IN THE SUPREME COURT OF FLORIDA

NATHANIEL WHITE,

Petitioner,

versus

CASE NO. 85,603

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted in 1990 in the Circuit Court of Volusia County, Florida, of possession of a firearm by a convicted felon; burglary of a dwelling; robbery; two counts of aggravated assault; and eluding a law enforcement officer, and was sentenced as an habitual violent felony offender to concurrent terms totalling thirty years in prison. (R 86-92) His convictions and sentences were affirmed, per curiam, by the Fifth District Court of Appeal on February 26, 1991. White v. State, 576 So. 2d 307 (Fla. 5th DCA 1991). On May 6, 1994, the trial court denied his motion to correct an illegal sentence. (R 20-23, 35-40) On February 24, 1995, the trial court's order was affirmed by the District Court and on March 24, 1995, Petitioner's motion for rehearing was denied. White v. State, 20 Fla. L. Weekly D482 (Fla. 5th DCA February 24, 1995).

Notice of seeking this Honorable Court's review was filed on April 21, 1995.

SUMMARY OF ISSUES

The District Court's decision in this case directly and expressly conflicts with decisions of this Honorable Court and of other District Courts of Appeal in two respects:

(1) The District Court's refusal to review a trial court's denial of a motion to correct an illegal habitual violent felony offender sentence because the sentence has already been affirmed on direct appeal conflicts with Rule 3.800(a) and other Florida Courts' rulings that an illegal sentence may be corrected at any time.

(2) The District Court's affirmance of an habitual violent felony offender sentence on the basis of a prior conviction for D.U.I. manslaughter directly and expressly conflicts with the First District Court of Appeal's decision that D.U.I. manslaughter is not an offense contemplated by the habitual felony offender statute and does not qualify a defendant for sentencing thereunder because D.U.I. manslaughter is not a "consciously violent" type of crime.

ISSUE

THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH WILLIAMS v. STATE, 591 So. 2d 948 (Fla. 1st DCA 1991); BEDFORD v. STATE, 633 So. 2d 13 (Fla. 1994); AND WATKINS v. STATE, 622 So. 2d 1148 (Fla. 1st DCA 1993).

In this case, the District Court has affirmed the Volusia County trial court's denial of Petitioner's motion to correct an illegal sentence as an habitual violent felony offender. White v. State, 20 Fla. L. Weekly D482 (Fla. 5th DCA February 24, 1995). Petitioner had argued in his motion to correct his sentence and on an earlier direct appeal that his conviction which purportedly qualified him as an habitual violent felony offender, a 1977 adjudication for manslaughter, was not a "violent" felony but was rather the result of driving under the influence of alcohol. Id. (R 66) In its decision, the District Court wrote:

> In [Petitioner's] prior direct appeal, based on this court's records, White in fact challenged his violent habitual felony offender sentence on the very grounds he now seeks to raise in the context of this appeal from a rule 3.800 motion. Under the law of the case doctrine (a species of res judicata), White cannot raise this issue again. Sanders v. State, 621 So. 2d 723 (Fla. 5th DCA), rev. denied, 629 So. 2d 135 (Fla. 1993). A per curiam decision even without opinion establishes the law of the case on the same issues and facts which were raised or which could have been raised. Gaskins v. State, 502 So. 2d 1344, 1346 (Fla. 2d DCA 1987); State v. Stabile, 443 So. 2d

398 (Fla. 4th DCA 1984).

If the necessary predicate convictions are absent, an habitual felony offender sentence is illegal, and an illegal sentence may be corrected at any time. Williams v. State, 591 So. 2d 948 (Fla. 1st DCA 1991), quashed on other grounds, 599 So. 2d 998 (Fla. 1992); Rule 3.800(a), Fla. R. Crim. P. In Bedford v. State, 633 So. 2d 13 (Fla. 1994), the Fourth District Court of Appeal had denied relief from an illegal sentence for kidnapping "on the rationale that [the Supreme Court] had previously affirmed that sentence and because the law of the case precluded review." Id., 633 So. 2d at 14. This Honorable Court in Bedford agreed with District Court Judge Anstead's dissent and held that an illegal sentence may be corrected even after it has been erroneously affirmed. The illegality of the kidnapping sentence had not been raised on direct appeal in Bedford; but by analogy, in Preston v. State, 444 So. 2d 939 (Fla. 1984), the Supreme Court reconsidered its ruling on a suppression issue because, it said, an appellate court has the power to reconsider and correct erroneous rulings, notwithstanding that such rulings have become the "law of the case," in exceptional circumstances where reliance on a previous decision would result in manifest injustice.

It should be noted that in Sanders v. State, 621 So. 2d 723 (Fla. 5th DCA 1993), cited by the District Court in this decision for the proposition that Petitioner may not seek relief herein because his sentence had been previously affirmed, the appellant

Sanders' claims had been rejected because the errors complained of did not constitute an illegal sentence. Additionally, in Gaskins v. State, 502 So. 2d 1344 (Fla. 2d DCA 1987), that portion of Gaskins' sentence which was deemed to be illegal was corrected by the District Court, but the sentencing error which may have merely violated the sentencing guidelines and had been raised already on appeal was rejected.

The District Court's decision, therefore, directly and expressly conflicts with decisions of this Honorable Court and of other Florida Courts which have held that an illegal sentence may be corrected at any time.

The District Court's decision furthermore directly and expressly conflicts with Watkins v. State, 622 So. 2d 1148 (Fla. 1st DCA 1993), wherein the First District Court of Appeal held that the defendant could not be sentenced as an habitual violent felony offender on the basis of his having previously been convicted of **DUI manslaughter.** The Fifth District Court of Appeal wrote herein:

> . . . This court has upheld sentencing a defendant as a violent felony offender based on a previous felony conviction approximately the equivalent of DUI/manslaughter. Canales v. State, 571 So. 2d 87 (Fla. 5th DCA 1990).

White v. State, 20 Fla. L. Weekly D482 (Fla. 5th DCA February 24, 1995). In Canales v. State, 571 So. 2d 87 (Fla. 5th DCA 1990), the issue was whether the prior violent felony qualifying a defendant for habitual violent felony offender sentencing must

have been committed within the state of Florida, and not whether "second degree manslaughter" in a state (New York) which had no D.U.I. manslaughter statute was an "especially violent" crime. In this case, however, Canales has been cited for the proposition, and the instant decision holds, that a prior conviction of D.U.I. manslaughter may qualify a defendant for sentencing as an habitual violent felony offender. This decision therefore directly and expressly conflicts with Watkins, supra.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Brynn Newton

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Nathaniel White, P. O. Box 747, Starke, Florida 32091-0747, this first day of May, 1995.

Brynn Newton
ATTORNEY

Since applications requiring major review are already before the county council, it appears that this appeal procedure is primarily for appeals from applications requiring minor review. Section 102.07 requires that the petitioner state the grounds for the appeal and "all of the facts relied upon by the petitioner." There is nothing in section 102.07 which limits the facts to those presented to the Development Review Committee and Consolidated has not pointed to any other ordinance which so restricts review to the matters presented to the Committee. Allowing the petitioner to rely on facts *outside* of those presented to the Committee indicates that Volusia County intended for the "appeal" to be a *de novo* hearing before the county council.

Furthermore, the meetings of the county council are open to the public. Volusia County Home Rule Charter §§ 306.1 and 306.2. Consolidated has not pointed to any ordinance which restricts the council in the types of testimony it can receive at its public hearings. As in *Stockton*, there would be no point in holding a public hearing if the county council were restricted to a review of the matters presented to the Committee.

Finally, under its Home Rule Charter, the county council has the ultimate power in setting policy for the county. §§ 203, 307-308. These factors indicate that the "appeal" under section 102.07 is a mechanism for formulating final action by the council, rather than a judicial-type review limited to the record below. Thus I conclude that the circuit court was incorrect in determining that the Volusia County Council exceeded its jurisdiction by conducting a *de novo* hearing in this matter.

The circuit court also found that Volusia County had "demonstrated no ordinance, law or regulation justifying the imposition of the two additional requirements imposed by the Volusia County Council." However, on review of administrative action, the circuit court is only required to determine whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the findings and judgment are supported by substantial, competent evidence. *City of Deerfield Beach; Department of Highway Safety and Motor Vehicles v. Satter*, 643 So. 2d 692 (Fla. 5th DCA 1994); *Rivera v. Dawson*, 589 So. 2d 1385 (Fla. 5th DCA 1991); *City of Sanford v. Seminole County*, 538 So. 2d 113 (Fla. 5th DCA 1989). Thus, the circuit court also improperly placed the burden on Volusia County to demonstrate a justification for its actions rather than determining whether those actions were supported by substantial, competent evidence.

For the reasons discussed above, I would grant Volusia County's petition and quash the order of the circuit court.

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[1]Section 681.1095(13) of the lemon law provides as follows:
An appeal of a decision by the [arbitration] board to the circuit court by a consumer or manufacturer shall be by trial *de novo*. In a written petition to appeal a decision by the board, the appealing party must state the action requested and the grounds relied upon for appeal.

* * *

Criminal law—Sentencing—Habitual violent felony offender sentence may be predicated on DUI manslaughter conviction—Appeals—Law of the case—Issues raised in prior appeal in which convictions and sentences were per curiam affirmed may not be raised in rule 3.800 motion

NATHANIEL WHITE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1276. Opinion filed February 24, 1995. 3.800 Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin Compton Jones, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) White appeals the trial court's denial of his motion to correct an illegal sentence filed pursuant to rule 3.800. He argues he was improperly sentenced as a violent habitual offender[1] because the predicate offense used was a 1977 manslaughter conviction.[2] It stemmed from a charge of driving under the influence of alcohol during the course of which White struck and killed a bicyclist with his car.

White took a direct appeal to this court. His sentences and convictions were *per curiam* affirmed. *See White v. State*, 576 So. 2d 307 (Fla. 5th DCA 1991). This court has upheld sentencing a defendant as a violent felony offender based on a previous felony conviction approximately the equivalent of DUI/manslaughter. *Canales v. State*, 571 So. 2d 87 (Fla. 5th DCA 1990).

In the prior direct appeal, based on this court's records, White in fact challenged his violent habitual felony offender sentence on the very grounds he now seeks to raise in the context of this appeal from a rule 3.800 motion. Under the law of the case doctrine (a species of *res judicata*), White cannot raise this issue again. *Sanders v. State*, 621 So. 2d 723 (Fla. 5th DCA), *rev. denied*, 629 So. 2d 135 (Fla. 1993). A per curiam decision even without opinion establishes the law of the case on the same issues and facts which were raised or which could have been raised. *Gaskins v. State*, 502 So.2d 1344, 1346 (Fla. 2d DCA 1987); *State v. Stabile*, 443 So. 2d 398 (Fla. 4th DCA 1984).

AFFIRMED. (DAUKSCH and PETERSON, JJ., concur.)

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[1]§ 775.084(1)(b)(1), Fla. Stat. (1989).
[2]§ 860.01, Fla. Stat. (1977).

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Criminal law—Aggravated battery—Evidence that defendant struck victim in back of head with wooden weapon resembling baseball bat, causing injuries that required stitches and medical treatment, sufficient to support conviction

DONALD CUNNINGHAM, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1664. Opinion filed February 24, 1995. Appeal from the Circuit Court for Volusia County, R. Michael Hutcheson, Judge. Counsel: James B. Gibson, Public Defender, and Daisy G. Clements, Assistant Public Defender, Daytona Beach, for Appellant. Donald Cunningham, Daytona Beach, pro se. No Appearance for Appellee.

(SHARP, W., J.) Cunningham argues on appeal that the trial court erred in not granting his motion for judgment of acquittal at the close of the state's case. He was convicted of aggravated battery[1] because he struck a victim in the back of the head with a wooden weapon resembling a baseball bat. We affirm.

Although disputed by Cunningham's testimony, the state presented evidence at trial through the testimony of the victim and another eye witness, that Cunningham hit the victim in the head with the bat. The victim received injuries requiring stitches and medical treatment. Cunningham admitted he hit the victim, but argued it was done in self-defense. The evidence presented by the state's witnesses refuted his self-defense theory. The jury resolved these factual disputes contrary to Cunningham's position and found him guilty as charged. Under these circumstances, as an appellate court, we must affirm. *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla. 1981).

AFFIRMED. (HARRIS, C.J., and DAUKSCH, J., concur.)

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[1]§ 784.045(1)(a)(2), Fla. Stat.

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Criminal law—Post conviction relief—Claim that counsel was ineffective in failing to challenge illegal search and seizure refuted by records of appellate court—Suppression issue which was raised and decided on direct appeal may not be raised again in rule 3.850 motion

CHARLES WRIGHT, JR., Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-0003. Opinion filed February 24, 1995. 3.850 Appeal from the Circuit Court for Lake County, G. Richard Singeltary, Judge. Counsel: Charles Lee Wright, Jr., Cross City, pro se. No Appearance for Appellee.

(SHARP, W., J.) Wright appeals from a summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.850. He agues that he was subjected to an unlawful search and seizure, and that defense counsel failed to file a motion to suppress the allegedly tainted evidence. We affirm.