IN THE SUPREME COURT OF FLORIDA

GREGORY J. TRIGG,

Petitioner,

v. Case No. 81,578

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar No. 0365645
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366

COUNSEL FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

The court below expressed no opinion with respect to the remaking of habitual offender findings upon revocation of probation. Neither did Kendrick v. State, infra. Accordingly, no conflict exists on this issue.

Conflict does not exist based upon any interpretation of the requirement of Section 775.084(4)(b), Florida Statutes, that says a habitualized sentence shall not be increased. Vindictive increase in sentence after reversal on appeal has nothing to do with sentencing after a willful violation of probation. Therefore, no conflict with Graham v. State, infra, exists.

ARGUMENT

ISSUE

WHETHER THIS COURT SHOULD LIMIT ITSELF TO THE ONLY ISSUE ON WHICH THE COURT BELOW EXPRESSED DIRECT CONFLICT?

It is clear that the Second District expressed conflict with Wood v. State, 593 So.2d 557 (Fla. 5th DCA 1992). However, with respect to the court's opinion that its opinion conflicts with Kendrick v. State, 596 So.2d 1153 (Fla. 5th DCA 1992), there is no remaining conflict.

The Second District originally expressed conflict with Kendrick on the point of whether a defendant can be given "habitualized probation". The Second District said nothing at all about remaking habitual offender findings upon revocation of probation and resentencing. Neither did the court in Kendrick. Surely, "express and direct" conflict does not mean conflict based upon a fictitious stretch of the legal imagination. Not even a "fair implication" can be raised that Kendrick requires making new findings after revocation. Hardee v. State, 534 So.2d 706 (Fla. 1988).

Although Petitioner may like to argue that making findings anew is somehow a requirement, his examples of what types of findings need be re-made deserve attention. He says that circumstances might have changed by the time of revocation, such as the granting of a pardon. Petitioner fails to realize that matters such as pardon must be raised as an affirmative defense to habitualization. State v. Rucker, 613 So.2d 490 (Fla. 1993). Ergo, the burden, at best, is not on the revoking court to make

findings anew, but on Petitioner and those like him to raise such affirmative defenses at the time of resentencing and ask for new findings based upon such a change in circumstances.

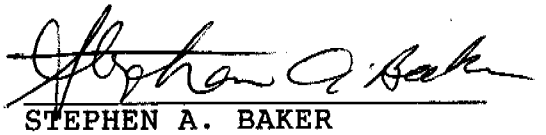
Finally, the decision below is not in conflict with Graham v. State, 472 So.2d 464 (Fla. 1985). Relying on Hicks v. State, 595 So.2d 976 (Fla. 1st DCA 1992), the Second District agreed that an "increased" habitual sentence upon revocation of probation cannot be read to be contrary to that portion of 775.084(4)(b) that says a habitualized sentence cannot be increased. Petitioner fails to point out that the "increase" talked about in Hicks is the sort of vindictive resentencing as outlawed in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), NOT resentencing after a willful violation of probation. Vindictive resentencing after reversal on appeal versus resentencing after violation of probation have nothing to do with one another and thereby leads to the comfortable conclusion that the phrase alluded to by Petitioner allows for an "increased" sentence after a probationer continues to violate the law. Therefore, conflict jurisdiction cannot be had on this point.

CONCLUSION

In conclusion, jurisdiction may only be had in this case by virtue of Boomer v. State, 604 So.2d 486 (Fla. 1992) and Boomer v. State, 596 So.2d 730 (Fla. 2d DCA 1992). No other issue should be entertained other than where conflict was expressed and still exists, inasmuch as the opinion below establishes no other point of law contrary to a decision of this Court or another district court. The Florida Star v . B.J.F., 530 So.2d 286, 289 (Fla. 1988).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

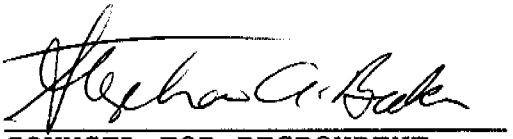


STEPHEN A. BAKER
Assistant Attorney General
Florida Bar No. 0365645
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Stephen Krosschell, Assistant Public Defender, Public Defender's Office, P.O. Box 9000--Drawer PD, Bartow, Florida 33830 this 15th day of April, 1993.



COUNSEL FOR RESPONDENT