SUPREME COURT OF FLORIDA

ANTHONY LLOYD STEEL,

Petitioner,

v.

Case No. 81,437
DCA #92-411
Marion County #90-2678-CF-A-Y

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, TO THE SUPREME COURT OF FLORIDA

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the Accused in the criminal division of the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida, and the appellant in the Fifth District Court of Appeal. Respondent was the prosecutor and the appellee below.

In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF CASE AND FACTS

The crime for which the Petitioner was convicted occurred November 10, 1990 (R-1). At sentencing, the State sought to have the Petitioner qualified and sentenced as a Habitual Felony Offender pursuant to F.S. 775.084, based on evidence of an October 24, 1990, State of Florida conviction for Possession of a Firearm by a Convicted Felon (R 34-39), a May 24, 1987, State of New York conviction for Criminal Sale of a Controlled Substance 5th degree (R 40, 41) and a simultaneous May 24, 1987, State of New York conviction for Attempted Robery 1st degree (R 42, 43).

Immediately following the Petitioner's entry of his plea to the instant offense, judgment was entered and a sentence imposed of 20 years in the Department of Corrections, with eleven years thereof being suspended, followed by 14 years of probation, as a Habitual Felony Offender (R 48-52). The sentence (R 51) expressly provides:

> "The defendant is adjudged a habitual offender and has been sentenced to an extended term on this sentence in accordance with the provisions of F.S. Section 775.084. The requisite findings by the Court are set forth in a separate order as stated in the record in open court."

By a pro se Motion to Correct Illegal Sentence filed in the trial court June 21, 1992, the Petitioner attacked the legality of his Habitual Offender Sentence on the grounds the applicable amendments to that statute were unconstitutional and void (R 53). This Motion was summarily denied by the trial court that ruling was

per curiam affirmed by the Fifth District Court of Appeal. On May 5, 1993, this Court granted the Petitioner's pro se Petition for Writ of Certiorari. Pursuant to and unobjected to, Motion by the undersigned, the Court extended the time within which to file this brief until July 1, 1993.

SUMMARY OF ARGUMENT

Petitioner's sentence was enhanced and habitualized by application of F.S. 775.084 as amended by Chapter 89-280, Laws of Florida (1989). Petitioner would not have qualified for enhancement under F.S. 775.084 as it existed prior to the amendments contained in Chapter 89-280. Because Chapter 89-280 was held unconstitutional for violating the single subject rule, F.S. 775.084 was not effectively amended until May 2, 1991. Petitioner's crime was committed November 10, 1990. Petitioner did not qualify for enhancement under F.S. 775.084 as it existed at the time of his crime, and therefore his sentence was illegal.

ARGUMENT

THE PETITIONER WAS ILLEGALLY SENTENCED AND CLASSIFIED AS A HABITUAL OFFENDER.

In State v. Johnson, 18 FLW S. 55 (January 14, 1993), there as here, because the matter had not been raised in the trial court at the time of the original sentence whether the issue was fundamental is the first issue to be resolved. Johnson held, as applicable here, where the statutory amendment substantially extends the appropriate terms of imprisonment, these amendments involve fundamental "liberty" due process interests, the issue is one of fundamental error. Specifically Johnson held:

> "We conclude that the validity of 89-280 falls within the definition of fundamental error as a matter of law..."

Johnson went on to hold that 89-280 as a charter law was unconstitutional for violating the single subject rule of the Florida Constitution. However, this constitutional flaw is cured when this charter law is reenacted as a portion of the Florida Statutes. The practical result of this legal effect is that the amendments to F.S. 775.084 contained in 89-280 were constitutionally ineffective to alter 775.084 until May 2, 1991. Any attempt to apply the amendments contained in 89-280 prior to May 2, 1991 would be both constitutional and fundamental error.

Johnson also contained statements from which one might argue this petitioner is not entitled to relief; to-wit:

> "We hold that chapter 89-280 violates Article III, Section 6, of the Florida Constitution. However, we conclude that chapter 92-44's biennial reenactment of chapter 89-280,

> effective May 2, 1991 cured the single subject violation as it applied to all defendants sentenced under Section 775.084 after that date [May 2, 1991] (emphasis supplied).

There is no doubt the Petitioner was sentenced after May 2, 1991, just as there is no doubt the crime for which he was sentencwed occurred prior to May 2, 1991. The amendments of 89-280 were critical to the Petitioner's qualification as a habitual offender by allowing out of state convictions to satisfy the statutory predicates, just as the amendment adding "aggravated battery" as a predicate to Habitual Violent Offender classification was critical to Johnson supra. That the Petitioner should benefit from the holding of Johnson is clearly expressed in Baxter v. State 18 FLW S. 208 (April 1, 1993):

> "Chapter 89-280 is the only authority for considering prior out-of-state felony convictions as the basis for sentencing as a habitual felony offender; and the crime for which the petitioner was being sentenced occurred before May 2, 1991, the effective date of the reenactment of the habitual offender statute. Therefore it appears that the petitioner did not meet the requirements for being sentenced as a habitual felony offender. We cannot agree that this issue was waived. SEE JOHNSON" (emphasis supplied).

The record clearly shows the Petitioner did not have sufficient prior convictions to qualify for enhancement of sentence under F.S. 775.084 until the effective date of the amendments contained in 89-280. At the time of Petitioner's crime, November 10, 1991, F.S. 775.084 had not been effectively amended. To increase Petitioner's punishment by changes in the law which were not legally effective until nearly six months after his crime would

create an ex post facto result.

According to the Sentencing Guideline Scoresheet prepared herein, the Petitioner's permitted range of sentence was 5 1/2 - 12 years. Not only was his 20-year sentence a departure from the guidelines in the absence of written reasons therefore, his classification as a Habitual Offender statutorily denied his gain time and other reductions of incarceration he would otherwise be entitled to.

Upon remand, it would be illegal to now depart from the guidelines and file written reasons in support thereof after having a sentence reversed for failure to jusify a departure. Brown V. State 593 So. 2d 1042 (Fla. 1992); mere reference to "habitual offender" on the guideline scoresheet will not suffice as a written reason for a guideline departure Moultrie v. State, 488 So. 2d 558 (Fla. 5th DCA 1986). Where the reasons for departure are held invalid on appeal, the trial court may not enter valid ones on remand (Shull v. Dugger 515 So. 2d 748 (Fla. 1987). The trial court here realized it was departing from the guidelines so the law of State v. Betancourt 552 So. 2d 1107 (Fla. 1989) will not on remand allow for the "initial" consideration of guideline departure. Additionally, it would be illegal to impose a more harsh sentence than that reversed on appeal, because such sentencing would discourage appeals, thereby violating constitutional due process and the dictates of North Carolina v. Pearce 395 U.S. 711, 89 S. Ct. 2072, 23 L Ed 2nd 656 (1969). Under the particular facts and law of this case, upon remand, it would be

illegal to either depart from the guidelines or to sentence the Petitioner to more than 9 years in the Department of Corrections without any enhancement or disqualification from gain time and other early release benefits.

CONCLUSION

Petitioner respectfully requests this Honorable Court vacate the illegal sentence imposed herein and remand the matter to the trial court for imposition of a guideline sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Barbara Arlene Fink, Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114, counsel for respondent by mail, this ~~11th~~ 18th day of June, 1993.

_____

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