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IN THE SUPREME COURT OF FLORIDA

MICHAEL EDENFIELD,

Petitioner,

v. CASE NO. 81,889

STATE OF FLORIDA,

Respondent.

_____/

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHRISTOPHER M. SIERRA
Assistant Attorney General
Florida Bar No. 0977446
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

The trial court properly imposed a habitualized sentence upon revocation of probation.

Petitioner is mistaken as to the effective date of the amendment to §948.06(6) which provides for the forfeiture of all gain time previously earned upon revocation of probation. Petitioner asserts that the effective date is September 1, 1990; however, it is the State's position that forfeitures for revocation of probation under §948.06(6) became effective for all offenses on or after October 1, 1989. Since Petitioner committed his offense in July, 1990, the forfeiture provision applies, and the trial court exacted the forfeiture in accordance with the statutory authority invested in it by §948.06(6), Florida Statutes (1989).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SENTENCED MR. EDENFIELD AS A HABITUAL OFFENDER.

This Honorable Court accepted jurisdiction of the instant case due to a conflict of decisions regarding the effective date of the statute allowing forfeiture of gain time. In his initial brief, Petitioner requests this Honorable Court to review issues over which this Court has not accepted jurisdiction. As noted by Petitioner, this Honorable Court does have the authority of plenary review over any case before it. However, the authority of plenary review is a matter of discretion with this Honorable Court. Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982); Freund v. State, 520 So. 2d 556, n.2 (Fla. 1988). This Honorable Court should recognize the function of the district courts as courts of final jurisdiction and refrain from using the authority of plenary review unless those issues effect the outcome of the petition after the review of the certified question. Bell v. State, 394 So. 2d 979 (Fla. 1981).

Turning to the merits of Petitioner's argument, Petitioner relies upon Burrell v. State, 610 So. 2d 594 (Fla. 2d DCA 1992) and Moorer v. State, 614 So. 2d 643 (Fla. 2d DCA 1993), for the proposition that after a non-habitual sentence is imposed, a defendant cannot be resentenced as a habitual offender following a violation of probation. However, both Burrell and Moorer, are distinguishable factually from the instant case. In both Burrell

and Moorer, the defendant's had been sentenced to a term in prison (non-habitual) followed by a term of probation as a habitual offender. In those cases, the district court ruled that this type of hybrid sentence, incarceration without habitual offender status followed by probation as a habitual offender, was inconsistent with the habitual offender statute and therefore improper. In the instant case, however Petitioner was initially sentenced upon conviction to two years of probation with a determination that he qualified as a subsequent felony offender. (R. 15-16) As noted by the Second District Court, "There is nothing inherently or per se illegal about a sentence of community control [or by extension probation] coupled with a determination that a defendant is an habitual felony offender." King v. State, 597 So. 2d 309 (2d DCA) review denied, 602 So. 2d 942 (Fla. 1992), approved, McKnight v. State, 616 So. 2d 31 (Fla. 1993). In addition, Petitioner failed to attack the initial sentence of community control coupled with a determination of habitual offender status on direct appeal. Therefore any error in the procedure that lead to the determination of the habitual offender status now complained of was waived by the lack of a timely appeal. King, id.

Under the habitual offender statute, Section 775.084, Florida Statutes (1990), a trial judge, having found a defendant to be an habitual felony offender, may elect not to sentence the defendant as an habitual offender if the sentencing judge decides that a sentence as a habitual felony offender or an habitual

violent felony offender is not necessary for the protection of the public. The version of the habitual offender statute under which Petitioner was sentenced requires no "findings" in order to enable the trial judge to "decide" not to impose sentence as a habitual felony offender. In previous versions of the statute, findings were necessary in order to not impose a sentence under the statute, whereas only a "decision" not to impose such a sentence was required by the statute under which Petitioner was sentenced. It must be presumed that the legislature had a purpose in choosing such contrasting terms of art to describe the trial judge's use or nonuse of the habitual offender statute as a sentencing tool. Clearly, the legislature intended to vest in the trial courts discretion to exercise leniency in regard to habitual felony offenders.

Section 775.084(4)(e), Florida Statutes (1991), is also applicable to the instant case. This section indicates that any sentence imposed under the habitual offender statute shall not be subject to the provisions of Section 921.001, Florida Statutes (1991), (the sentencing guidelines). However, should the trial court decide pursuant to Section 775.084 (4) (c), Florida Statutes (1991), not to sentence a person as a habitual felony offender, even though that person qualifies as an habitual offender, any sentence then imposed must comport with the sentencing guidelines or departure rules and any failure to do so would be the proper subject of appeal by the State as well as by the defendant. Fla. R. App. P. 9.140 (c)(1) (J). However, any

such appeal must be taken at the time the original sentence is imposed and within the time limits required by Fla. R. App. P. 9.140 (b)(2) and (c)(2).

This issue was addressed by the Second District Court of Appeals in King v. State, 597 So. 2d 309 (2d DCA), review denied, 602 So. 2d 942 (Fla. 1992). In King, the Second District concluded that once such sentence is imposed, and no appeal is then pursued, that sentence may not be later attacked when a subsequent sentence as a habitual felony offender is imposed, pursuant to Section 775.084 upon revocation of probation or community control. A sentencing judge may, upon revocation of community control or probation, impose any sentence that could have been imposed upon the defendant at the time the probation or community control was imposed. Williams v. State, 581 So. 2d 144 (Fla. 1991).

In accordance with controlling authority, the trial court committed no error by imposing an enhanced sentence pursuant to Section 775.084, Florida Statutes (1991) upon revocation of defendant's community control solely upon the defendant's habitualization at the time community control was originally imposed. No further findings other than the original habitualization of the defendant needed to have been made. King, id.

Petitioner contends that the habitual offender sentence imposed was unauthorized in the accordance with this Honorable Court's decision in Snead v. State, 616 So. 2d 964 (Fla. 1993).

However, Snead is factually distinguishable from the instant case. In Snead, a habitual offender sentence was not originally sought. The trial court in Snead originally sentenced the defendant under the guidelines rather than as a habitual offender. However, even in Snead, this court held that if the reasons for a departure sentence existed when the trial court initially sentenced the defendant, then upon revocation of probation the trial court may depart the guidelines based upon the original reasons which existed at the time of the initial sentencing. Since the trial court originally imposed a sentence of habitualized probation, a habitual sentence would seem to be proper.

Petitioner next contends that this court should reverse the sentence imposed by the trial court because he was given incorrect information on the maximum sentence he could receive as a habitual offender when he initially entered his pleas. Petitioner cites two plea forms signed by Petitioner and contained in the record indicating that he was instructed only on the non-enhanced sentences he could have received. (R. 11, 37) However, the record does not contain a transcript of the original plea colloguy or the original sentencing hearing. Therefore the record on this issue is incomplete. Petitioner's reliance on Ashley v. State, is therefore misplaced due to a factual distinction as well as a differing appellate posture. In Ashley, this Honorable Court made clear reference to portions of the appellate record containing the plea colloquy. In fact, this

Honorable Court specifically mentioned and quoted the portion of the plea colloquy which was relied upon as a basis for vacating the habitual offender sentence imposed on the defendant. While this Honorable Court to some extent relied upon the written plea signed by the defendant in Ashley, the opinion, read as a whole, indicates that proper weight must be given to the plea colloquy. Regardless of any written plea, this Honorable Court held that in order for a defendant to be habitualized following a guilty or a nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization. Ashley, at 490. Clearly, a trial court is unable to fulfill this function at any time prior to a plea colloquy. Because Petitioner has failed to provide a complete record upon which this Honorable Court may review the issue, and at least one plea entered by Petitioner indicates that he was charged as a habitual felony offender (R. 37), this Honorable Court must accept as correct both the judgment of the trial court and the District Court absent a completed record.

Finally, Petitioner alleges that the sua sponte notice of habitual offender treatment was ineffective because it was provided in one case one day prior to sentencing, (R. 36, 40-43) and in the second case on the same day of sentencing. (R. 14, 15-16) Petitioner claims that this alleged error cannot be harmless because he was given erroneous information as to the

maximum penalty at the time he signed the plea forms. However, as previously noted, Petitioner has failed to provide an adequate record upon which this court may determine the propriety of the trial court's actions.

ISSUE II

WHETHER UPON REVOCATION OF PROBATION THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S GAIN TIME PREVIOUSLY EARNED.

Petitioner is mistaken as to the effective date of the amendment to §944.28(1), Florida Statutes (1989), which provides for the forfeiture of all gain time previously earned upon revocation of probation. Petitioner asserts that the effective date is September 1, 1990; however, it is the State's position that forfeitures for revocation of probation under §948.06(6), Florida Statutes (1989), became effective for all offenses committed on or after October 1, 1989. Since Petitioner committed his offense in July of 1990 (R. 8), the trial court properly exacted the forfeiture in accordance with the statutory authority invested in it by §948.106(6), Florida Statutes (1989).

Petitioner's argument is premised on his erroneous belief that the effective date of the amendments of §948.06(6) , Florida Statutes (1989), authorizing forfeiture of gain time for revocations of probation and community control is September 1, 1990. On the contrary, the amendment authorizing the forfeiture of gain time upon revocation of probation or community control became effective for offenses committed on or after October 1, 1989. See Ch. 89-531, §13, §19, &20, Laws of Florida. The effective date of September 1, 1990, applies only to the additional provision which authorizes forfeitures for revocation of control release supervision. See Ch. 89-526, §8, §52, Laws of

Florida. The State believes the confusion arose because of the enactment of two (2) separate bills during the 1989 special legislative session both of which amended §948.06(6), Florida Statutes, but each for different reasons and with different effective dates.

In response to the decision in State v. Green, 547 So. 2d 925 (Fla. 1989), the Florida Legislature proposed legislation during the regular session in 1989, to allow for the forfeiture of all gain time while earned in prison on a probationary split term, upon revocation of the probation (or community control) and return to custody. See Ch. 89-531, §13, §19, §20, Laws of Florida. (Exhibit A).[1] Although this legislation was vetoed at the close of regular session, the amendments to §948.06(6), Florida Statutes, were again re-presented at the special legislative session which followed. [2] These amendments [3] were

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[1] Exhibits will be listed as Exhibits A through D.

[2] Exhibit C is a copy of six staff analysis and economic impact statements for House Bill 300 which was proposed in the regular session of 1989. This bill was later vetoed by the Governor at the close of the regular session. The amendments to Section 948.06(6) contained in House Bill 300 (and the companion Senate Bill 728) were resurected during the special legislative session which followed the regular session, as Senate Bill 12-B. SB 12-B passed during the special legislative session and was signed into law on June 28, 1989. (See Exhibit D.) Those amendments are contained in Chapter 89-531, Laws of Florida.

[3] The amending language contained in Ch. 89-531, §6, Laws of Florida, provided as follows:

> 944.28 Forfeiture of gain-time and the right to earn gain-time in the future.--
>
> (1) If a prisoner is convicted of escape, or if the

effective for all offenses committed on or after October 1, 1989. Ch. 89-531, §19, Laws of Florida.

During the same special legislative session, the Florida legislature enacted a new early release mechanism to control prison overcrowding. This new mechanism, called control release, authorizes the Florida Parole Commission, sitting as the control release authority, to control the prison population. See Ch. 89-526, §1 - 9, Laws of Florida, now codified at §947.146, Florida Statutes. Because the control release mechanism authorized the Commission (authority) to establish periods of supervision to follow control release, the legislature proposed an additional amendment to §944.28(1), Florida Statutes, to allow for the forfeiture of all of gain time earned up to the date of revocation of control release. This additional amendment [4] was

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> clemency, conditional release as described in Ch. 947, probation or community control as described in §948.01, provisional release as described in §944.277, or parole granted to him is revoked, the department may, without notice or hearing declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his release under such clemency, conditional release, probation or community control, provisional release, or parole.

[4] The amending language of Ch. 89-526, §6, Laws of Fla., provided as follows:

> 944.28 Forfeiture of gain-time and the right to earn gain time in the future.--
>
> (1) If a prisoner is convicted of escape, or if the clemency, conditional release as described in Ch. 947, probation or community control as described in §948.01, provisional release as described in §944.277, or parole, or control release as described in §947.146 granted to him is revoked, the department may, without notice or hearing,

specified to become effective on September 1, 1990, as that was the date the entire control release statute was to become effective. See Ch. 89-526, §52, Laws of Florida. The remainder of the amendments contained in Ch. 89-526 became effective October 1, 1989. Like Ch. 89-531, Ch. 89-526 was signed into law and filed with the Secretary of State's Office on June 28, 1989. (See Exhibit A.)

Based upon the State's understanding of these two bills and the effective dates established by the legislature, the State considers the forfeiture provisions enacted into law under Ch. 89-531---that is, those forfeitures which are authorized for revocation of probation, community control and provisional release--to be effective for all offenses committed on or after October 1, 1989; and the additional forfeiture provisions enacted into law under Ch. 89-526---that is the forfeiture which is authorized for revocation of control release---to be effective on September 1, 1990, the effective date for control release. (Exhibit D.)

The State's position is supported by both §1.04, Florida Statutes, which provides a rule for statutory construction of amendatory acts passed during the same session and case law construing that provision.

> declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his release under such clemency, conditional release, probation or community control, provisional release, control release, or parole.

Section 1.04 provides:

> Acts passed during the same legislative session and amending the same statutory provisions are in pari materia and full effect should be given to each, if that is possible. Language carried forward unchanged in one amendatory act, pursuant to Section 6, Article 3, of the State Constitution, should not be read as conflicting with changed language contained in another act passing during the same session. Amendments enacted during the same session are in conflict with each other only to the extent that they cannot be given effect simultaneously.

In order to give full effects to both amendatory acts and apply the appropriate effective dates, the purpose of each act and the amending language must viewed in pari materia. It is obvious that the legislature intended to counteract the effect of the Green decision as it pertains to revocations of probation and community control, and that the legislature intended that those amendments be given prompt effect, since the effective date which appears in Ch. 89-531 is October 1, 1989. It is also clear that the amendments and provisions contained in §1-9 of Ch. 89-526 were solely related to the establishment of a new early release mechanism, control release, which, because of its nature would require some lead time for implementation. Thus, the effective date for "control release" was established at the future date of September 1, 1990, because new language was already being proposed for forfeitures upon revocation of probation, community control, and provisional release. For other reasons, it was proper to include these additional amendatory provisions within

the text of the proposed amendment in Ch. 89-526; however there can be no doubts that the focus of the first nine provisions of Ch. 89-526 were related solely to control release. Thus, the later effective date of September 1, 1990, should only be applied to the additional amendatory language pertaining to revocation of control release. See, e.g., Gunite Works, Inc. v. Lovett, 392 So. 2d 910 (Fla. 1st DCA 1980) (We must assume that the act of the legislature in changing the effective date of some provisions of the Worker's compensation law and then failing to change the effective date for other provisions expressed the legislature's intent that the latter provisions take effect on the date initially designated.).

That the amendments to §948.06(6), Florida Statutes, contained in Ch. 89-531, were to be effective for all offenses committed on or after October 1, 1989, is also evidenced the note which follows §948.06 in the 1989 Statutes, which reads:

> As created By Section 13, Chapter 89-531, Section 8, Chapter 89-526, also created Subsection (6) which will amend this version, effective September 1, 1990 to read;
>
> (6) any provision of the law to the contrary notwithstanding, whenever probation, community control, or control release, including the probationary, community control portion of a split-sentence, is violated in the probationer, community control is revoked, the offender by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct as provided by law, earned up to the date of his release on probation, community control, or control release. This subsection does not deprive the prisoner of his right to gain-time or his commutation of time for good

conduct, as provided by law from the date on which his return to prison.

Since the amendments to §948.06, Florida Statutes, contained in Ch. 89-531 appeared in the 1989 Statutes, there can be no doubt under Ch. 89-531 that the effective date is October 1, 1989. There should also be no doubt that the September 1, 1990 effective date for the additional amendment to §948.06(6) under Ch. 89-526 is limited to that additional amendment which brought in revocation of control release supervision as the basis for automatic forfeiture of gain-time.

This court has apparently been presented with the dilemma created by the differing effective dates presented between Ch. 89-531 and 89-26 and has concluded that the State's authority to exact a forfeiture for violation of probationer community control under §948.06(6) is effective for offenses committed on or after October 1, 1989. See, Tripp v. State, 622 So. 2d 941 (Fla. 1993).

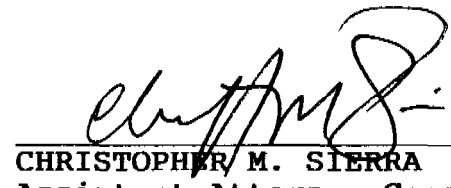
Accordingly, Petitioner is not entitled to gain time in the amount of two and one-half (2½) years previously served prior to violation of probation.

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, the judgement and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



CHRISTOPHER M. SIERRA
Assistant Attorney General
Florida Bar No. 0977446
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Karen K. Purdy, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33830, on this 29th day of November, 1993.

COUNSEL FOR RESPONDENT