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IN THE SUPREME COURT OF FLORIDA

STEVEN GEOHAGEN, :

Petitioner, :

v. : CASE NO. 82,846

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I PRELIMINARY STATEMENT

A one volume record on appeal will be referred to as "R", the state's initial brief will be referred to as "IB" and the answer brief will be referred to as "AB", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Appellant was charged by information with burglary, grand theft and fraudulent use of a credit card (R 116-118, 148-149). He pled no contest to the charges of grand theft and fraudulent use of a credit card (R 157, 169-172). He was convicted of the burglary charge (R 125).

At sentencing, the court found appellant to be an habitual felony offender (R 200-201). On the charge of burglary, appellant was sentenced to five years probation with one year in jail as a condition of probation (R 211). On the remaining charges, appellant was placed on five years probation which was to run consecutive to his burglary probation (R 212). On December 22, 1992, the state filed a notice of appeal, alleging that appellant's sentence was an illegal downward departure from the guidelines because no written reasons had been provided by the trial court (R 138-140).

The First District Court of Appeal reversed the trial court's order. State v. Geohagen, 18 Fla. L. Weekly D2268 (Fla. 1st DCA October 19, 1993). The district court held that appellant's sentence constituted a downward departure from the guidelines which required written reasons as well as a finding that habitual offender sentencing was not necessary for the protection of the public. Id.

On November 3, 1993, appellant filed a motion to certify this issue as one of great public. The district court granted this motion on December 3, 1993. Appellant filed notice to

invoke the discretionary jurisdiction of this Court on December 6, 1993. This appeal follows.

III SUMMARY OF THE ARGUMENT

The trial judge found Geohagen to be an habitual felony offender and properly sentenced him to probation on one case and to probation with a jail sentence on the other case. The trial judge's sentence was a legal sentence under the habitual offender statute because he was not required to sentence Geohagen to a "term of years".

In King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), rev. dismissed, 602 So. 2d 942 (Fla. 1992), the court suggested that incarceration was required for all habitual offender sentences and that sentences of community control or probation only were subject to the sentencing guidelines procedures. However in Burdick v. State, 594 So. 2d 267 (Fla. 1992), this Court held trial judges have discretion in imposing habitual offender sentences "anywhere" up to the maximum. This holding was premised on an extensive statutory interpretation analysis which read the "shall" in section 775.084(a), to be permissive.

Burdick dealt with first degree felonies. However, Burdick can not be limited to first degree felonies without creating an absurd construction. Section 775.084(a)1, states that life is the maximum sentence for a first degree felony, but it does not contain the phrase "term of years". Section 775.084(a)1. and 2., which set out the maximum sentences for second and third degree felonies, do contain the phrase "term of years".

Consequently, if the reasoning in Burdick (that "shall" means "may"), is not extended to second and third degree

felonies, then a trial judge sentencing under section 775.084(a), could impose a probationary sentence for a first degree felony, but would be required to impose a "term of years" for second and third degree felonies. The "term of years" cannot be read into section 775.084(a)1. to cure this absurdity without completely rewriting the subsection. Since the majority opinion in King appears not to have considered these points, and there is evidence Burdick was completely ignored, King's conflicting language should not be followed.

This Court should reverse the district court's decision and affirm Geohagen's sentence.

IV ARGUMENT

GEOHAGEN'S HABITUAL OFFENDER SENTENCE IS LEGAL SINCE THE TRIAL JUDGE IS NOT REQUIRED TO SENTENCE HIM TO INCARCERATION AND HAS THE DISCRETION TO IMPOSE A PROBATION ONLY SENTENCE.

The trial court declared Geohagen to be an habitual felony offender and then sentenced him on 3 third degree felonies to terms of probation (R 211-16). Appellee argued below that the legislature intended only incarcerative sanctions on third degree habitual offender sentences because it specified such sentences are to be for "a term of years not exceeding 10" (IB 3; Section 775.084(4)(a)(3), Fla. Stat. (1991)). Appellee argued that Geohagen's sentence was thus illegal because on two of Geohagen's offenses the trial court imposed only a probationary sentence (IB 3).

Appellee relied on King v. State, 597 So. 2d 309 (Fla. 2d DCA 1992), rev. dismissed, 602 So. 2d 942 (Fla. 1992), which was adopted by this Court in McKnight v. State, 18 Fla. L. Weekly, S191 (Fla. March 25, 1993). King held that habitual offender sentencing is a two step procedure. Id. at 313. The first step, described in section 775.084(3), is the determination of whether a defendant qualifies as an habitual felony offender. Id. The 1988 amendments to section 775.084(3) removed the trial court's discretion in this process so that qualification for habitual offender status is now merely a ministerial determination. Id. Here, the trial court properly determined Geohagen qualified as an habitual felon based on his prior record (R 200-4), and this act is not now in dispute.

The second step, described in section 775.084(4), involves determining the sentence to be imposed after a defendant is found to be an habitual felony offender. Id. It is this step that is at issue here (IB 3).

King holds that the "trial judge retains the discretion to exercise leniency in regard to habitual felony offenders in two ways." 597 So. 2d at 314. First, under section 775.084(4)(c), the trial judge (without the necessity of making findings that an habitual offender sentence is necessary for the protection of the public), can merely decide not to sentence the defendant as an habitual felony offender. Id. The trial judge did not choose this option when sentencing Geohagen. Instead, the trial judge chose the second option, which the King court described as follows:

> having determined to sentence the defendant as an habitual felony offender, the trial judge has the discretion to sentence an habitual felony offender to any term of years up to the maximum sentence provided in subsections 775.084(4)(a)(1), (2) and (3). . . .

597 So. 2d at 315 (emphasis supplied). Since, on at least one case, the trial judge failed to sentence Geohagen to a "term of years" and instead imposed a probationary sentence, the state argues it is an illegal sentence as contemplated in King.

This Court should reject this argument as it applies to Geohagen's facts because it conflicts with Burdick v. State, 594 So. 2d 267 (Fla. 1992) and State v. Tito, 18 Fla. L. Weekly S206 (Fla. April 1, 1993). Section 775.084(a) states:

> The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:
>
> 1. In the case of a felony of the fist degree, for life.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30.
>
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(emphasis supplied). After a detailed statutory interpretation analysis, the Burdick Court held that the term "shall" (underlined above), was actually permissive, meaning "may", and did not require trial judges to give life sentences on first degree felonies. 594 So. 2d at 271. Rather, trial judges "can sentence anywhere up to the maximum sanction." Id. at 269 (emphasis in original). Logically extending Burdick, since the term "shall" actually means "may", a trial judge could choose not to sentence a defendant to a "term of years" for a second degree or third degree felony under section 775.084(a)2. or 3. The trial judge might choose to sentence to a "term or years" or he might instead choose to impose probation or community control. Here, the trial judge chose the latter when he sentenced Geohagen.

Appellee's position is supported by the Florida Supreme Court's decision in Tito, 18 Fla. L. Weekly S206. In Tito (decided after McKnight), the Court approved of a probation only habitual offender sentence. In doing so the court stated:

> In Burdick v. State, 594 So. 2d 267 (Fla. 1992), we held that a sentencing judge may exercise his or her discretion in employing the habitual offender statute. We find no

> abuse of discretion in placing Tito on ten years' probation after completing his prior sentence. McKnight v. State, no. 79,689 (Fla. Mar. 25, 1993)[18 Fla. L. Weekly S191].

To limit Burdick to first degree felonies would result in a schizophrenic construction: The word "shall" would mean "may" for first degree felonies, but the same word "shall" would mean "shall" for second and third degree felonies. This construction has been adopted by the Fifth District Court of Appeal. See, Lowe v. State, 605 So. 2d 505, 507 (Fla. 5th DCA 1992); State v. Manning, 605 So. 2d 508, 510 (Fla. 5th DCA 1992). This Court should refuse to follow the fifth district. In practice such a construction would lead to absurd results. For example, if Geohagen had committed a first degree felony, such as armed robbery, his sentence would not require incarceration since section 775.084(a)1., does not require a "term of years". Consequently, if Burdick is not read to apply to second and third degree felonies, it will allow probationary sentences for first degree felonies and require incarceration for second and third degree felonies because section 775.084(a) 2., and 3. require a "term of years". Neither Lowe nor Manning address this absurd result.

Unfortunately, King is not very helpful on this point. The opinion concludes that defendants may be sentenced as: "habitual felony offenders under subsections 775.084(4)(a)(1), (2) and (3), for felonies of the first, second and third degree, respectively, for life or any term of years not to exceed the maximum sentence prescribed for each degree of offense."

597 So. 2d at 316 (emphasis supplied). The court came to this conclusion even though it agreed "the term 'shall', as it applies to the sentencing procedure set forth in subsections 775.084(4)(a)(1) and (b)(1), [was] permissive rather than mandatory." Id. at 315. Consequently, King states that any community control or probation only sentence requires "activation of the guidelines procedures." Id. However, if "shall" is truly permissive, a "term of years" is not required under section 775.084(a) and Geohagen's trial judge was not bound to follow guidelines procedure since he imposed a legal habitual offender sentence.

King, without any analysis, reads into section 775.084(a)1., a term of years requirement for first degree felonies, even though the term - "term of years" - is not found in subsection 1. This is apparently what Lowe and Manning also do. Reading "term of years" into section 775.084(a)1., would require rewriting the entire subsection. Moreover, such an interpretation ignores Burdick's holding that trial judges can sentence "anywhere" up to the maximum. 594 So. 2d 269. Even more peculiar, although the majority cited Burdick at the beginning of its opinion, 597 So. 2d at 313, it ignored it in its analysis and cited conflict with the lower court opinion in Burdick even though this Court had already resolved this conflict. This suggests the majority actually ignored this Court's Burdick opinion and is good evidence the majority did a poor job of fully considering Burdick's application.

However, the concurring opinion did address Burdick, stating:

> the supreme court's multiple, unrestricted use of the word "permissive" in its Burdick opinion requires the conclusion that the court meant what it said, i.e., that it is permissive whether to sentence a habitual offender to incarceration or not.
>
> 597 So. 2d at 318. (Lehan, J. concurring).

This is the cleanest view of the issue here. This court should not read King to require "term of years" sentences under section 775.084(a) because such a reading would conflict with Burdick. Burdick means a trial judge may impose an incarcerative or probationary sentence when sentencing pursuant to section 775.084(a). The trial judge here chose not to impose incarceration since he had this discretion under 775.084(a). Burdick. Since he did sentence under section 775.084(a), guidelines procedures were not activated. Section 775.084(e), Fla. Stat. (1991); King.

Geohagen's original sentence was proper. Therefore, this Court should reverse the decision of the district court.

V CONCLUSION

Based on the foregoing argument, this court should reverse the decision of the district court and affirm Geohagen's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by delivery to Ms. Amelia Beisner, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to petitioner, Mr. Steven Geohagen, on this 10th day of January, 1994.

JOHN R. DIXON

IN THE SUPREME COURT OF FLORIDA

STEVEN GEOHAGEN,	:	
Petitioner,	:	
v.	:	CASE NO. 82,846
STATE OF FLORIDA,	:	
Respondent.	:	
_____/		

A P P E N D I X

TO

PETITIONER'S INITIAL BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

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

v.

CASE NO. 92-4377

STEVEN GEOHAGEN,

Appellee.

_____/

Opinion filed October 19, 1993.

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

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellant.

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

PER CURIAM.

The state appeals the trial court's sentencing of Steven Geohagen to straight probation despite the explicit finding that Geohagen qualified as a habitual felony offender. The issue raised by the state is whether section 775.084, Florida Statutes, authorizes sentences of straight probation. We find this issue controlled by the supreme court's decision in McKnight v. State,

616 So. 2d 31 (Fla. 1993), expressly adopting the rationale of the en banc opinion in King v. State, 597 So. 2d 309 (Fla. 2d DCA), review denied, 602 So. 2d 942 (Fla. 1992). Accordingly, we reverse.

McKnight simply holds that a trial judge "has the discretion to place an habitual felony offender on probation." 616 So. 2d at 31. This holding would appear to compel affirmance; however, in adopting the rationale of King, the McKnight decision belies its simplicity, for King, in reality, does not stand for an affirmative answer to the issue raised by the state. Rather, a careful reading of King leads to the conclusion that section 775.084, by its terms, does not authorize sentences of straight probation. To the contrary, according to the King rationale, section 775.084 affords a trial court a number of options. For example, a trial court may apply the statutory criteria and determine a person to be qualified as a habitual felony offender, but the court is not required thereafter to sentence the person as such if the court decides pursuant to subsection 775.084(4)(c) that a habitual offender sentence is not necessary for the protection of the public. However, once the court makes the latter determination, even though the person qualifies as a habitual offender, King holds that "any sentence then imposed must comport with sentencing guidelines or departure rules and any failure to do so would be the proper subject of appeal by the state as well as the defendant." 597 So. 2d at 315-16. As King explained:

> It does seem clear that under section 775.084, absent a decision that sentencing as an habitual felony offender is not necessary, any sentence of such an habitualized defendant must be a prison sentence for a term of years not to exceed the maximum sentences allowable. In order to properly sentence a defendant found to be an habitual felony offender to probation or community control, the trial judge would first have to make a decision under subsection 775.084(4)(c) that a sentence as an habitual felony offender was not necessary. Having made that decision, a sentence pursuant to sentencing guidelines would then be required. If the guidelines recommended sentence called for a sentence other than probation or community control, in order to impose such a sentence, the trial judge would be required to enter an order finding proper reasons for a downward departure.

Id. at 317 (emphasis in original).

Applying the above rationale to the facts of the instant case requires reversal. Although the trial court conclusively found Geohagen to be a habitual felony offender, it nonetheless chose to place him on probation.[1] However, the imposition of probation amounted to a downward departure from the guidelines permitted range of 2½ to 5½ years' incarceration. Therefore, it was incumbent on the court to give reasons for this departure. Additionally, we note that nowhere in the record does it appear that the court specifically determined under subsection 775.084(4)(c) that sentencing Geohagen as a habitual offender was

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[1] In actuality, Geohagen received two probationary sentences: in case number 92-2440 (burglary), Geohagen was placed on probation for five years, with one condition being a year in county jail; in case number 92-2666 (fraudulent use of a credit card and grand theft), Geohagen was placed on probation for five years, to run consecutively to the probation in case number 92-2440. The state argues only the latter sentence is illegal.

not necessary for the protection of the public. Consequently we reverse and remand for the court to reconsider Geohagen's sentence. As there is no indication on the record that the court intended to impose a departure sentence, the court may re-impose a departure sentence if it files appropriate written reasons. See Henderson v. State, 577 So. 2d 653 (Fla. 1st DCA), review denied, 589 So. 2d 291 (Fla. 1991).

REVERSED and REMANDED for further proceedings.

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