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APR 28 1995

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

MARVIN LEE KING,

Petitioner,

v.

CASE NO. 85,026

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner will use the same designations as in his initial brief on the merits, with the addition of the respondent's brief on the merits being cited as "RM. ___."

STATEMENT OF THE CASE AND FACTS

Petitioner and state stipulate to the statement of the case and facts as presented in petitioner's initial brief on the merits.

ARGUMENT

ISSUE/CERTIFIED QUESTION: AFTER A TRIAL JUDGE MAKES A VALID FINDING THAT A DEFENDANT IS AN HABITUAL FELONY OFFENDER, AND IMPOSES A NON-HABITUAL OFFENDER SENTENCE OF PRISON, FOLLOWED BY PROBATION, AND THE DEFENDANT SERVES THE PRISON TERM, BUT SUBSEQUENTLY VIOLATES HIS ORDER OF PROBATION, MAY THE TRIAL JUDGE, UPON RESENTENCING, IMPOSE AN HABITUAL FELONY OFFENDER PRISON TERM, THE TOTAL OF WHICH DOES NOT EXCEED THE MAXIMUM ALLOWED BY LAW, PROVIDED THAT IT ALLOWS CREDIT FOR ALL PRIOR PERIODS OF INCARCERATION?

Petitioner relies upon all facts, law, and argument presented in his initial brief on the merits, and replies to the state's response as follows:

Respondent, the State, in footnote 4 of its initial brief on the merits, states:

In any event, because the State sought habitual offender sentencing and requested that the trial court impose the maximum possible sentence of life in prison before petitioner was placed on probation (ASM 10), petitioner was well aware of the consequences he faced if he did not successfully complete his probationary term.

(RM. 18)(Emphasis in original).

This is not supported by the record, however, it does point out a legal fiction which creates the situations such as that of which the petitioner complains. The petitioner was NOT sentenced as a habitual offender, and he was not told that he could be sentenced as such upon a violation of probation. A reasonable person would not realize he could be habitualized for a violation of probation where he was not habitualized for the underlying crime.

Petitioner steadfastly argues that the certified question should be answered in the negative, however, if this Court were to find that it is proper to habitualize someone in the petitioner's posture, then it should also find that petitioner should have explicitly been made aware of such grave consequences. This would require the same general language required in pleas where habitualization is a possibility. See Ashley v. State, 614 So. 2d 486 (Fla. 1993). No such warning was given to petitioner and the state cannot argue he was aware of such consequences.

The state also argues that:

[i]f petitioner is successful in his argument and this Court determines that a trial court cannot habitualize a career criminal after revoking the probationary portion of a non-habitual split sentence, even when the defendant is made aware of the consequences of habitualization before he or she is placed on probation, then no courts in the future will afford habitual felons the same kind of second chance the trial court in this case initially afforded petitioner.

(RM.20-21).

There are two problems with this all or nothing argument by the state. First, petitioner was not aware that a violation of his probation would result in being sentenced as an habitual offender, where the trial court did not sentence him as such to begin with, and where he was not warned that such consequences could follow upon violation of his probation. Second, should this Court should find in the affirmative on the question certified, then it could also find that for a person to be habitualized in this manner would require an advance warning -- in words similar to those required by Ashley. Thus, the dire consequences predicted by the state would not come to pass.

However, in regard to the warning which may be required should this Court find in the affirmative -- what would constitute a violation such that a defendant would be sentenced to 30 years for a violation of probation? Should a person who has served his time in prison and has served well almost all of his probation afterwards, suddenly find himself incarcerated for 30 years for a failure to file a report? This would be absurd, and petitioner would ask this Court, should it answer the question certified in the affirmative and find a warning required, to also

set out specifically what violations would be necessary before habitualization can be imposed upon violation of probation in circumstances similar to those herein, and that those violations be substantial, not trivial or technical.

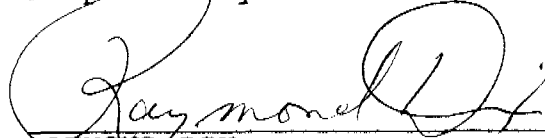
CONCLUSION

Based on the foregoing arguments and authorities, the certified question must be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Amelia L. Beisner, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to petitioner, Mr. Marvin Lee King, on this 28th day of April, 1995.

Respectfully submitted,



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