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IN THE SUPREME COURT OF FLORIDA

GREGORY J. TRIGG,

Petitioner,

v. FSC NO. 81,578

STATE OF FLORIDA,

Respondent.
_____/

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

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Respondent bases its arguments herein on the premise that Petitioner's failure to object to and appeal from his initial "habitualized probation" sentence sounds the death knell for all his arguments before this Court. Just because Petitioner's conduct after accepting the great gift of probation now proves to be the source of his current incarceration does not mean that any of the trial courts "original sins" are worthy of review by what amounts to a belated appeal before this Court. Moreover, inasmuch as this Court approved King v. State, infra, Petitioner's jail time habitual sentence after violating probation is indeed lawful without any need to require any statutory findings anew.

ARGUMENT

WHETHER PETITIONER WAS REQUIRED TO TAKE A TIMELY APPEAL FROM HIS ORIGINAL "HABITUALIZED PROBATION" SENTENCE AND WHETHER HE SHOULD NOW BE ALLOWED TO CHALLENGE IT IN THIS COURT AFTER HINDSIGHT REVEALS THAT IT INURED TO HIS DETRIMENT AFTER VIOLATING PROBATION?

For his first issue, Petitioner harkens back to his original sentence that placed him on what has now come to be known as "habitualized probation". From this point he builds his argument to the conclusion that the trial court could not have ever imposed a habitualized sentence after Petitioner violated his probation some time after his original sentence. Petitioner's arguments rely on some faulty premises and non-recognition of facts.

First of all, the facts. Petitioner willingly entered into a plea agreement whereby he accepted the benefits of habitualaized probation. See Brief of Petitioner at page 11, (R. 20-22). Kendrick v. State, 596 So. 2d 1153 (Fla. 5th DCA 1992), as relied upon by Petitioner in its jurisdictional brief and as uncited at this level, clearly allows the State to appeal from a "habitualized probation" sentence because such is "illegal". Conversely, it is fair to interpret Kendrick that a defendant has an equal right to appeal from such an illegal sentence if indeed he or his appellate defense attorney were inclined to avail themselves of all the benefits a Florida State Prison allows. Although the court below somehow recognized a conflict between

its opinion in King v. State, 597 So. 2d 309, 317 (Fla. 2d DCA 1992) and Kendrick, they are consistent on this point. When read together, King and Kendrick simply indicate that although a defendant may appeal from a habitualizezd probation sentence, his failure to do so bars him from instituting an untimely appeal when he finds himself in a "fix", as does the instant Petitioner, down the probationary road. Ergo, inasmuch as Petitioner wishes to be bound by the reasonings in King, he should not be allowed to attack his original habitualized probation sentence in this Court and should be forced to seek a remedy by way of Rule 3.800, Florida Rules of Appellate Procedure.

Moreover, Petitioner's argument suggests that the trial court somehow impliedly followed King in that, by giving him a probationary sentence, the judge found it not necessary for the protection of the public for him to be given an enhanced sentence. He bolsters his King argument by citing to McKnight v. State, 616 So. 2d 31 (Fla. 1993) which cites King that a judge could never do away with a Section 775.084(4)(c), Florida Statutes, finding if he wishes to sentence a defendant to habitualized probation. In other words, King seems to leave no room for habitualized probation absent a determination that the public is not in need of protection. Id, at 316. However, in this case, we have a plea agreement whereby a defendant recognized his eligibility for habitual treatment and whereby the

court and all the parties agreed to impose probation. For sure, such would not be the first time in Florida sentencing history that parties agree to do something and waive some kind of finding requirement. Thus, under a very strict King analysis, it cannot be said that the judge made a 775.084(4)(c) finding which automatically activates the guidelines. [1]

Lastly, Petitioner bootstraps his argument to the level that because he received an initial guideline sentence, habitual offender treatment upon violation of probation thereafter is illegal. For this proposition he cites to Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989) as approved by this Court in Snead v. State, 616 So. 2d 964 (Fla. 1993) In order for this argument to work, one must assume that Petitioner's original sentence was indeed illegal, that he can rely on its apparent illegality upon resentencing for VOP, and appeal from the imposition of a habitual "jail time" sentence all without ever having challenged his initial habitualized probation sentence on direct appeal. If this Court indeed accepts all that King stands for, then surely it must accept the most basic premise that "those issues and any procedural errors related thereto were thereby waived" when

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[1] Of course, had Petitioner actually decided to appeal his probationary gift sentence, his case might have given the Second District the opportunity to expound upon the same range of subjects as in King and we would now have some kind of affirmative 775.084(4)(c) finding for the record as King seems to require.

Petitioner failed to appeal his original sentence setting him on the habitual offender as opposed to guidelines track for purposes of VOP. King, at 317. Absent any authority for the proposition that a defendant can elect, at his option, to take a radically untimely appeal from a gift sentence that later turns sour on him, this entire issue must be dismissed as procedurally barred.

ISSUE II

WHETHER PETITIONERS' ACQUIESCENCE IN BEING CLASSIFIED A HABITUAL OFFENDER AT HIS INITIAL SENTENCING ALLOWED THE TRIAL COURT TO GIVE HIM JAIL TIME CONSECUTIVE TO HIS HABITUAL OFFENDER SENTENCE UPON VIOLATION OF PROBATION?

Next, Petitioner argues that since his original habitualized probation sentence was nothing more than a guidelines probationary sentence his VOP sentencing exceeded the now traditional one-cell departure. Of course, this issue will only succeed for Petitioner if this Court is able to leap through the hurdles as outlined by Respondent in Issue I. For its argument herein, Respondent stakes its success on the fall of Petitioner's first issue. Thus, inasmuch as Respondent is unwilling to speculate that this Court would actually do away with the Rules of Appellate Procedure in order to allow Petitioner to reach back in time to correct a course of action that hindsight proves a folly, we will rely on Boomer v. State, 616 So. 2d 991 (Fla. 1993)

ISSUE III

WHETHER PETITIONER WAS GIVEN A VINDICTIVE INCREASE IN SENTENCING FOR VIOLATION OF PROBATION?

For his final issue, Petitioner argues, as he did in the court below, that he ultimately received an unlawful increase in sentence by virtue of actually getting some habitual offender jail time upon VOP. The Second District relied on Hicks v. State, 595 So. 2d 976 (Fla. 1st DCA 1992). As explained therein, the so called "increase" talked about 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 has nothing to do with one another. Given that Hicks is not within the ambit of the issues certified as being in conflict with the decision below, it should not be reached by this Court. See Gould v. State, 577 So. 2d 1302 (1991), at footnote 2.

Petitioner further argues that his VOP habitual offender sentence needs reversal because the trial court did not make any statutory findings in favor of habitualization. Now disagreeing with King, he says that the court should have made habitual offender findings anew and not have relied on his previous acknowledgment of habitual offender eligibility. 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 changed circumstances. Unless this Court is perfectly willing to render all factual acknowledgments such as those made herein (R. 20) as worthless parchment upon which the State can never rely, there is just no good reason to require a sentencing court to re-find all that a defendant acknowledges in the first place.

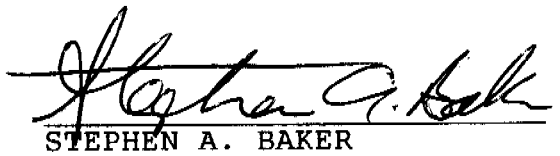
As a final note, Petitioner says that a habitualized probation sentence "requires completely opposite statutory findings" from that necessary for imposing jail time as a habitual offender. See Brief of Petitioner at page 12. Again, inasmuch as he perceives some kind of "original sin" error in the trial court's initial habitual probationary sentence, such is all the more reason not to allow Petitioner out of his obligation to take a timely appeal from a purportedly illegal sentence EVEN IF IT INURES TO HIS GREAT BENEFIT AT THE TIME IT IS IMPOSED!

CONCLUSION

For the forgoing reasons, this Court is asked to affirm the decision of the court below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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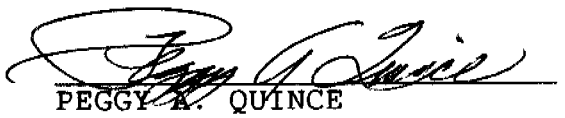

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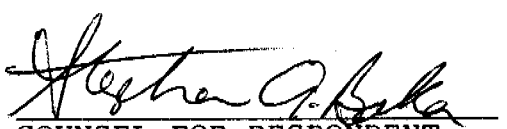
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jennifer Fogle, Assistant Public Defender, P.O. Box 9000-PD, Bartow, Florida 33830 this 15th day of October, 1993.



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