IN THE SUPREME COURT OF FLORIDA

WILLIE HARRIS, :

Petitioner, :

vs. :

STATE OF FLORIDA, :

Respondent. :

_____ :

82,165

Case No. 92-2760

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

ANDREA NORGARD
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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

In the Circuit Court for Sarasota County, the State filed an Information charging Petitioner, Willie B. Harris, with one count of Armed Robbery with a Firearm contrary to Section 812.13, Florida Statutes (1989), and one count of Resisting an Officer without Violence contrary to Section 843.02, Florida Statutes (1989) (R108-111).

At his original sentencing the trial court ruled that although Petitioner met the criteria for habitualization, a first degree felony punishable by life could not be subject to habitualization (R399-400, 404-405, 424, 540-605). The court sentenced Petitioner to a guidelines sentence of 27 years (R423-424, 609-610).

On September 26, 1990, the State filed a Notice of Appeal on the issue of habitualization (R622). On September 27, 1990, Petitioner filed a Notice of Cross-Appeal (R625). The Second District ordered that the State's Notice would be treated as a cross-appeal (R627-628).

The Second District Court of Appeal affirmed petitioner's convictions and held that a first degree felony punishable by life was properly subject to habitualization. Harris v. State, 593 So. 2d 301 (Fla. 2d DCA 1992). The Court remanded Petitioner's case for a resentencing.

On June 19, 1992, Petitioner was resentenced. The Court declared him to be a habitual offender and imposed a 27 year sentence.

On July 23, 1993, the District Court of Appeal upheld Petitioner's sentence, finding no law violations in the more severe sanction.

SUMMARY OF THE ARGUMENT

The ruling of the Second District that Appellant, on resentencing, may be subject to ~~a stiff~~ more severe sanction by virtue of the imposition of habitual offender sanctions violates the principals of double jeopardy and is in direct conflict with the decision of Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991).

ARGUMENT

ISSUE

THE INSTANT DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION IN DAVIS v. STATE, 587 SO. 2D 580 (FLA. 1ST DCA 1992), AND WILLIAMS v. STATE, 595 SO. 2D 936 (FLA. 1992).

The Second District's opinion holds that Petitioner may be resentenced as a habitual offender because the judge did not believe that Petitioner could be subject to habitualization at the original sentencing proceeding. Petitioner's original sentence of 27 years was a legal, guidelines sentence. The decisions of Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1992) and Williams v. State, 595 So. 2d 936 (Fla. 1992) expressly provide that once a legal sentence is imposed, a more severe sentence or habitualization may not be re-imposed, even if the original decision rejecting more severe sanctions was erroneous. To permit the imposition of a harsher sentence violates the double jeopardy provisions of the Federal and Florida State Constitutions.

CONCLUSION

Based upon the foregoing argument and authorities, Petitioner asks this court to accept jurisdiction of the instant case.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WILLIE HARRIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 92-02760

Opinion filed July 23, 1993.

Appeal from the Circuit Court
for Sarasota County;
George K. Brown, Jr., Acting
Circuit Judge.

Appellant Pro Se.

James Marion Moorman, Public
Defender, and Andrea Norgard,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
William I. Munsey, Jr.,
Assistant Attorney General,
Tampa, for Appellee.

FRANK, Chief Judge.

Willie Harris has appealed from the trial court's imposition of a habitual offender sentence after remand from an

unsuccessful appeal to this court, claiming that his new sentence is harsher and violates the constitutional prohibition against double jeopardy. We reject his argument and affirm.

Harris was convicted of robbery while armed with a firearm and resisting an officer without violence. At his sentencing, the state requested habitual offender sanctions. The trial court did not impose them but only because the trial court agreed with Harris that a first degree felony punishable by life was not subject to habitualization. Accordingly, Harris was given a guidelines sentence of 27 years. He appealed the convictions and sentence, and the state cross appealed the question of whether habitualization was properly refused. This court affirmed the convictions, held that first degree felonies punishable by life were subject to habitualization, and reversed and remanded for resentencing. Harris v. State, 593 So. 2d 301 (Fla. 2d DCA 1992). At the hearing on remand Harris argued that once he had begun to serve a legal sentence, resentencing him to a more severe sanction offends North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L.Ed. 2d 656 (1969). The trial court rejected the argument and, in accordance with our mandate, sentenced him as a habitual offender to the same 27 year term of imprisonment. We acknowledge, but only in passing and not as an issue in this proceeding, that the loss of gain time flowing from habitualization results in Harris' serving a period of actual incarceration greater than that of the original sentence of the same term. Under his original, non-habitual offender sentence he would have been eligible to acquire gain time.

In any event, it is apparent that the trial court would have originally sentenced Harris as a habitual offender but for the uncertainty in the then state of the law regarding the habitualization of first degree felonies punishable by life. Harris, in essence, received his initial guidelines sentence somewhat as a matter of grace based upon the arguments he advanced at sentencing. This was not the situation where a judge habitualizes a defendant but exercises his discretion not to sentence him to an enhanced term. See King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992) (en banc). When he chose to appeal from his convictions and sentences, however, Harris risked having the trial court's misperception of the law corrected. The imposition of the habitual offender sentence, pursuant to the mandate of this court, was effected without a scintilla of the vindictiveness focused upon in North Carolina v. Pearce. See Wood v. State, 582 So. 2d 751 (Fla. 5th DCA 1991).

Accordingly, we affirm.

CAMPBELL and ALTENBERND, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28 day of July, 1993.

Respectfully submitted,

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