IN THE SUPREME COURT OF FLORIDA

TYRONE STEPHAN JACKSON, :

Petitioner, :

v. : CASE NO. 84,475

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Any references to the record proper shall be referred to by the letter "R" followed by the appropriate page number. Any references to the transcript shall be by the letter "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

By second amended information filed on April 5, 1993, Petitioner was charged with having committed attempted armed robbery and two counts of second-degree felony murder on or between August 11 and 12, 1992. (R-39).

Petitioner proceeded to jury trial and on April 8, 1993, he was found guilty of attempted robbery with a firearm, and both counts of second-degree felony murder. (R-42-43).

On April 23, 1993, Petitioner was sentenced to life, with credit for 255 days jail time, with a minimum mandatory 15-year sentence imposed as an habitual violent felony offender for both counts of second-degree felony murder, with each count to run concurrently with the other. (R-84-85). For Petitioner's conviction on attempted armed robbery, he was sentenced to a prison term of 30 years as an habitual violent felony offender with the 10-year minimum mandatory sentence imposed. This minimum mandatory sentence was ordered to run concurrently with the two 15-year minimum mandatory sentences imposed above. Petitioner's 30-year sentence on this count was to run consecutively to the sentences imposed on Counts II and III (above). Additionally, the trial court ordered that Petitioner serve the 3-year minimum mandatory term prescribed by Section 775.087(2) with this term to run consecutively to the 15-year minimum mandatory terms imposed in Counts II and III. (R-86).

Notice of appeal was timely filed on or about May 4, 1993. (R-96).

On September 8, 1994, the Florida First District Court of Appeal issued its opinion in this case. The Florida First District Court of Appeal affirmed all three of Petitioner's convictions and affirmed the sentences on the felony murder convictions but reversed the sentence imposed for attempted armed robbery.

Under the authority of Hale v. State, 630 So.2d 521 (Fla. 1993), and Brooks v. State, 630 So.2d 527 (Fla. 1993) the sentence for attempted armed robbery which was imposed to run consecutively to the sentences on the felony murders was reversed and ordered to run concurrently with the felony murder sentences because all three involved habitual offender penalties.

However, the court allowed the minimum mandatory firearm sentence imposed upon Petitioner to run consecutively to the habitual offender minimum mandatory sentences. In doing so, the Florida First District Court of Appeal acknowledged that the decision in this case was in conflict with the decisions in Davis v. State, 630 So.2d 595 (Fla. 2d DCA 1993), and Longley v. State, 614 So.2d 34 (Fla. 5th DCA 1993).

SUMMARY OF THE ARGUMENT

In sentencing Petitioner, the trial court improperly stacked the 3-year minimum mandatory sentence for possession of a firearm in Petitioner's conviction for attempted robbery on top of Petitioner's minimum mandatory habitual violent felony offender sentences. The Florida First District Court of Appeal approved this improper sentencing scheme without authority and in the face of authority to the contrary because the minimum mandatory statutes involved "separate harms".

The Florida First District Court of Appeal's twisted rationale was a distinction without a difference. The statutes involved in Daniels v. State, 595 So.2d 952 (Fla. 1992) likewise were addressed to "separate harms" but notwithstanding this Daniels prohibits the stacking of habitual offender minimum mandatory sentences within a single criminal episode. Palmer v. State, 438 So.2d 1 (Fla. 1983) prohibits the stacking of firearm minimum mandatory sentences within a single episode. Davis v. State, 630 So.2d 595 (Fla. 2d DCA 1993) and Longley v. State, 614 So.2d 34 (Fla. 5th DCA 1993) recognize that under Daniels and Palmer it is impermissible to stack the minimum mandatory sentence for possession of a firearm on top of the minimum mandatory sentences imposed by the habitual violent felony offender statute. Davis and Longley both considered the Florida First District Court of Appeal's misguided rationale and rejected it.

ARGUMENT

ISSUE ON APPEAL

THE FLORIDA FIRST DISTRICT COURT OF APPEAL WAS WRONG TO SANCTION THE STACKING OF THE MINIMUM FIREARM MANDATORY SENTENCE ON TOP OF THE MINIMUM MANDATORY VIOLENT FELONY HABITUAL OFFENDER SENTENCES.

Daniels v. State, 595 So.2d 952 (Fla. 1992) prohibits the stacking of habitual offender minimum mandatory sentences within a single criminal episode. Palmer v. State, 438 So.2d 1 (Fla. 1983) prohibits the stacking of firearm minimum mandatory sentences within a single episode. Davis v. State, 630 So.2d 595 (Fla. 2d DCA 1993) and Longley v. State, 614 So.2d 34 (Fla. 5th DCA 1993) recognize that under Daniels and Palmer it is improper in a single criminal episode to stack the minimum mandatory firearm sentence on top of the minimum mandatory habitual offender sentences. As pointed out by the dissenting judge in the Florida First District Court of Appeal's opinion, the majority below authorized the consecutive stacking of the minimum mandatory firearm sentence on top of the minimum mandatory habitual violent felony sentences because such sentences address "separate harms" even though there is no case authority for such a ruling, and the statutes involved in Daniels, Palmer, and Hale v. State, 630 So.2d 521 (Fla. 1993), and Brooks v. State, 630 So.2d 527 (Fla. 1993), also involved various statutes which addressed different "harms" and separate crimes.

In Daniels, this Court stated:

> Because the statute prescribing the penalty for Daniels' offenses does not contain a provision for a minimum mandatory sentence, we hold that his minimum mandatory sentences imposed for the crimes he committed arising out of the same criminal episode may only be imposed concurrently and not consecutively. [Id. at 954].

Likewise, in this case the penalties for Petitioner's offenses do not contain a provision for a minimum mandatory sentence. Hence, the trial court had no discretion nor authority to stack the minimum mandatory 3-year firearm sentence on top of the minimum mandatory habitual offender sentences.

The "separate harms" argument was presented squarely to the Longley court where, out of the same criminal episode, the 3-year minimum mandatory firearm sentence was imposed consecutively to Longley's 15-year minimum mandatory habitual violent felony offender. In rejecting this argument, the Fifth District Court of Appeal stated:

> However, the State contends that even though Longley committed only a single episode of armed robbery, the trial court properly stacked the two minimum mandatory terms within a single sentence because the two sentencing enhancement statutes address separate and distinct wrongs.
>
> In Daniels v. State, [citations omitted], the Florida Supreme Court addressed a situation that involved three criminal charges arising out of a single criminal episode. The court held that the trial court must order the defendant to serve concurrently, and not consecutively, the minimum mandatory portions of the sentences for crimes that arose out of a single episode. Id. at 954. See also Brown v. State, 599 So.2d 132 (Fla. 2d DCA 1992); McCormick v. State, 494 So.2d 285 (Fla. 2d

> DCA 1986), review denied, 503 So.2d 328 (Fla. 1987). We find that similar reasoning controls the instant case, which involved only one sentence for one criminal charge arising out of a single criminal episode. Accordingly, we hold that the trial court erred by order Longley to serve consecutively, rather than concurrently, the two minimum mandatory portions of his sentence. [Emphasis added; Id. at 35].

Similarly, in Davis, the defendant was sentenced to a 15-year minimum mandatory sentence as an habitual violent felony offender with a 3-year minimum mandatory sentence for possession of a firearm consecutively stacked on top of it. Davis was apparently convicted of armed robbery and possession of a firearm.

In rejecting the state's position, the Florida Second District Court of Appeal stated:

> [In Daniels] The Supreme Court held that the sentences could only be imposed concurrently because the statutes prescribing penalties for those offenses do not require minimum mandatory sentences. Rather, it was the habitual offender statute that required the minimum mandatory sentences and, "As in the case of the 3-year minimum mandatory sentence required for committing a felony while in possession of a gun, Section 775.084 constitutes an enhancement of the felony prescribed by statute for the underlying offense." 595 So.2d at 954. [Davis at 595].

The Second District Court of Appeal agreed with the Fifth District Court of Appeal that under the circumstances here, Daniels required reversal of the consecutive imposition of the minimum mandatory firearm sentence on top of the minimum mandatory habitual violent felony offender sentence "...because they too were not required by the statute's prescribing

penalties for the offense of which Davis was convicted." Id. at 595-596.

Without authority, and without rationale, the majority concluded that notwithstanding this Court's decisions in Daniels, Brooks, and Hale, as well as the Fifth District Court of Appeal's decision in Longley, and the Second District Court of Appeal's decision in Davis, it could do willy-nilly what it pleased without regard to the law. The distinction that separate harms are addressed by the statutes involved is a distinction without a difference, and one unsupported in the law.

Under the circumstances, the sentences in this case must run concurrently; and the minimum mandatory sentence for the use of a firearm must run concurrently with the minimum mandatory sentences authorized by the habitual offender statute.

CONCLUSION

Based on the foregoing arguments and authorities, the Florida First District Court of Appeal's opinion that approved the stacking of the minimum mandatory firearm provision on top of the minimum mandatory habitual violent felony offender provisions should be quashed.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to Giselle Rivera, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 12th day of January, 1995.

Respectfully submitted,

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