhere from retail theft, auto theft, grand larceny, auto theft, trespassing, burglary, two counts of auto theft, auto theft, aggravated assault and battery, armed robbery, and armed robbery. And while incarcerated on armed robbery, according to Brevard Correctional Institution, the defendant received eleven disciplinary reports for a robbery attempt, armed assault, fighting, being in an unauthorized area, and disobeying orders and regulations. He was sentenced to six and one-half years on -- the last sentence being on February the 29th,

1988 and he was released on May the 14th, 1990.

For a nineteen year old, and I have seen others, but this is one of the longest records I have seen for a nineteen year old. It covers every gauntlet. They have either dropped or he was found not guilty on an attempted murder/manslaughter, been convicted on armed robbery, and has pled as a juvenile to aggravated assault and battery.

***

Which tells me that he has a propensity for violence. I even noticed where he fired and shot a police car in trying to leave at one time, if I'm not mistaken. Maybe I am on that. Maybe it was another one I had read.

But the armed robbery, this was a very grave act. This lady was coming out of K-Mart in broad daylight with her son, her little daughter and their little friend.

All right. The court's going to adjudicate Mr. Clarence Brooks as a habitual violent felony offender. He is a definite menace to society at age nine teen, and I intend to sentence you to the maximum amount allowed by law, sir.

***

You have 30 years to serve before you are eligible for parole, for a nineteen year old, and this I'm doing for the protection of the innocent people in our society.

You are a definite menace even in prison according to the PSI. You were robbing other inmates or attempting to rob other inmates.

(T ???)

Equally obvious is that, while it erroneously referenced the term "parole," the court intended to express

to petitioner that he would not be eligible for release from prison until expiration of the 30-year minimum mandatory portion of his habitual violent felony offender sentences.

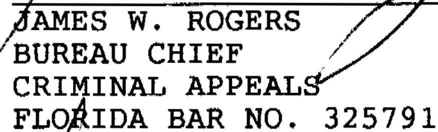
Under the above circumstances, no abuse of discretion is shown, and any error must be deemed harmless beyond a rasonable doubt.

CONCLUSION

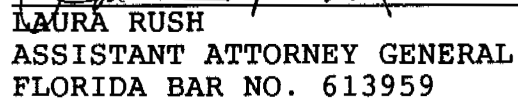
Based on the foregoing argument and citations of authority, respondent requests this court to answer the certified question in the affirmative, and to otherwise approve the decision of the district court of appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NO. 325791



LAURA RUSH
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 613959

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Fourth Floor North, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301, this 21st day of December, 1992.

Laura Rush
Assistant Attorney General