Archives

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,220

THE STATE OF FLORIDA,

Petitioner,

-vs-

CALVIN LEE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED CONFLICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The court accepted jurisdiction in this case based on a conflict between the various jurisdictions regarding the degree of a felony conviction for trafficking in cocaine. Respondent has decided to raise a secondary issue in his brief which is not germane to the issue before this court nor is it a basis for the court's discretionary review. The State recognizes, however, the ability of this court to entertain additional issues in rare circumstances once the court accepts jurisdiction of a particular case.

Therefore, the State will briefly discuss the issue raised by the Respondent for the first time in this answer brief, but would request that this court decline to consider the issue raised. The Third District ruled against Respondent on the issue in the direct appeal and also did not find the issue to be worthy of certification to this court, as it was requested to do in Respondent's motion for rehearing and/or certification to this court. The State will first briefly respond to the arguments raised in Respondent's brief relating to the issue which was the basis for the invocation of the court's discretionary jurisdiction. The same references to the record and transcripts used by the State in its initial brief will be used here.

ISSUE I

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT A CONSPIRACY TO TRAFFIC IN COCAINE IS A SECOND DEGREE FELONY.

The State will rely in large measure on the arguments it has presented in its initial brief on the merits. In response to specific arguments raised in Respondent's brief the State presents the following.

Respondent argues that a conspiracy to traffic may be charged under both the conspiracy statute as a second degree felony or under the trafficking statute as a first degree felony. Although one case appears to support the State's ability to do this, see, Stidham v. State, 579 So. 2d 319 (Fla. 5th DCA 1991), the State addressed this argument in its merits brief, shown why this can't be done and commends this court to the arguments raised therein. Respondent next contends that because the State proceeded in the alternative under the general conspiracy statute it cannot convict him of a first degree felony due to lack of notice. The State has likewise established in its brief the adequacy of notice given to Respondent by the charging document and would again ask the court to note the State's arguments presented there, in this regard.

Finally, the State strongly disagrees with Respondent's contention that all parties concerned "labored under the belief that the State was pursuing a second degree felony...[and that] it was only at the point that the State filed its motion for rehearing of the district court's opinion that it first reached a belief...that section 893.135(5) controls this case." (Respondent's brief at pg. 7). Respondent entirely fails to recognize that the judgment and sentence itself lists the offense as a first degree felony. Thus, Respondent cannot reasonably argue that the State labored under the belief it was pursuing a second degree felony when the judgement itself lists it as a first degree felony long before the issue was raised on rehearing in the direct appeal. (RI. 82, 87; RII. 84,89).

ISSUE II

THE TRIAL COURTS SENTENCE OF DEFENDANT AS A HABITUAL FELONY OFFENDER WAS VALID NOTWITHSTANDING AN INCORRECTLY CALCULATED GUIDELINE SCORESHEET WHICH IN PART FORMED THE BASIS FOR THE PROSECUTORS RECOMMENDATIONS REGARDING SENTENCING BECAUSE THE GUIDELINES DO NOT APPLY TO SENTENCING UNDER THE HABITUAL FELONY OFFENDER STATUTE.

In the interests of economy the State adopts the lions share of Respondent's recitation of the legal principles which apply to this issue and to this area generally. The State will summarize

the more significant rules and point out discrepancies where necessary. First, the State notes that Respondent was lawfully found to meet the habitual felony offender criteria and was sentenced to 20 years accordingly, a proper sentence pursuant to that statute, a matter not disputed by Respondent. (TI. 4, 10). Section 775.084(1)(a) and 775.084(4)(a)(1) Fla. Stat. (1991)(RII. 62, 89-92, RI. 65, 87-90). What Respondent argues is that the incorrect calculation of a guideline scoresheet rendered the sentence improper, even though the guidelines do not apply to habitual offender sentences, because, he contends, the trial court "affirmatively relied" on the scoresheet. There is little if no evidence to support this contention and the record itself refutes this claim.

The determination by a trial court of the defendant's status as a habitual felony offender is a ministerial duty required to be performed by the court, however, the length of the sentence to be imposed pursuant to the habitual offender statute is discretionary. King v. State, 597 So. 2d 309, 313 (Fla. 2nd DCA)(en banc), rev. denied, 602 So. 2d 942 (Fla. 1992); Burdick v. State, 594 So. 2d 267, 271 (Fla. 1992). The impact of these principles extends in two directions. First, the court has discretion to sentence the habitual offender to any term of years up to the maximum set out in the habitual offender statute for

the particular level of offense. King, supra 597 So. 2d at 314-315. [1]

Secondly, although a trial court may sentence a habitual felony offender to probation, it must first decide that sentencing as a habitual offender is not necessary for the protection of the public, opt out of the habitual offender scheme and thereafter be subject to the guidelines rules; any sentence imposed which fell below the permitted guidelines range would have to be accompanied by written reasons for the departure. See, King, supra, at page 316-317, adopted McKnight v. State, 616 So. 2d 31 (Fla. 1993).

As previously mentioned, Respondent was found to be a habitual felony offender and sentenced to 20 years accordingly. This sentence is a proper sentence under the statute. The question raised is whether the incorrectly calculated guidelines sentence scoresheet requires a remand for resentencing even though the guidelines do not apply to sentencing under the habitual offender statute. See Fla. R. Crim. P. 3.988 (1991). Respondent claims that on the unique facts of this case the court considered the guidelines when sentencing him and since that portion of the basis for the courts determination was in error,

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[1] Although this question is not at issue it is submitted that a sentence as a habitual felony offender to a term well below the maximum and significally below the lower end of the permitted guidelines range for a particular defendant would amount to an abuse of the discretion afforded a trial court under the habitual offender statute.

resentencing is required. It is clear, however, from the record that the focus of the State and the court was not on the guidelines scoresheet but rather on those pertinent factors which supported habitualization in this case. In other words, the incorrect scoresheet did not reversibly harm the sentencing process in this case.

The State agrees with Respondent, that the 65 points assessed for the conspiracy count as an additional conviction was erroneous, and thus, the guidelines scoresheet was incorrectly calculated. Respondent cites to a limited comment by the prosecutor which he takes out of context in an attempt to support his argument that the trial judge, in some manner, utilized the scoresheet when sentencing the defendant. [2] However, a review of the record clearly shows that the trial judge sentenced the defendant under the habitual felony offender statute without regard to the scoresheet and for reasons which support such a sentence.

The following took place at the sentencing hearing:

> **MS. ROBINSON (Prosecutor):** We are proceeding under habitual felony offense.
>
> **THE COURT:** The court finds that based on the prior convictions in case 88-1522 and case 88-

[2] The comment by the prosecutor was "the scoresheet scores Mr. Lee at 17 years. So I am recommending three additional years, 20 years as a habitual felony offender." (TI. 8).

1523CF that the defendant Calvin Lee is a habitual felony offender.

(TI. 4).

* * * *

MS. ROBINSON: Judge, I would like to point out for the record that the State could recommend life in prison for Mr. Lee. I'm only recommending 20 years as a habitual felony offender in this case, and that's based upon Mr. Lee's prior record and also the fact that the Key West Police Department investigation revealed that Mr. Lee in this case was the individual who was providing the cocaine. He owned several vehicles.

Mr. Lee does not work full time. He was the one that was carrying the beeper. Judge, to be quite honest, Mr. Lee is the drug dealer in this case. He was the big street level dealer that we've been trying to target for quite a while. Mr. Lee provided the cocaine for this particular transaction. Mr. Fulton and the other individual were just the middlemen that arranged the deal. Mr. Lee was the one that actually put the deal together.

And I would also like to note that the scoresheet scores Mr. Lee at 17 years. So I am recommending three additional years, 20 years as a habitual felony offender.

(TI. 7-8).

* * * *

THE COURT: Mr. Lee, I've been looking through at the different sentences that have been imposed in various cases over the years, starting in 1988 when you were put on community control, told to get your act together. Then that had to be revoked, and you were sentenced to prison. You completed boot camp, got out. Came back on probation. Then here we are again.

Really, all you have managed to do since that time is to increase your level of criminality. Going up into trafficking. And what makes it really bad is that you don't -- like most people in front of

> me with these kind of charges, they are trying to feed their own habits. They are addicted to cocaine, and they are out there selling it so they can buy something for their own habit. Whereas you don't even have an addiction. You are doing this as a businessman. This is your business.
>
> And this was a high level, a large amount of drugs, compared to the normal situation. Forty-some grams.
>
> And you were working with two other people, one which happened to turn State's evidence.

(TI. 9-10).

It is quite evident that the court sentenced Respondent as a habitual felony offender for the reasons which justify such a sentence, without regard to and notwithstanding the guidelines scoresheet. The trial court made absolutely no reference to the guidelines score during sentencing. Furthermore, sentences imposed under the habitual felony offender statute are not subject to the provisions contained in the sentencing guidelines rules. See section 775.084(4)(e), Fla. Stat. (1991). "In sentencing [a defendant] as an habitual felony offender, the court [is] not required to utilize a sentencing guidelines scoresheet since habitual offender sentencing is by statute exempted from sentencing guidelines procedure." Holley v. State, 577 So. 2d 624 (Fla. 1st DCA 1991).

This is not a case, as Respondent suggests, where the court used the guidelines scoresheet as a base from which to depart. Instead, the court sentenced the defendant to 20 years

because he qualified as a habitual offender. The court made no reference to the guidelines scoresheet when it sentenced Respondent. Since the guidelines do not apply to sentences imposed under the habitual felony offender statute the erroneous calculation of the scoresheet was irrelevant and harmless.

All of the cases cited by Respondent are distinguishable because they involve sentences in which there is a departure from the guidelines, and where the scoresheet is used as a base from which to depart. This was not the case here.

CONCLUSION

Based on the forgoing arguments and authorities, the State of Florida, respectfully requests that this court reverse the decision of the Third District finding that a conspiracy to traffic in cocaine is a second degree felony and affirm the conviction in all other respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **JULIE M. LEVITT**, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 7 day of February, 1994.

MARK ROSENBLATT
Assistant Attorney General

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