IN THE SUPREME COURT OF FLORIDA

MARVIN TUCKER, :

Petitioner, :

vs. : Case No. 80,870

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES

§ 843.01, Fla. Stat. (1989)	1
§ 893.13(1)(e), Fla. Stat. (1989)	1
§ 893.13(1)(f), Fla. Stat. (1989)	1

STATEMENT OF THE CASE AND FACTS

On May 21, 1991, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Petitioner, Marvin Tucker, with the following: possession of cocaine in violation of section 893.13-(1)(f), Florida Statutes (1989); possession of cocaine with intent to deliver within 1000 feet of a school in violation of section 893.13(1)(e), Florida Statutes (1989); and obstructing an officer with violence in violation of section 843.01, Florida Statutes (1989). All of these charges allegedly occurred on May 6, 1991, and involved one small brown packet containing 21 chunks of cocaine. As a result of these charges, the possession of cocaine charge Mr. Tucker was presently on probation for (lower case number 90-18534) was also before the trial court on a violation of probation. That possession charge had occurred on December 7, 1990.

On July 22, 1991, Mr. Tucker entered open pleas of no contest to the three new charges and the older probation case. There was no agreement as to sentence, and it was pointed out that the State had noticed Mr. Tucker as a violent habitual felony offender. Mr. Tucker was sentenced as a violent habitual felony offender on August 27, 1991, as follows: 10 years prison on the possession of cocaine on May 6, 1991; 15 years prison with 3 years minimum mandatory on the possession of cocaine with intent to sell within 1000 feet of a school; 10 years prison on the obstructing with violence; and 10 years prison on the December 7, 1990, possession

of cocaine. Credit for 114 days served was given, and all sentences were ordered to run concurrent. The guidelines in this case recommended 9 to 12 years of prison. Mr. Tucker timely filed his Notice of Appeal on September 18, 1991.

The Second District Court of Appeal issued an opinion in this case on November 6, 1992. That opinion reversed one charge based on double jeopardy but upheld all the remaining sentences. Mr. Tucker had attacked all of his sentences on the basis that he was improperly found to be a violent habitual offender; but the Second District Court of appeal upheld these sentences in accordance with its opinion rendered in Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992).

SUMMARY OF THE ARGUMENT

This Court has accepted jurisdiction on the Baxter[1] case on November 4, 1992. The Baxter decision specifically certified its decision was in conflict with other District Court of Appeal cases. Because this Court has accepted jurisdiction over Baxter and Mr. Tucker's case was decided on the basis of Baxter, this Court should also accept jurisdiction over Mr. Tucker's case.

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[1] Baxter v. State, Case No. 79,993.

ARGUMENT

ISSUE I

WHETHER THE ISSUE OF MAKING SPECIFIC FINDINGS UNDER THE HABITUAL OFFENDER STATUTE IS AN AFFIRMATIVE DEFENSE OR A REQUIREMENT IS PRESENTLY PENDING BEFORE THIS COURT ON CERTIFIED CONFLICT?

In his Second District Court of Appeal brief Mr. Tucker attacked the imposition of habitual offender sentences because the State failed to show that none of the priors was either pardoned or set aside in a post-conviction proceeding. The Second District Court of Appeal decided this issue against Mr. Tucker on the basis of its decision in Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992), by holding that the pardon/post-conviction relief requirement is an affirmative defense that must be raised by the defendant. However, the Court recognized there is conflict and has certified that conflict with the First District Court of Appeal in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992); and Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991). It should also be noted that the Fourth District Court of Appeal has entered this fray on the side of the First District Court of Appeal and noted conflict with the Second District Court of Appeal in Van Bryant v. State, 602 So.2d 582 (Fla. 4th DCA 1992). Both the Fourth and First District Court of Appeals certified the question to this Court. Baker was accepted by this Court for purposes of jurisdiction on November 4, 1992, in Case Number 79,993.

In Mr. Tucker's case the prosecutor did not show that there were no pardons or successful post-conviction relief proceedings. Mr. Tucker asks this Court also accept jurisdiction over his case inasmuch as this Court has accepted jurisdiction over the Baxter case. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

CONCLUSION

Based on the foregoing argument and authorities, this Court should accept jurisdiction over this case.

APPENDIX

PAGE NO.

1. Opinion filed in the Second District Court of Appeal November 6, 1992. A1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MARVIN TUCKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-03058

Opinion filed November 6, 1992.

Appeal from the Circuit
Court for Hillsborough County;
Barbara C. Fleischer, Judge.

James Marion Moorman,
Public Defender, and
Deborah K. Brueckheimer,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Davis G. Anderson, Jr.,
Assistant Attorney General,
Tampa, for Appellee.

PER CURIAM.

Marvin Tucker was convicted of possession of cocaine, possession of cocaine with intent to deliver within 1000 feet of

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a school and obstructing an officer with violence.[1] We reverse the conviction for possession of cocaine on double jeopardy grounds. Keene v. State, 600 So. 2d 513 (Fla. 2d DCA 1992).

We affirm the remaining convictions as well as the habitual offender sentence imposed. See Baxter v. State, 599 So. 2d 721 (Fla. 1992).

RYDER, A.C.J., HALL and THREADGILL, JJ., Concur.

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[1] §§ 893.13(1)(f), 893.13(1)(e), 843.01, Fla. Stat. (1989).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis G. Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 8th day of December, 1992.

Respectfully submitted,

Deborah K. Brueckheimer

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