IN THE SUPREME COURT OF FLORIDA

BOBBIE DARIN THOMPSON,

Petitioner,

v. CASE NO. 82,502

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
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FLA. BAR NO. 0513253

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal. Thompson v. State, ____ So.2d ____, 18 Fla.L. Weekly D2186 (Fla. 1st DCA Oct. 4, 1993).

All proceedings in the circuit court were held in Escambia County before Judge William H. Anderson. Petitioner was the defendant in the circuit court and the appellant in the district court. The state was the prosecutor and the appellee. The one-volume record on appeal will be referred to as "R."

II STATEMENT OF THE CASE AND FACTS

October 20, 1992, petitioner, Bobbie Darin Thompson, was found guilty by a jury in Escambia County no. 92-3755 on charges of burglary of the Palafox Pawn Shop and felony petit theft therein (R-7-9). November 10, he pleaded no contest to two counts of dealing in stolen property in no. 92-3754, on condition that he receive a concurrent sentence (R-40-43).

October 26, the state filed an habitual violent felony offender sentencing notice (R-12). The record contains the following judgments and sentences: 1) August 9, 1990, convictions of three counts of burglary, two grand theft, one robbery, sentenced to 42 months in prison, concurrent (R-15-18); 2) September 19, 1990, two counts burglary of dwelling, grand theft, petit theft, sentenced to a total of 12 years concurrent (R-27-32); 3) October 22, 1990, burglary of structure, grand theft, grand theft firearm, total of 12 years concurrent with other sentences (R-33-38).

November 10, 1992, Thompson was sentenced to 20 years in prison (10 years each count consecutive) as an habitual offender on the burglary and felony petit theft, with credit for time served of 90 days on Count I only (15 years, non-habitual, concurrent, in no. 92-3754) (R-64-71). His recommended guidelines sentence was 17 - 22 years, the permitted range, 12 - 27 years (R-72).

On appeal, the First District Court of Appeal affirmed Thompson's convictions and sentences per curiam, citing Brooks and certifying the question previously certified in Brooks:

MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

Brooks v. State, 605 So.2d 874 (Fla. 1st DCA 1992), review granted 618 So.2d 208 (Fla. 1993), quashed no. 80,768 (Fla. Oct. 28, 1993).

III SUMMARY OF THE ARGUMENT

This court recently answered the same certified question in Brooks, based on its earlier decision in Hale, infra. This court held that habitual offender sentences may not be imposed consecutively. Thus, petitioner's consecutive habitual offender sentences are illegal and must be run concurrently.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED
MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

This court has recently answered the same certified question in Brooks v. State, no. 80,768 (Fla. Oct. 28, 1993), quashing Brooks v. State, 605 So. 2d 874 (Fla. 1st DCA 1992). This court held that consecutive habitual offender sentences cannot be imposed for crimes growing out of a single episode, answering the certified question in the negative, quashing the district court opinion, and remanding with instructions that Brooks' enhanced sentences be imposed to run concurrently. Petitioner Thompson seeks the same relief here.

This decision in Brooks was based on this court's previous opinion in Hale v. State, ____ So.2d ____, 18 Fla.L.Weekly S535 (Fla. Oct. 28, 1993), the lead case on this issue. Hale was convicted of sale and possession with intent to sell after he sold a small amount of cocaine to a confidential informant. His recommended guidelines sentence was 4-1/2 to 5-1/2 years in prison. Id. He was sentenced, however, as an habitual violent felony offender to 50 years in prison, with 20 years mandatory minimum (two consecutive 25-year terms, with two consecutive 10-year minimum mandatories). Id.

This court rejected Hale's due process claim (that he could not be sentenced as an habitual violent offender for a non-violent offense, Tillman) and his claim concerning cruel or

unusual punishment, neither of which are issues here. Tillman v. State, 609 So.2d 1295 (Fla. 1992).

This court did, however, grant relief on Hale's Daniels claim. Daniels v. State, 595 So.2d 952 (Fla. 1992). In Daniels, this court held that habitual offender mandatory minimum sentences could not be imposed consecutively, on the theory the statute permits only a single enhancement, not consecutive enhancements. In Hale, this court answered the question left unresolved in Daniels and held that "[f]or the same rationale set out in Daniels," not only could the mandatory minimums not run consecutively, but neither could the habitual offender sentences themselves. 18 Fla.L.Weekly at S536.

In Daniels, this court held that habitual offender mandatory minimums more closely resemble mandatory sanctions for use of a firearm in the commission of a felony than those for commission of a capital offense. 595 So.2d at 954. Firearm mandatory minimums cannot exceed a total of three years for each criminal episode because the applicable statute creates an enhancement, not a substantive offense, which does not provide for a mandatory sentence longer than the three years authorized. Palmer v. State, 438 So.2d 1 (Fla. 1983). In contrast, the mandatory penalty applies to each capital crime and may be imposed consecutively for each crime committed. Daniels, 595 So.2d at 953-954.

Each capital crime enhancement rests on a distinct, substantive crime, not on a circumstance common to several crimes which enhance their severity. By comparison, what qualifies an

offender for an habitual violent mandatory minimum term is prior convictions. Prior record, like possession of a firearm during a number of connected crimes, is a single circumstance authorizing enhancement of each crime in the episode. Regardless of the crime, the same enhancing circumstance attaches. Therefore, like the common circumstance of possession of a firearm during a criminal episode, consecutive mandatory minimum penalties for this common circumstance are unauthorized. This ruling was based on a distinction between statutes which specifically include a minimum mandatory sentence, such as capital crimes, from "sentences in which there is no minimum mandatory penalty although may be provided as an enhancement through the habitual violent offender statute." Id.

The same principles apply to the overall sanction imposed under section 775.084, whether as enhancement for a third felony of any character (section 775.084(1)(a)) or for a second felony following a violent felony (section 775.084(1)(b)). For purposes of this analysis, the focus is not whether a mandatory minimum penalty is involved, but whether the same enhancement factor attaches to each offense. For habitual offenders, the enhancement factor authorizes the overall penalty, and for habitual violent offenders, a mandatory minimum term as well. For crimes committed with a firearm, the enhancement factor authorizes a mandatory minimum penalty. The prohibition of consecutive firearm mandatory minimum penalties in Palmer, depended not on the nature of the penalty, i.e., that it is a mandatory minimum and not an overall sanction, but on the

absence of express legislative authority for denial of parole longer than three calendar years. Thus, the distinction between overall sentences and mandatory minimum penalties, drawn in Daniels and by the district court in Brooks, is artificial and should be reconsidered. In determining whether a consecutive penalty is authorized by the existence of an enhancement factor, the nature of the penalty is irrelevant. Whether mandatory or permissive, whether gain time attaches or not, a sentence is a sentence is a sentence.

Although Daniels and Hale involved habitual violent felony offender sentences, and petitioner was sentenced as a nonviolent habitual offender, the principle here applies equally to him. This court should reach the same conclusion it reached in Hale and Brooks.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, quash the district court opinion, and remand with orders that his habitual offender sentences be run concurrently.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Bobbie Darin Thompson, inmate no. #200175, Madison Correctional Institution, P.O. Box 692, Madison, Florida 32340, this 4 day of November, 1993.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

BOBBIE DARIN THOMPSON,

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v. CASE NO. 82,502

STATE OF FLORIDA,

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APPENDIX

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER
FLA. BAR NO. 0513253

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BOBBY DARIN THOMPSON,

Appellant,

v.

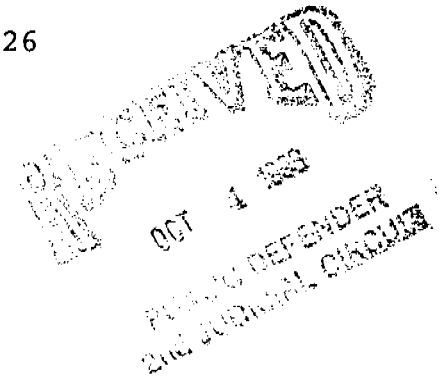
STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 92-4326



Opinion filed October 4, 1993.

An appeal from the circuit court for Escambia County. William Anderson, Judge.

Nancy A. Daniels, Public Defender, and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. See Brooks v. State, 605 So. 2d 874 (Fla. 1st DCA 1992), review granted, 618 So. 2d 208 (Fla. 1993). As we did in Brooks, we certify the following question as one of great public importance:

> MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

ZEHMER, C.J., BARFIELD and ALLEN, JJ., CONCUR.