O.A. 4-5-94 847

FILED
SID J. WHITE
JAN 20 1994
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WILLIE HARRIS, :

Petitioner, :

vs. : Case No. ~~82,154~~ 82,165

STATE OF FLORIDA, :

Respondent. :

_____ :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ANDREA NORGARD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 661066

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner was the Appellant and Cross-Appellee in the Second District Court of Appeal, per order of that Court, and the defendant in the trial court. Respondent, the State, was the Appellee and Cross-Appellant in the Second District, per order of the Court, and the prosecuting authority in the trial court. The record on appeal will be designated "R." The original record, containing the trial transcripts and first sentencing, will be referred to as "AR."

STATEMENT OF THE CASE AND FACTS

On April 19, 1990, the State Attorney for the Twelfth Judicial Circuit in and for Sarasota County filed a five count Information against Petitioner, Willie Harris (R108-111). A co-defendant, Jerrell Graves, was also charged (R108-111). Mr. Harris was named in two counts, one count of 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).

On August 29, 1989, Petitioner was tried by a jury with the Honorable George Brown, Acting Circuit Judge, presiding. Briefly, the trial testimony was that Petitioner had exited a blue car and, utilizing a firearm, took jewelry and $1.00 from Barbara McKnight as she walked down the street on March 27, 1991 (AR86-87, 89-93). After Mr. Harris was apprehended following a chase by law enforcement, a $1.00 bill was found on his person (AR135-136, AR182-183). Two shotgun shells were in his coat pockets (R124, AR174-175). Jewelry was found in the rear of the patrol car (R134). The co-defendant testified she also observed Mr. Harris comment the offense and use a gun (AR202-204).

Mr. Harris was convicted by the jury as charged on each count (AR528-529).

On September 21, 1990, Mr. Harris appeared for sentencing. The State sought sentencing as a habitual offender (AR464-465). Petitioner contended that habitual sanctions were precluded from being imposed on first degree felonies punishable by life (AR385-

397). After reviewing case law, the Court ruled that Mr. Harris could not be habitualized (AR385-397). The court did rule that the predicate felonies had been established to support habitualization (R424). Some evidence of prior convictions was admitted (AR399-400, 404-405, 540-605).

The Court then sentenced Mr. Harris within the permitted range of sentencing guidelines. Petitioner was sentenced to 27 years incarceration with a three year minimum mandatory (AR423-424, 609-610). No objections were made to the scoresheet (AR407-411, 606).

On September 26, 1990, the State timely filed a Notice of Appeal. The State sought review of the court's ruling that first degree felonies punishable by life were not subject to habitualization (AR622). On September 27, 1990, a Notice of Appeal was filed by defense counsel. The Second District ordered that the State's Notice of Appeal, the first Notice filed, would be treated as a cross-appeal (AR627-628). Petitioner was order by the Second District to submit briefs as the Appellant and Cross-Appellee (AR627-628).

The Second District, in Harris v. State, 593 So. 2d 301 (Fla. 2d DCA 1992), affirmed Petitioner's conviction. The Court then reversed and remanded for resentencing, holding that first degree felonies punishable by life could be habitualized.

On April 10, 1992, Petitioner appeared for resentencing. The State again sought habitual offender sanctions (R46-49). Defense counsel objected and the proceedings were stayed (R65-79). On June

19, 1992, the court sentenced Petitioner to 27 years as a habitual offender (R94-95, 118-123).

On July 17, 1992, Mr. Harris again appealed (R124). The Second District, in Harris v. State, 624 So. 2d 279 (Fla. 2d DCA 1993), held that the increased sentence due to habitual sanctions did not violate double jeopardy. The court specifically found that Petitioner, by choosing to appeal, "risked having the trial court's misperception of the law corrected" and his original sentence was "somewhat a matter of grace."

Petitioner sought discretionary review by this Honorable Court. On December 28, 1993, this Court accepted jurisdiction of Petitioner's cause and ordered Petitioner's Brief on the Merits to be filed on January 24, 1994.

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing Petitioner to a habitual offender sentence after an initial, legal sentence as a non-habitual was imposed. The trial court's initial, erroneous belief that Petitioner could not be habitualized does not permit the otherwise legal sentence to be increased. While Petitioner may be designated a habitual offender, a sentence served as a habitual offender is violative of double jeopardy.

ARGUMENT

ISSUE I

WHETHER THE IMPOSITION OF A HABITUAL OFFENDER SENTENCE IMPOSED AFTER REMAND VIOLATES DOUBLE JEOPARDY WHEN THE ORIGINAL SENTENCE WAS LEGAL WHEN IMPOSED AND DID NOT CONTAIN HABITUAL SANCTIONS.

At Petitioner's original sentencing the trial court erroneously ruled that Petitioner could not be legally subject to habitual sanctions based upon the degree of his offense. The trial court found that Petitioner did have the requisite number of predicate offenses to qualify for habitualization. The Court then held Mr. Harris should be sentenced in the guidelines. The State urged the Court to depart from the guidelines range, but the Court declined, finding a departure inappropriate (AR400-404). The Court then imposed a guidelines sentence of 27 years, saying that this sentence was "reasonable" and "appropriate" (AR423).

The State then appealed the ruling, filing a Notice of Appeal prior to that filed by defense counsel's. The Second District ordered the position of the parties as Appellant and Appellee, and Cross-Appellant and Cross-Appellee, reversed. The Second District ordered Petitioner resentenced, and when habitual offender sanctions were imposed, found that Petitioner had risked a larger sentence by appealing, thus there was no double jeopardy violation. The opinion ignores the fact that Mr. Harris' original sentence was legal and therefore, not subject to change.

The original sentence imposed upon Petitioner was a legal sentence. It was within the sentencing guidelines. Therefore, the 27 years sentence which permitted Petitioner to receive full gain time should remain despite the trial Court's initial erroneous determination regarding the question of habitualization. An analysis of the law surrounding habitualization and general sentencing principals supports Petitioner's argument.

Initially, there is no question that the designation of habitual offender upon Petitioner's sentence amounts to an increased sentence. Even though the number of years of incarceration was not increased, the amount of time Petitioner must serve is greatly increased. Designation as a habitual offender renders Petitioner ineligible for gain time he would have been previously entitled to. It affects his eligibility for controlled or early release.

Habitualization in this State is at present governed by the opinion of the Second District in King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), reviewed denied, 602 So. 2d 942 (Fla. 1992), by virtue of its adoption by this Court in McKnight v. State, 616 So. 2d 31 (Fla. 1993). King requires the trial court to find a defendant to be a habitual offender if he meets the statutory criteria, but continues to permit the court to exercise discretion in sentencing the defendant. King permits a trial court to elect to sentence one declared a habitual offender to a non-habitual offender if the judge decides a habitual sentence is not necessary. The designation of "habitual offender" is referred to as a

"ministerial determination." If the court chooses to sentence a habitual offender to non-habitual sanctions, this must be communicated to the Department of Corrections. The current judgment and sentence forms do not provide a space for the trial court to make this sentencing alternative. Thus, if the Court checks the appropriate space on the Judgment and Sentence form, DOC will forfeit gaintime even if the Court did not intend Habitual Sanctions. The trial courts must, if they intend to exercise their discretion in sentencing with non-habitual sanctions, either enter separate orders or leave the boxes blank.

Appellant's original sentence was not illegal in that it comported with the requirements of King. The trial court originally found that Mr. Harris met the statutory requirements for habitualization. He then imposed a guidelines sentence. Under King this sentence was legal, because although the trial judge lacked discretion in labelling Petitioner as a habitual offender, he was still not obliged to sentence Petitioner as a habitual offender. Because the original sentence imposed was legal, the State has no authority to seek a harsher sentence. The law is settled and clear -- a previously imposed legal sentence may not later be increased. Daniels v. State, 513 So. 2d 244 (Fla. 2d DCA 1987); Williams v. State, 591 So. 2d 1111 (Fla. 2d DCA 1992).

In Wright v. State, 599 So. 2d 179 (Fla. 2d DCA 1992), the trial court decided not to treat the defendant as a habitual offender and imposed a guidelines sentence. Based on Allen v. State, 573 So. 2d 170 (Fla. 2d DCA 1991), the State claimed the

defendant's sentence was illegal and the trial court vacated Wright's sentence and sentenced him as a habitual offender. The Second District reversed, holding that since Wright's sentence was legal under King, it could not be reversed for a more severe sentence.

The District Court's conclusion that Appellant's sentence was not governed by King is error. The record does not make it apparent, as the District Court's opinions state, that the trial court would have sentenced Appellant to a habitual sentence. Rather, the trial court refused to depart from the guidelines and termed the sentence of 27 years as a non-habitual "reasonable" and "appropriate" (R423).

The trial court's initial belief that Petitioner could not be subject to habitual sanctions was erroneous. Even though the trial court was mistaken, this mistake does not now permit Petitioner to be subject to a more severe sentence. In Williams v. State, 595 So. 2d 936 (Fla. 1992), the State cross-appealed the defendant's life sentence imposed after the trial judge allowed the defendant to waive penalty phase with the State's consent on the grounds that the judge thought the death penalty was not appropriate. This Court noted that, absent the defendant appealing, the State could not have appealed the sentencing issue. This Court held that, although the trial judge may have made an erroneous ruling, double jeopardy prohibited a new penalty phase that could subject the defendant to an increased penalty. See also Brown v. State, 521

So. 2d 110 (Fla.), cert. denied 488 U.S. 912, 109 S. Ct. 270, 102 L. Ed. 2d 258 (1988).

This principal relating to erroneous rulings has been applied with regards to findings regarding habitualization. In Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991), the trial court initially declined to declare the defendant a habitual offender but then sentenced the defendant to a sentence in excess of the statutory maximum. Later, the Court attempted to designate the defendant a habitual offender to make the sentence legal. The First District held the judge could not do this, even if the early failure was erroneous.

Once Petitioner began to serve a legal sentence, to modify it by converting it to a sentence as a habitual offender instead of just a designation of habitual offender violates double jeopardy. Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990). At most, Petitioner may be designated to be a habitual offender but have deleted from the judgement and sentence the language "and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a)." Russell v. State, 605 So. 2d 1342 (Fla. 2d DCA 1992).

Thus, Petitioner's original sentence of 27 years as a non-habitual must be reinstated.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse the sentence of the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of January, 1994.

Respectfully submitted,

Andrea Norgard

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

ANDREA NORGARD
Assistant Public Defender
Florida Bar Number 661066
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

AN/lw