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MAR 30 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JOHN OVERSTREET, :
 :
 Petitioner, :
 :
 v. : CASE NO. 81,445
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 _____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 261580
LEON COUNTY COURTHOUSE
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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
<u>ISSUE</u>	
PURSUANT TO SECTION 775.084(2), FLORIDA STATUTES, WHEN ADJUDICATION IS WITHHELD AND A DEFENDANT SENTENCED AS A YOUTHFUL OFFEND- ER TO INCARCERATION FOLLOWED BY PROBATION SUBSEQUENTLY COMMITS A FELONY WHILE INCAR- CARATED FOR THE PRIOR OFFENSES, CAN TEH PRIOR OFFENSES INVOLVING WITHHELD ADJUDICA- TION BE TREATED AS PRIOR CONVICTIONS FOR PURPOSES OF HABITUAL FELONY OFFENDER SENTENCING?	5
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX	

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE(S)</u>
<u>Brown v. State</u> , 463 So.2d 1230 (Fla. 1st DCA 1985)	6
<u>Harrison v. State</u> , 585 So.2d 393 (Fla. 5th DCA 1991)	6
<u>Jeffries v. State</u> , 18 Fla. L. Weekly S7 (Fla. 1992)	8
<u>Key v. State</u> , 589 So.2d 348, 350 (Fla. 1st DCA 1991)	6
<u>Myrick v. State</u> , 582 So.2d 797 (Fla. 1st DCA 1991)	6

<u>STATUTES</u>	
Section 775.021(1), Florida Statutes (1991)	6
Section 775.084(1)(a)2, Florida Statutes (Supp. 1988)	8
Section 775.084(2), Florida Statutes	4,5,7
Section 948.01(6), Florida Statutes (1991)	6
Section 958.04(2)(c), Florida Statutes	5

IN THE SUPREME COURT OF FLORIDA

JOHN OVERSTREET,

Petitioner,

v.

CASE NO. 81,445

STATE OF FLORIDA,

Respondent.

_____ /

PRELIMINARY STATEMENT

The record on appeal is consecutively paginated and shall be referred to by the letter "R" followed by the appropriate page number. John Overstreet was the appellant below, and will be referred to by the term "Petitioner" or by his last name in this brief.

STATEMENT OF THE CASE AND FACTS

By information dated July 15, 1991, John Overstreet was charged with the aggravated battery of David Mudd on May 28, 1991. (R-2-3).

On September 26, 1991, Overstreet entered into a plea agreement with the State whereby he agreed to plea nolo contendere to the reduced charge of aggravated assault and the state was to recommend a cap of five years on the sentence and to seek habitual violent felony offender status. (R-5-6).

On March 17, 1992, over the objections of defense counsel, Overstreet was sentenced as an habitual violent felony offender and received a five-year minimum mandatory sentence consecutive to the time that he was presently serving. (R-71).

As a predicate for his status as an habitual violent felony offender, the State introduced composite exhibit 1, which indicated that Overstreet had not been adjudicated for the offenses of robbery, burglary of a dwelling and grand theft, burglary of a conveyance with a weapon, grand theft, and criminal mischief (Dade County Circuit Court case numbers 90-1324, 90-2288 and 90-2289). (R-68). For these offenses, Overstreet had previously received a "youthful offender sentence", which consisted of four years imprisonment followed by two years of probation. (R-68-69; 16-24). Apparently, while serving the four-year sentence, Overstreet committed the act which led to his nolo contendere plea for aggravated assault. (R-69-70).

Notice of Appeal was timely filed on March 24, 1992.
(R-25).

On November 24, 1992, the Florida First District Court of Appeal issued its opinion affirming Overstreet's sentence but certifying the following question to this Court:

PURSUANT TO SECTION 775.084(2), FLORIDA STATUTES, WHEN ADJUDICATION IS WITHHELD AND A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER TO INCARCERATION FOLLOWED BY PROBATION SUBSEQUENTLY COMMITS A FELONY WHILE INCARCERATED FOR THE PRIOR OFFENSES, CAN THE PRIOR OFFENSES INVOLVING WITHHELD ADJUDICATION BE TREATED AS PRIOR CONVICTIONS FOR PURPOSES OF HABITUAL FELONY OFFENDER SENTENCING?

A Motion for Rehearing was filed on December 7, 1992, and by order of the Court, was denied on February 19, 1993.

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative. The Florida First District Court of Appeal admitted that under the circumstances of Overstreet's case, a literal interpretation of Section 775.084(2) would not allow Overstreet to be classified as an habitual felon. This is because the rule of lenity requires that a criminal statute be strictly construed. This rule is embodied in our Florida Constitution, and takes precedence over any common law rules of construction. The remedy in this case is for the legislature to redraft the statute.

ARGUMENT

ISSUE:

PURSUANT TO SECTION 775.084(2), FLORIDA STATUTES, WHEN ADJUDICATION IS WITHHELD AND A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER TO INCARCERATION FOLLOWED BY PROBATION SUBSEQUENTLY COMMITS A FELONY WHILE INCARCERATED FOR THE PRIOR OFFENSES, CAN THE PRIOR OFFENSES INVOLVING WITHHELD ADJUDICATION BE TREATED AS PRIOR CONVICTIONS FOR PURPOSES OF HABITUAL FELONY OFFENDER SENTENCING?

The trial court sentenced Overstreet as an habitual violent felony offender pursuant to Section 775.084(2), Florida Statutes, which provides:

For the purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which he is to be sentenced was committed during such probationary period.

The argument below and here in this Court, is that Overstreet did not commit the subsequent offense during his probationary period (he committed the aggravated assault during his incarcerative period).

Overstreet was sentenced as a "youthful offender" pursuant to Section 958.04(2)(c), Fla. Stat., which provides in pertinent part:

The court may impose a split sentence whereby the youthful offender is to placed on probation or community control upon completion of any specified period of incarceration; however, if the incarceration period is to be served in a department facility other than a probation and restitution center or community residential facility, such period shall be for not less than 1 year or more than 4 years. The period of probation or

community control shall commence immediately upon the release of the youthful offender from incarceration. The period of incarceration imposed or served and the period of probation or community control, when added together, shall not exceed 6 years [emphasis added].

It is very clear from this language that the period of incarceration is separate and distinct from the period of probation. Moreover, it is well-recognized that "probation" is not to be construed as a "sentence". See, for instance, Brown v. State, 463 So.2d 1230 (Fla. 1st DCA 1985).

Any doubts in this area are resolved by Section 948.01(6), Florida Statutes (1991), which reads in pertinent part that:

The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

There does not appear to be any case on point that construes the statute under the situation that the Court is presented with in this case. See, for example, Harrison v. State, 585 So.2d 393 (Fla. 5th DCA 1991); Key v. State, 589 So.2d 348, 350 (Fla. 1st DCA 1991) and Myrick v. State, 582 So.2d 797 (Fla. 1st DCA 1991).

As this is a criminal statute, punitive in nature, it must be strictly construed. Section 775.021(1), Florida Statutes (1991). Under the plain reading of this statute, Overstreet was improperly sentenced as an habitual violent felony offender.

In its opinion, the Florida First District Court of Appeal stated:

In the circumstances of this case, a literal interpretation of Section 775.084(2) would permit [Overstreet] to evade classification as an habitual felon because he was incarcerated with adjudication withheld when he committed the instant felony, as opposed to being on probation when he committed the felony.

Notwithstanding this admission, the Court then proceeded to functionally operate as a legislature and to re-write the law to its satisfaction.

It is the prerogative of the Court to interpret statutes but it is the prerogative of the legislature to re-write statutes. Although it is clear that the Florida First District Court of Appeal did not like the result that must be obtained when the statute is plainly read, it is not the prerogative of the Florida First District Court of Appeal to re-write the statute to ensure that Overstreet falls under its ambit.

The Florida First District Court of Appeal admits that the circumstances surrounding the sentencing disposition in this case "are not addressed expressly by Section 775.084(2)", and as such, because the criminal law must be strictly construed, the Court below has improperly concluded that "...the same results should obtain for commission of a felony while serving the incarcerative portion of a split sentence imposed upon offenses for which adjudication was withheld."

Finally, the Florida First District Court of Appeal stated that:

The language of Section 775.084(2) evinces legislative intent that an offender ought not evade classification as an habitual felon by virtue of a withheld adjudication,

when he or she commits a subsequent felony while on probation.

The language, quite to the contrary of this statement, does not, as the Florida First District Court of Appeal indicates, "expressly" address the sentencing disposition. The perceived remedy for this submission is for the legislature to amend the statute if it really intended the result that the Florida First District Court of Appeal strained to reach in this case.

Finally, in Jeffries v. State, 18 Fla. L. Weekly S7 (Fla. 1992), this Court had an occasion to construe Section 775.084(1)(a)2, Florida Statutes (Supp. 1988). In strictly construing the language of this statute, this Court stated:

We have stated elsewhere that common law rules of construction...cannot take precedence over provisions of the Constitution. Perkins v. State, 576 So.2d 1310, 1314 (Fla. 1991). We also have held that criminal statutes must be strictly construed according to their letter, and that this rule of strict construction emanates from article I, section 9 and article II, section 3 of the Florida Constitution. Id. at 1312-1314.

In Jeffries, this Court applied the strict rule of construction required in criminal cases, and noted that the literal language did not include the defendant in that case. The remedy in Jeffries was the same remedy suggested here (i.e., that "...the legislature is free to redraft the statute with greater precision". Jeffries, at footnote 2.).

Under the circumstances, the certified question should be answered in the negative.

CONCLUSION

The certified question in this case should be answered in the negative, and the Florida First District Court of Appeal should be directed to reverse Overstreet's sentence as an habitual violent felony offender.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to James W. Rogers, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 30th day of March, 1993.



DAVID P. GAULDIN

IN THE SUPREME COURT OF FLORIDA

JOHN OVERSTREET, :

Petitioner, :

vs. :

CASE NO. 81,445

STATE OF FLORIDA, :

Respondent. :

_____ :

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOHN OVERSTREET,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
DISPOSITION THEREOF IF FILED.

CASE NO. 92-1153

Opinion filed November 24, 1992.

An Appeal from the Circuit Court for Okaloosa County;
Ben Gordon, Judge.

Nancy A. Daniels, Public Defender, and David P. Gauldin,
Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Joe S. Garwood,
Assistant Attorney General, and Charlie McCoy, Assistant
Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant, John Overstreet, appeals a five-year sentence as an habitual violent felony offender, after entry of his nolo contendere plea to the reduced charge of aggravated assault. The issue in this case concerns the propriety of imposing an habitual violent felony offender sentence based upon prior felony offenses for which adjudication was withheld. We affirm, but certify the

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PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

question to the Florida Supreme Court as a question of great public importance. See Fla.R.App.P. 9.030(a)(2)(A)(v).

Appellant committed the offense which gave rise to this appeal while he was incarcerated at Okaloosa Correctional Institution for three 1990 cases, involving multiple felony offenses. Adjudication was withheld with respect to the 1990 offenses, and appellant was sentenced as a youthful offender to four years in the custody of the Department of Corrections boot camp program, to be followed by a two-year probationary period. Appellant was serving the incarcerative portion of his youthful offender sentence when he committed the offense in the instant case. Initially, appellant was charged with the aggravated battery of another inmate. Thereafter, he entered into a written plea agreement whereby he pled nolo contendere to the reduced charge of aggravated assault, in return for the state's agreement to recommend a five-year cap on the habitual violent offender sentence sought by the state.

At sentencing, the state introduced certified copies of the 1990 cases as the predicate for sentence as an habitual violent felony offender. It is appellant's position that since adjudication was withheld with respect to the 1990 offenses, the enumerated cases are not relevant to an habitual felony offender classification. The state relies upon section 775.084(2), Florida Statutes, which provides that probation without adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which the defendant is being sentenced

was committed during the probationary period.¹ In this vein, the state urges that because appellant committed the instant crime while still serving the incarcerative portion of his split sentence as a youthful offender, the offenses for which appellant previously was incarcerated qualified him as an habitual felon.

In the circumstances of this case, a literal interpretation of section 775.084(2) would permit appellant to evade classification as an habitual felon because he was incarcerated with adjudication withheld when he committed the instant felony, as opposed to being on probation when he committed the felony. The language of section 775.084(2) evinces legislative intent that an offender ought not evade classification as an habitual felon by virtue of a withheld adjudication, when he or she commits a subsequent felony while on probation. We conclude the same result should obtain for commission of a felony while serving the incarcerative portion of a split sentence imposed upon offenses for which adjudication was withheld.

Nevertheless, because the circumstances surrounding the sentencing disposition in this case are not addressed expressly by section 775.084(2), we certify the following as a question of great public importance:

¹ § 775.084(2), Fla.Stat. (1989), provides:

(2) For the purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which he is to be sentenced was committed during such probationary period.

PURSUANT TO SECTION 775.084(2), FLORIDA STATUTES, WHEN ADJUDICATION IS WITHHELD AND A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER TO INCARCERATION FOLLOWED BY PROBATION SUBSEQUENTLY COMMITS A FELONY WHILE INCARCERATED FOR THE PRIOR OFFENSES, CAN THE PRIOR OFFENSES INVOLVING WITHHELD ADJUDICATION BE TREATED AS PRIOR CONVICTIONS FOR PURPOSES OF HABITUAL FELONY OFFENDER SENTENCING?

Appellant's sentence as an habitual violent felony offender is affirmed.

JOANOS, C.J., BARFIELD and WOLF, JJ., CONCUR.