IN THE SUPREME COURT OF FLORIDA

GREGORY J. TRIGG, :

Petitioner, :

vs. : Case No. 81,578

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

STEPHEN KROSSCHELL
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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On July 25, 1990, the Hillsborough County state attorney charged the Appellant, 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, 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, he 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, Trigg's probation was modified to include one year in the county jail on a conditional release program. (R36-38)

On September 30, 1991, he 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 (R41) On October 30, 1991, after a guilty plea, probation was revoked and he was sentenced to ten years in prison as an habitual offender for the underlying offenses.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 now invokes the jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

The district court expressly acknowledged conflict with other decisions. In addition, the opinion conflicts with the principle that a court should not interpret a statute to mean exactly the opposite of what it says.

ARGUMENT

ISSUE

THE DISTRICT COURT EXPRESSLY ACKNOWLEDGED CONFLICT WITH OTHER DECISIONS.

The district court's opinion expressly acknowledged conflict with Wood v. State, 593 So. 2d 557 (Fla. 5th DCA 1992), and Kendrick v. State, 596 So. 2d 1153 (Fla. 5th DCA 1992), on issues that are currently pending in this Court. Accordingly, this Court should take jurisdiction in this case.

Petitioner recognizes that McKnight v. State, 18 Fla. L. Weekly S191 (Fla. Mar. 25, 1993), stated that trial courts have the discretion to place a habitual felony offender on probation. In other words, a trial judge who determines that a habitual offender qualifies for habitual offender sentencing does not have to impose a habitual offender sentence. McKnight, however, did not address the question presented in this case -- whether a trial judge who imposes a habitualized prison sentence must make the statutorily required habitual offender findings after revoking the probation of someone found previously to qualify for habitual offender sentencing. Petitioner argues that a trial judge must make such findings because some of the previous findings may no longer be valid, such as the lack of a pardon with civil rights restored for the prior predicate felonies. Kendrick clearly means that a trial judge must make these new findings, and McKnight did not necessarily disturb

Kendrick on this point. Accordingly, conflict with Kendrick still exists, even after McKnight.

Petitioner also argued in the Second District that his habitualized prison sentence was illegal because it increased the habitualized probation sentence previously imposed. According to the habitual offender statute, a "sentence imposed under this section shall not be increased after such imposition." § 775.084(4)(d), Fla. Stat. (1989) (emphasis added). The Second District relied on Hicks v. State, 595 So. 2d 976 (Fla. 1st DCA 1992), which states in effect that this statute does not mean what it says and really means exactly the opposite -- that a "sentence imposed under this section [may] be increased after such imposition." Hicks, however, overlooks the fact that an unambiguous statute cannot be interpreted to mean something other than what it says. "When the language of a penal statute is clear, plain and without ambiguity, effect must be given to it accordingly. Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning." Graham v. State, 472 So. 2d 464, 465 (Fla. 1985) (citation omitted). The Second District's opinion therefore also conflicts with Graham because it makes the statute mean exactly the opposite of what it says.

CONCLUSION

This Court should take jurisdiction.

APPENDIX

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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.

A1

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 6th day of April, 1993.

Respectfully submitted,

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