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12-18

IN THE SUPREME COURT OF FLORIDA

CLARENCE BROOKS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,768

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0664261
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

A Jacksonville resident, Louise Manning, noticed that her Toyota van was missing from her yard on the morning of June 3, 1990. (T57)[1] Later that morning of June 3, Barbara Rahilly found a man in her Toyota van in the parking lot of a store. (T24-26) Confronted by Rahilly, the man got out of her van and into a similar one parked next to it. (T26) The man started to drive away, but backed up to Rahilly and told her to give him her purse. (T29) She refused the demand and the man drove off. (T30) Rahilly testified that she saw no gun, but her son, who was with her, said he saw the man point a small black gun at his mother. (T54) Within minutes, a man in a van drove up to a gas station near the store, and robbed the clerk of some money at gunpoint. (T61-66) Police were dispatched, and they chased a van matching a description given by the woman who had called police after the

[1]In this brief, references to pleadings, orders and the sentencing hearing are designated (R[page number]), while citations to the trial transcript appear as (R[page number]).

man drove away. (T75) The chase ended when the van was discovered abandoned nearby. (T77-78) It was the same van reported missing that morning. (T112) Police apprehended appellant not far from the abandoned van. (T108) The gas station clerk identified petitioner as the robber, and the mother and son in the store parking lot also identified him as the man they had confronted. (T111-128)

At the conclusion of a jury trial, petitioner was convicted of robbery with a weapon of the gas station clerk, attempted simple robbery of Rahilly in the parking lot, grand theft of Rahilly's van, and grand theft of Manning's van. (R31-34, 64-65) The court found appellant to be a habitual violent felony offender and imposed the maximum sentences allowed: Life with a 15-year mandatory minimum term on Count III, the armed robbery, and 10 years with 5-year mandatory minimum terms on each of the three remaining crimes. (R66-74) The court ordered that all sentences be served consecutively, including the mandatory minimums, for an overall sanction of life plus 30 years with a 30-year mandatory minimum term. (R66-74)

On direct appeal, the district court reduced the conviction of robbery with a weapon to simple robbery. The court found that, because the state conceded at trial that the starter gun used in the robbery did not meet the definition of a firearm, it was not used as a "weapon" under the applicable statute. Brooks v. State, 17 FLW D670 (Fla. 1st DCA March 9, 1992). On rehearing, the court ordered that the mandatory minimum terms for the two offenses on the woman in the parking lot, Counts I and II, be

designated as concurrent. However, the court rejected petitioner's argument that the gas station robbery was part of the same episode, and that therefore that mandatory minimum term should also be designated as concurrent. The court also rejected petitioner's argument that consecutive overall sentences under the habitual offender statute for offenses committed in the same episode are unauthorized. Brooks v. State, 17 FLW D1019 (Fla. 1st DCA April 15, 1992). On a second motion for rehearing, the court certified the following as a question of great public importance:

> MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

Brooks v. State, 17 FLW D2458 (Fla. 1st DCA October 22, 1992).

SUMMARY OF THE ARGUMENT

I. Consecutive overall sentences are not authorized under the habitual offender statute for crimes committed in a single episode and prosecuted in the same case. Habitual offender enhancement is like firearm enhancement. The factor authorizing the enhancement, be it a firearm or a qualifying prior record, attaches to each crime committed in a single episode. Consistent with the law of firearm enhancement, the qualifying factor is subject to only one enhancement per criminal episode. Stacking of sentences creates multiple enhancements. Preclusion of stacked sentences in these circumstances is consistent with the language of the habitual offender statute, which calls for sentence enhancement on a case-by-case, not crime-by-crime, basis.

II. The trial court mistakenly told appellant he would be eligible for parole after completing the mandatory minimum portion of his habitual offender sentences. In fact, a habitual offender is ineligible for parole for the duration of the sentence. The court's misapprehension calls into question the validity of the sentences imposed. A judge may properly exercise discretion in sentencing only if he or she is correctly informed of the consequences of the sentencing decision.

ARGUMENT

I. CONSECUTIVE OVERALL SENTENCES ARE NOT AUTHORIZED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE.

In Daniels v. State, 595 So.2d 952 (Fla. 1992), this Court barred consecutive mandatory minimum terms of imprisonment under section 775.084(4)(b), Florida Statutes, for each offense committed in a single criminal episode. The district court had certified a question which questioned the authority for consecutive overall sentences as well as mandatory minimum terms, but this Court reworded the question, "in an effort to highlight the disputed issue," so as to include only the mandatory minimums.

Herein, petitioner requests that this Court address the question left unresolved in Daniels, that is, whether consecutive overall sentences are authorized under section 775.084, Florida Statutes, for crimes committed in a single episode. Using Daniels as a polestar, petitioner seeks to demonstrate that the holding there legally and logically applies with equal force to the overall sanction imposed under the habitual offender statute.

In Daniels, this Court held that habitual offender mandatory minimums more closely resemble mandatory sanctions for use of a firearm in the commission of a felony than those for commission of a capital offense. Id. at 954. Firearm mandatory minimums cannot exceed a total of three years for each criminal episode because the applicable statute creates an enhancement, not a substantive offense, which does not provide for a mandatory sentence longer than the three years authorized. Palmer v. State, 438 So.2d 1 (Fla. 1983). In contrast, the mandatory

penalty for capital crimes may be consecutively imposed for each crime committed. Daniels, 595 So.2d at 953-954. Each capital crime enhancement rests on a distinct, substantive crime, not on a circumstance common to several crimes which enhance their severity. By comparison, what qualifies an offender for a habitual violent mandatory minimum term is the prior record. This prior record, like possession of a firearm during a number of connected crimes, is a single circumstance authorizing enhancement of each crime in the episode. Regardless of the crime, the same enhancing circumstance attaches. Therefore, like the common circumstance of possession of a firearm during a criminal episode, consecutive mandatory minimum penalties for this common circumstance are unauthorized. This, is any event, is the lesson appellant draws from Daniels.

The same principles apply to the overall sanction imposed under section 775.084, whether as enhancement for a third felony of any character (section 775.084(1)(a)) or for a second felony following a violent felony (section 775.084(1)(b)). For purposes of this analysis, the focus is not whether a mandatory minimum penalty is involved, but whether the same enhancement factor attaches to each offense. For habitual offenders, the enhancement factor authorities the overall penalty, and for habitual violent offenders, a mandatory minimum term as well. For crimes committed with a firearm, the enhancement factor authorizes a mandatory minimum penalty. The prohibition of consecutive firearm mandatory minimum penalties in Palmer, supra, depended not on the nature of the penalty, i.e., that it is a mandatory

minimum and not an overall sanction, but on the absence of express legislative authority for denial of parole longer than three calendar years. Thus, the distinction between overall sentences and mandatory minimum penalties, drawn in Daniels and the district court in this case, is artificial and should be reconsidered. In determining whether a consecutive penalty is authorized by the existence of an enhancement factor, the nature of the penalty is irrelevant. Whether mandatory or permissive, whether gain time attaches or not, a sentence is a sentence is a sentence.

The phrasing used in section 775.084 supports the conclusion that crimes committed in a single episode and prosecuted in the same case may not be punished by consecutive enhanced sentences. Section 775.084(4)(a)1, Florida Statutes, provides that "in the case of a felony of the first degree," the court may sentence a habitual offender to life imprisonment. In the case of a second-degree felony, the permitted punishment is 10 years, and 5 for a third-degree felony. Secs. 775.084(4)(a)1 and 2. The same punishments, plus the mandatory minimum terms, are authorized "in the case of" felonies committed by a habitual violent felon. Sec. 775.084(4)(b)1-3. Use of the word "case" and not "offense" or "crime" cannot be presumed unintentional or insignificant. Thus, unlike the penalty for capital offenses, which requires a life sentence with a 25-year mandatory minimum term for each offense, the habitual felon statute does not mandate sentencing by offenses. Instead, it specifies cases. This indicates legislative intent for a single, enhanced punishment in each case

in which an offender qualifies for sentence enhancement. Even if the word "case" is susceptible of a construction different from that advanced here, the construction most favorable to the accused must be adopted. Sec. 775.021(1), Fla. Stat. (1989). Therefore, in sentencing an offender for offenses committed in a single criminal episode and prosecuted in a single case, consecutive sentences are not authorized.

The district court rejected these arguments for several reasons, none of them compelling. First, it found that this Court in Daniels "impliedly" found consecutive overall sentences authorized because it "affirm[ed] without discussion Daniels' consecutive habitual violent offender sentences." 17 FLW at D1020. This assumption is wholly unwarranted. As noted above, this Court reworded the certified question in Daniels to avoid any consideration of consecutive overall sentences. There is no indication this argument was made on the district court level in Daniels, either. Of the issues listed in the opinion there, none include this claim. According to the opinion, Daniels argued lack of authorization for consecutive mandatory minimum terms. Daniels v. State, 577 So.2d 725 (Fla. 1st DCA 1991).

As further authority for its rejection of petitioner's argument in this case, the district court invoked section 775.021(4), Florida Statutes. That provision calls for a separate sentence, either concurrent or consecutive, for each criminal offense committed in an episode. 17 FLW at D1020. The district court interpreted the language of the provision too broadly. In Daniels, this Court found that section 775.021(4)(b)

had nothing to do with mandatory minimum sentences. 595 So.2d at 954. In fact, section 775.021(4) does no more than state a general requirement of separate sentences. It expresses no preference for consecutive sentences. In short, it has nothing to do with whether sentences imposed under section 775.084 are to served concurrently or consecutively, or how the rule of lenity codified in section 775.021(1) informs that determination.

In summary, because habitual offender enhancement is akin to firearm enhancement, and because the habitual offender statute prescribes enhancement by cases and not crimes, consecutive sentences under section 775.084, Florida Statutes are not authorized for crimes committed in a single episode and prosecuted in the same case. Of the four habitual offender sentences imposed in this case, the theft and attempted robbery committed against Barbara Rahilly in the store parking lot, Counts I and II, are inarguably part of the same episode. The district court so found in ordering that the mandatory minimum terms for these crimes be run concurrent. 17 FLW at 1020. Therefore, one of the two 10-year overall sentences on Counts I and II must be vacated and the case remanded for imposition of concurrent sentences. If this Court construes section 775.084 as permitting a single enhancement for all offenses prosecuted in the same case, regardless of whether they occurred in the same criminal episodes, the sentences on Counts I and IV must also run concurrent to those on Counts II and III.

II. THE TRIAL COURT ERRED IN IMPOSING SENTENCES UNDER THE MISTAKEN BELIEF APPELLANT WOULD BE ELIGIBLE FOR PAROLE AFTER COMPLETING MANDATORY MINIMUM TERMS.

After imposing sentences totaling life plus 30 years with a 30-year mandatory minimum term, the trial judge informed Mr. Brooks, "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." (R114-115) Judge Lewis was mistaken. Section 775.084(4)(e), Florida Statutes, excludes those sentenced under its provisions from the operation of chapter 947, governing parole, which effectively denies them an opportunity for parole during the duration of their sentence. At the time sentences were imposed, that meant life in Mr. Brooks' case. (Count III, on which the life sentence was imposed, has since been reduced to simple robbery). Section 775.084(4)(b), which sets out mandatory minimum sentences, provides only that offenders shall not be released during the mandatory portion of the sentence.

The court's mistaken assumption renders the sentences invalid. Sentencing is within the discretion of the sentencing court, and may be disturbed only upon an abuse of discretion. Thomas v. State, 461 So.2d 234 (Fla. 1st DCA 1984). However, the informed, intelligent exercise of discretion is essential to the fairness of sentencing proceedings. Cf. Huntley v. State, 339 So.2d 194, 196 (Fla. 1976) (means to assure the informed exercise of judicial discretion in sentencing is a procedural matter properly determined by court rules). As the Florida Supreme Court has said, the sentencing process must be a matter of

reasoned judgment. Raulerson v. State, 358 So.2d 826 (Fla. 1978). Here, the court imposed the maximum sentences available, each consecutive to the other, under a mistaken belief as to its consequences. Had the trial judge been aware that Mr. Brooks was not eligible for parole at any point during his sentences as a habitual violent felony offender, less severe sanctions may have been imposed. For this reason, appellant's sentences must be vacated and the cause remanded for resentencing.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court vacate his sentences and remand with appropriate directions.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 0664261
Leon Co. Courthouse
301 S. Monroe St., 4th Fl. N.
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by hand to Laura Rush, Assistant Attorney General, Criminal Division, The Capitol, Tallahassee, Florida, on this 23rd day of November, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER