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IN THE SUPREME COURT OF FLORIDA

GREGORY J. TRIGG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 81,578

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JENNIFER Y. FOGLE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 628204

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Gregory J. Trigg, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On July 25, 1990, the Hillsborough County state attorney charged the Petitioner, GREGORY J. TRIGG, with having committed burglary of a dwelling and dealing in stolen property on February 27, 1990. (R5) On October 2, 1990, after a guilty plea, Mr. Trigg was sentenced to ten years as an habitual offender, but this sentence was suspended in favor of ten years probation. (R23-25)

On February 15, 1991, the Petitioner was charged with having violated his probation by not filing written reports, not paying restitution or costs, moving without permission, and not completing community service work. (R30-31) On June 7, 1991, Mr. Trigg's probation was modified to include one year in the county jail on a conditional release program. (R36-38)

On September 30, 1991, the Petitioner was charged with having committed the offense of escape on July 28, 1991. (R51) On October 23, 1991, he was charged with having violated his probation by committing this offense. (R41) On October 30, 1991, after a guilty plea, probation was revoked and he was sentenced to ten years in prison as an habitual offender for the underlying offenses. (R45, 48-49, 89-91) For the new offense of escape, after a guilty plea, he was sentenced to thirty months in prison, consecutive, not as an habitual offender. (R61, 93)

On appeal (case number 91-3963) on March 26, 1993, the district court rejected his arguments that (1) the consecutive guideline sentence was an illegal departure from the guidelines, (2) the prison sentence illegally increased an habitual offender

sentence previously imposed, and (3) the habitualized probation was illegal.

Petitioner sought jurisdiction of this Court on the basis of conflict of decisions and statutory interpretation. On June 25, 1993, this Court entered an order accepting jurisdiction of Mr. Trigg's cause.

SUMMARY OF THE ARGUMENT

The Petitioner argues in Issues I and II that his true split sentence of ten years in prison as an habitual felony offender on his original offenses -- completely suspended in favor of ten years on probation as an habitual felony offender -- was a sentence which activated the sentencing guidelines. As such, the habitual offender statute could not be invoked. He also could not receive consecutive prison time on his new offense. He is entitled to be resentenced under the guidelines or to the balance of the suspended sentence, whichever is less, plus the discretionary one-cell increase for the new offense.

Alternatively in Issue III, Petitioner argues that his habitual offender sentence upon revocation of probation was illegally increased in violation of statutory provisions and also must be reversed because of the lack of the requisite statutory findings. Resentencing within the guidelines is required.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING A TEN YEAR PRISON SENTENCE SUSPENDED COMPLETELY IN FAVOR OF PROBATION AS AN HABITUAL OFFENDER.

The instant case involves an initial plea by the Petitioner, Gregory Trigg, of guilty to two second-degree felonies. (R5-6, 18-19) On October 2, 1990, the trial court imposed a concurrent sentence of ten years in prison as an habitual offender, but suspended the entire ten year term in favor of ten years on probation as an habitual offender. (R25-29) The Petitioner's guidelines scoresheet called for a sentence of four-and-one-half to five-and-one-half years in prison. (R22)

Ultimately Mr. Trigg was charged with violating his probation and he pled guilty to the violation. On October 30, 1991, the trial court revoked probation and sentenced the Petitioner to the full ten years in prison as an habitual offender with credit for jail time served. (R45, 48-49, 89-91) Mr. Trigg contends that he could not be sentenced as an habitual offender, and that he is entitled to be sentenced pursuant to the guidelines, without an habitual offender designation and its attendant consequences, for the following reasons.

In McKnight v. State, 18 Fla. L. Weekly S191 (Fla. March 25, 1993), this Court determined that a trial judge has the discretion to place an habitual felony offender on probation. The Court adopted the rationale of King v. State, 597 So. 2d 309 (Fla.

2d DCA), review denied, 602 So. 2d 942 (Fla. 1992). King stands for the proposition that any sentence composed only of community control or probation imposed after a determination of habitualization is not an enhanced sentence under the statute and thus would require a subsection 775.084(4)(c) decision (an habitual offender sentence is not necessary for the protection of the public) and activation of guidelines procedures. King, 597 So. 2d at 316, 317.

In this case, the initial sanction was prison as an habitual offender suspended completely in favor of probation. Thus, the initial sentencing judge found that probation was the appropriate sanction. Under King, an enhanced sentence as an habitual offender was improper and the sentencing guidelines procedures should have been applied.

In Snead v. State, 18 Fla. L. Weekly S220 (Fla. April 8, 1993), this Court approved the holding in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), review dismissed, 560 So. 2d 235 (Fla. 1990). In Scott, the defendant was first placed on straight probation which he violated. At sentencing upon the violation of probation, the state invoked the habitual offender statute, and the court imposed an habitual sentence. The appellate court reversed, citing the inconsistency in the findings required by the habitual offender statute and those required by the probation statute, and Lambert v. State, 545 So. 2d 838 (Fla. 1989), which held that a violation of probation did not permit an increase or departure in sentencing. Scott, 550 So. 2d at 112.

Snead is applicable to this case because here the court initially made the presumptive finding that the Petitioner was an appropriate candidate for probation. The complete suspension of sentence in favor of probation presupposes that there was no need initially to invoke the habitual offender statute. By analogy to Snead, and because of the inconsistency in the statutory findings, the habitual offender statute should not have been invoked upon revocation of probation.

The instant case also involves a "true split sentence" consisting of a total period of confinement with a portion or all of the confinement period suspended and the defendant placed on probation for that suspended portion. Poore v. State, 531 So. 2d 161, 164 (Fla. 1988); Helton v. State, 611 So. 2d 1323, 1324 (Fla. 1st DCA 1993); Silva v. State, 602 So. 2d 694, 695 (Fla. 2d DCA 1992).

> . . . if [a true split sentence] is used as the original sentence, the sentencing judge in no instance may order new incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence. . . . the possibility of the [probation] violation already has been considered, albeit prospectively, when the judge determined the total period of incarceration and suspended a portion of that sentence, during which the defendant would be on probation. In effect, the judge has sentenced in advance for the contingency of a probation violation, and will not later be permitted to change his or her mind on that question.

Poore, 531 So. 2d at 164-165.

Under King and Snead, the initial determination here that the Petitioner qualified for probation should be deemed to have activated the sentencing guidelines; thus, upon revocation of probation the habitual offender statute could not be invoked.

Under Poore, the cause should be remanded and the court limited to ordering Mr. Trigg's incarceration as a non-habitual offender to the guidelines recommendation or the remainder of the original split sentence, whichever is less. Poore, 531 So. 2d at 165.

ISSUE II

IMPOSING ADDITIONAL CONSECUTIVE INCARCERATION FOR THE NEW OFFENSE RESULTED IN AN ILLEGAL DEPARTURE FROM THE GUIDELINES.

For the reasons set forth in Issue I, the sentence on the original offense in this case must be deemed a guidelines sentence. Thus, this case is not controlled by the decision in Boomer v. State, 18 Fla. L. Weekly S241 (Fla. April 15, 1993). There this Court held that where a court imposes a guidelines sentence to be served consecutively with a capital sentence the resulting term does not constitute a guidelines departure requiring written justification. Presumably under the Boomer decision this would be true for other sentences excluded from the sentencing guidelines scheme, such as habitual offender sentences.

In the instant case, however, under the King, Snead, and Poore analysis previously set forth, the facts show that the imposition of probation activated the guidelines. Thus, the sentence does not fall within the category of sentences to which Boomer applies.

To give effect to the guidelines, all sentences imposed on the same day and pending for sentencing should be considered together rather than separately. Clark v. State, 572 So. 2d 1387 (Fla. 1981). Florida Rule of Criminal Procedure 3.701 (d)(14) provides that sentences imposed after revocation of probation or community control must be in accordance with the guidelines and permissible one-cell increases. In a true split sentence such as that involved here, upon violation of probation the court may sentence the

defendant to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence, provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by the Rule. Any further departure for violation of probation is not allowed. Franklin v. State, 545 So. 2d 851, 852 (Fla. 1989), citing Lambert v. State, 545 So. 2d 838, 841-842 (Fla. 1989).

Based on the foregoing, the consecutive sentence imposed here on the new offense was an illegal sentence. Resentencing is required with the trial court limited to a one-cell upward increase. Franklin, 545 So. 2d at 852.

ISSUE III

ALTERNATIVELY, THE COURT ILLEGALLY INCREASED AN HABITUAL OFFENDER SENTENCE PREVIOUSLY IMPOSED.

If this Court does not agree with Petitioner's argument in Issues I and II, he alternatively argues that his habitual offender sentence was illegally increased and imposed without proper findings.

In the instant case we have a situation where there were no specific habitual offender findings by the trial court in support of the sentence initially imposed. There was a purported waiver by the Petitioner of the habitual offender statutory findings. (R18-19) Upon revocation of probation, the court summarily found it unnecessary to make the findings required by the habitual offender statute because Mr. Trigg had ". . . already been adjudicated. . . . That finding has already been made. . . ." (R92)

Section 775.084 (4)(d), Florida Statutes (1989), provides that a sentence imposed under the habitual offender provisions "shall not be increased after such imposition." Here the ten year habitual offender probation sanction was increased to ten years in prison which illegally increased Mr. Trigg's sentence under the statute.

Although Hicks v. State, 595 So. 2d 976 (Fla. 1st DCA 1992), holds in the context of a probationary split sentence that the statute means exactly the opposite of what it says, Hicks overlooks the basic principle of statutory construction -- where the language of a penal statute is clear, plain, and without ambiguity, effect

must be given to it accordingly; and the courts are without power to restrict or extend the meaning. Graham v. State, 472 So. 2d 464, 465 (Fla. 1985), citing Fine v. Moran, 74 Fla. 417, 77 So. 533, 536 (1917). Graham stands for the proposition that penal statutes are to be strictly construed. This fundamental principle was emphasized in Perkins v. State, 576 So. 2d 1310 (Fla. 1991), where the court said words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute. The rule of strict construction of criminal statutes is also explicitly codified in section 775.021 (1), Florida Statutes (1989). Hicks also should not apply in the context of a true split sentence as is involved here.

Based on the plain language of section 775.084(4)(d), the increased sentence imposed here was illegal, and remand is necessary for resentencing.

The lack of statutorily mandated findings also compels reversal. Under King, 597 So. 2d at 317, normally no findings other than the original habitualization and sentence need be made. This case is different than King, however, because here the initial sanction was prison as an habitual offender completely suspended for probation, which requires completely opposite statutory findings. There is no indication that the initial trial court judge actually made findings supporting the imposition of an habitual offender prison sentence; the Petitioner merely waived findings.

Additionally, Petitioner disagrees with King in that a person cannot agree to an unauthorized and illegal sentence. Williams v. State, 500 So. 2d 501 (Fla. 1986). The failure to make proper findings at the instant revocation hearing also makes the error a present rather than a past error.

On remand, resentencing should be within the guidelines. The trial judge cannot on remand impose an habitualized sentence on the 1990 offenses because these are not new felonies. The habitual offender statute does not permit prosecution and punishment of former convictions, and the enhanced punishment must be an incident of a new offense, but for which it cannot be imposed. Reynolds v. Cochran, 138 So. 2d 500, 503 (Fla. 1962).

CONCLUSION

In light of the foregoing reasons, authorities, and arguments, Petitioner respectfully asks this Honorable Court to reverse his judgment and sentence as an habitual offender and remand his cause for resentencing under the guidelines.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREGORY J. TRIGG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-03963

Opinion filed March 26, 1993.

Appeal from the Circuit Court for Hillsborough County; Bob Anderson Mitcham, Judge.

James Marion Moorman, Public Defender, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Stephen A. Baker, Assistant Attorney General, Tampa, for Appellee.

THREADGILL, Acting Chief Judge.

The appellant, Gregory J. Trigg, challenges his habitual offender sentence entered upon a second violation of probation. He raises three issues for review, all of which have been previously decided in other cases before this or another district court. We affirm.

The appellant first argues that the trial court illegally departed from the sentencing guidelines by imposing a guidelines sentence of incarceration consecutive to a habitual offender sentence. This issue has been decided adversely to the appellant's position by this court in Boomer v. State, 596 So. 2d 730 (Fla. 2d DCA 1992); see also Ricardo v. State, 608 So. 2d 93 (Fla. 2d DCA 1992). In Boomer, we acknowledged conflict with Wood v. State, 593 So. 2d 557 (Fla. 5th DCA 1992), and the Florida Supreme Court has accepted jurisdiction in Boomer v. State, 604 So. 2d 486 (Fla. 1992).

The appellant next argues that the trial court, upon revocation of his probation, illegally increased the habitual offender sentence previously imposed. The sentence imposed by the trial court upon revocation is permissible under Hicks v. State, 595 So. 2d 976 (Fla. 1st DCA 1992).

Finally, the appellant argues that the imposition of probation, after he had been classified as a habitual offender, constituted an illegal sentence. This argument has previously been rejected by this court in King v. State, 597 So. 2d 309 (Fla. 2d DCA), rev. den., 602 So. 2d 942 (Fla. 1992). We acknowledge conflict with Kendrick v. State, 596 So. 2d 1153 (Fla. 5th DCA 1992).

Affirmed.

ALTENBERND, J., and STOUTAMIRE, R. GRABLE, Associate Judge, Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen A. Baker, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 22nd day of July, 1993.

Respectfully submitted,

JENNIFER Y. FOGLE
Assistant Public Defender
Florida Bar Number 628204
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

JYF/kf