

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

MAY 4 1995

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By                       
Chief Deputy Clerk

CASE NO. 85,479

**THE STATE OF FLORIDA,**

Petitioner,

vs.

**BOB MICHAEL CHAMPAGNE,**

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Petitioner was the appellee in the appellate court; Respondent was the appellant.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the state; Respondent may also be referred to as Defendant.

The following symbols will be used:

- "R" Record on Appeal
- "T" Trial Transcript
- "Ex." Petitioner's Exhibits (included in appendix to Petitioner's Brief on the Merits).

STATEMENT OF THE CASE

Respondent, Bob Michael Champagne, was charged with three counts of armed robbery. (R. 1-3). Following trial by jury, Appellant was found to be a habitual violent felony offender and sentenced to life in prison on each count. (R. 62-65). The sentences were ordered to run consecutive to each other, with concurrent minimum mandatory sentences. (R. 64). Respondent's permitted sentencing guidelines sentence was 9-22 years. (R. 65).

On appeal, the Third District Court of Appeal affirmed Respondent's conviction and reversed Respondent's sentence based upon the authority of Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, \_\_U.S.\_\_, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994) and Hill v. State, 645 So. 2d 90 (Fla. 3d DCA 1994), with directions to impose concurrent sentences. (Ex. 1). On rehearing, the Third District certified the following question to be of great public importance:

Whether Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, \_\_U.S.\_\_, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), precludes under all circumstances the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony or habitual violent felony offenders?

(Ex. 2).

STATEMENT OF THE FACTS

Because the facts and circumstances relating to the crimes preceding Respondent's arrest and conviction are wholly irrelevant to the legal question certified by the district court as a question of great public importance, Petitioner will not restate them in the instant brief. However, for the sake of completeness Petitioner relies on the Statement of the Case and Facts as presented in the state's brief on direct appeal which has been included in the appendix to the instant brief. (Ex. 3).

### SUMMARY OF THE ARGUMENT

Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, \_\_U.S.\_\_, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), which relies on Daniels v. State, 595 So. 2d 952 (Fla. 1992) and Palmer v. State, 438 So. 2d 1 (Fla. 1983), can only be read to prohibit the imposition of consecutive minimum mandatory sentences, not maximum permissible sentences.

Moreover, because the maximum permissible sentences authorized by §775.084 are merely substitutes for the maximum permissible sentences otherwise provided by law, and §775.021 allows maximum permissible sentences to be imposed consecutively, Hale cannot be read to prohibit consecutive maximum permissible sentences imposed pursuant to §775.084. This is particularly true since the limitation of consecutive maximum permissible sentences where a defendant has been declared a habitual felony or habitual violent felony offender may result in a sentence well below the guidelines sentence that would have been imposed if the defendant had not been declared a habitual felony or habitual violent felony offender and the trial court is directed to impose consecutive maximum permissible sentences in cases not involving habitual felony or habitual violent felony offenders to achieve a guidelines sentence.

QUESTION PRESENTED

WHETHER HALE v. STATE, 630 So. 2d 521 (FLA. 1993), cert. denied, U.S., 115 S. Ct. 278, 130 L. Ed. 2D 195 (1994), PRECLUDES UNDER ALL CIRCUMSTANCES THE IMPOSITION OF CONSECUTIVE SENTENCES FOR CRIMES ARISING FROM A SINGLE CRIMINAL EPISODE FOR HABITUAL FELONY OR HABITUAL VIOLENT FELONY OFFENDERS?



## ARGUMENT

WHETHER HALE v. STATE, 630 So. 2d 521 (FLA. 1993), cert. denied, U.S., 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), PRECLUDES UNDER ALL CIRCUMSTANCES THE IMPOSITION OF CONSECUTIVE SENTENCES FOR CRIMES ARISING FROM A SINGLE CRIMINAL EPISODE FOR HABITUAL FELONY OR HABITUAL VIOLENT FELONY OFFENDERS?

Respondent was convicted of three counts of armed robbery. (R. 44-45). Respondent was declared a habitual violent felony offender and sentenced to three consecutive terms of life in prison. (R. 62-65). The minimum mandatory terms of each sentence were ordered to run concurrent with each other. (R. 65; T. 313-314). On appeal Respondent claimed that the trial court improperly imposed consecutive sentences after he was habitualized because Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, U.S., 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), prohibits the imposition of consecutive sentences.

In Hale this court held that the trial court could not impose consecutive enhanced habitual offender sentences for the possession and the sale of the same identical piece of cocaine. 630 So. 2d at 525.

Petitioner submits that Hale, which expressly relies on Daniels v. State, 595 So. 2d 952 (Fla. 1992), and Palmer v. State, 438 So. 2d 1 (Fla. 1983), can only be read to prohibit the

imposition of consecutive minimum mandatory portions of the habitual violent felony offender sentence. In Daniels, this court held that the minimum mandatory sentences imposed for crimes committed in a single criminal episode may only be imposed concurrently and not consecutively. 595 So. 2d at 954. This was so because the statute prescribing the penalty for Daniels' offenses did not contain a provision for a minimum mandatory sentence. 595 So. 2d at 954. In Hale this court expressly stated that for the same rationale set out in Daniels, Hale's enhanced sentences could not run consecutively, 630 So. 2d at 524.

In Palmer this court held that minimum mandatory sentences for crimes arising from a single criminal episode could not be imposed consecutively because the legislature did not intend that §775.021 of the Florida Statutes, allowing the trial court to impose consecutive or concurrent sentences for offenses arising from a single criminal episode, to amount to a delegation of parole authority to the trial court. 438 So. 2d at 4.

Because Palmer and Daniels expressly prohibit only the imposition of consecutive minimum mandatory sentences and Hale relies on the rationale of Palmer and Daniels, Petitioner submits that Hale can only be read to prohibit consecutive minimum

mandatory sentences and should not be read to prohibit the imposition of consecutive maximum permissible sentences.<sup>1</sup>

Section 775.021(4) of the Florida Statutes authorizes the trial court to impose concurrent or consecutive sentences and applies to all offenses defined by other statutes unless the code provides otherwise. §775.021, Fla. Stat. (1993). Although this court held in Daniels that §775.02(4) could not support the imposition of minimum mandatory sentences, Petitioner submits that §775.021 does support the imposition of consecutive maximum permissible mandatory sentences, such as the consecutive life sentences imposed in the instant case. This conclusion is supported by the fact that only the minimum mandatory portions of the sentences in Daniels were ordered to run concurrently, while the remaining portion of the sentences in both cases were allowed to remain consecutive. Daniels, 595 So. 2d at 954; Palmer, 438 So. 2d at 3.

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<sup>1</sup> In fact, Hale challenged only the consecutive minimum mandatory sentences and this court in Hale stated:

Hale asserts that our decision in Daniels requires a reversal of the trial court's imposition of consecutive minimum mandatory sentences. We agree.

630 So. 2d at 524.

Maximum permissible habitual offender sentences are merely substitutes for standard (non-habitual) maximum permissible sentences. Because maximum permissible sentences may be imposed consecutively, the increased maximum permissible sentence must also be subject to consecutive imposition, else there would be no penalty as a result of designation as a habitual felony or habitual violent felony offender.

A standard (non-habitual) statutory maximum sentence may always be imposed to run consecutive to another such sentence pursuant to §§775.021(4)(a) & 4(b), Fla. Stat. (1993). Finding a defendant to be a habitual offender, an obligatory and purely administrative act,<sup>2</sup> and determining that imposition of such a sentence is necessary for the protection of the public simply results in the supplantation of the standard statutory maximum with the one set forth in the habitual offender statute. However, its essential character as a statutory maximum remains the same and, therefore, warrants a consistent application of the rules of construction with that which applies to standard maximum sentences. There is no valid reason to treat the replaced maximum sentences any differently as far as application of the rules of construction and the policies underlying them is concerned.

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<sup>2</sup> See King v. State, 597 So. 2d 309 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992).

The Hale rule is grounded on the belief that the legislature did not intend that the enhanced sentences imposed pursuant to §775.084 be further enhanced by permitting them to run consecutively. However, allowing these sentences to run consecutively is not a further enhancement any different from that which is permitted with standard sentences. By prohibiting enhanced maximum permissible sentences from running consecutively, Hale, if read to prohibit more than consecutive minimum mandatory sentences, has eviscerated the legislative intent behind §775.084, i.e., the need and desire to punish habitual offenders more harshly than non-habitual offenders.

Moreover, preclusion of consecutive non-minimum mandatory sentences in all cases where a defendant has been declared to be a habitual felony or habitual violent felony offender leads to the illogical conclusion that a habitual felony or habitual violent felony offender may actually benefit from such a designation. For example, as was the case in Hill v. State, Case No. 84,727, currently pending before this court, the requirement that all sentences arising from a single criminal episode be imposed concurrently rather than consecutively could result in a significant downward departure from the sentencing guidelines, despite the fact that the defendant has been designated a

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habitual felony or habitual violent felony offender for the protection of the public. <sup>3</sup> §775.084(4)(c) Fla. Stat. (1993).

The irony and illogic of this conclusion is made apparent when one considers the rule which requires that regular statutory maximum sentences be imposed consecutively where the sentences, if imposed concurrently, would be less than the guidelines recommended sentence. See Branam v. State, 554 So. 2d 512 (Fla. 1990). Hale as interpreted by the district court in the instant case, precludes the stacking of habitual offender maximum sentences in all cases, even where the failure to impose consecutive sentences would result in an "enhanced" sentence well below the guidelines, when the law requires non-habitual maximum sentences to be stacked to reach a sentence recommended by the guidelines. The result, of course, is that many defendants receive a lower sentence as a habitual felony offender than they would otherwise. This clearly and directly contravenes the expressed purpose of the habitual felony offender sentencing scheme. The legislature not only intended to provide for greater sentencing under the habitual felony and habitual violent felony offender sentencing scheme but expressly stated that the

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<sup>3</sup> Hill was convicted of burglary, grand theft of a motor vehicle and possession of burglary tools. Hill's recommended guidelines sentence was twenty-two to twenty-seven years in prison with a permitted sentence of seventeen to forty years. Hill was sentenced to three consecutive ten-year terms with three five-year minimum mandatory terms. On appeal, Hill's sentences were ordered to run concurrent, resulting in a substantial downward departure from the guidelines. Hill v. State, 645 So. 2d 90 (Fla. 3d DCA 1994).

guidelines limitations do not apply<sup>4</sup> so that defendants could be sentenced to a greater term than the guidelines permit.

A further unacceptable result of the district court's interpretation of Hale is that the trial court will be forced to compare a guideline sentence with a habitual felony offender sentence in every case. Afterward, despite the fact that a trial judge may determine sentencing as a habitual felony offender is necessary for the protection of the public,<sup>5</sup> the court will choose not to sentence the defendant as a habitual offender simply because the standard guidelines sentence is greater than the habitual offender sentence. Thus, ironically, it will be "necessary for the protection of the public" to sentence the defendant as a non-habitual offender rather than as a habitual felony offender. This result is patently unreasonable.

In summary, the state urges the court to limit the Hale rule to its particular facts and thereby only prohibit the imposition of consecutive minimum mandatory sentences for each offense committed during a single criminal episode under §775.084, Florida Statutes, the same restriction placed on non-habitualized sentences. Alternatively, an exception to the application of the rule must be created where prohibition of consecutive sentences

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<sup>4</sup> See §775.084(4)(e) Fla. Stat. (1993).

<sup>5</sup> See §775.084(4)(c) Fla. Stat. (1993).

will result in a downward departure from the permitted guidelines sentence. See Branam, supra.




CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that this court answer the certified question in the negative and find that maximum permissible sentences enhanced by §775.084 of the Florida statutes may be imposed consecutively pursuant to §775.021 of the Florida Statutes, even where the offenses arise from a single criminal episode, just as maximum permissible sentences not enhanced by §775.084 may be imposed consecutively pursuant to §775.021.

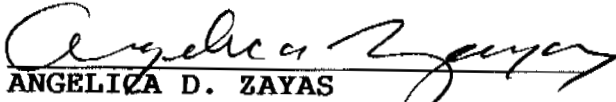
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS was furnished by mail to SHERYL J. LOWENTHAL, Suite 911, Douglas Centre, 2600 Douglas Road, Coral Gables, Florida 33134 on this 1<sup>st</sup> day of May, 1995.

  
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