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FILED
SID J. WHITE
AUG 7 1995
CLERK, SUPREME COURT
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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 THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In 1990, Petitioner was convicted 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, 651 So. 2d 726 (Fla. 5th DCA 1995).

SUMMARY OF ARGUMENT

ISSUE I: Petitioner maintains that a sentencing court must consider the nature of the crimes listed in Section 775.084(1)(b)1. as qualifying a defendant for sentencing as an habitual violent felony offender. A prior violent qualifying felony must be "especially" or "consciously" violent, and therefore a prior conviction for manslaughter by culpable negligence should not qualify a defendant as a habitual violent felony offender. The trial court erroneously relied upon the statute numbers of the separate crimes to distinguish D.U.I. manslaughter from manslaughter by culpable negligence although the habitual violent felony offender statute itself does not list any of the prior qualifying violent felonies by their statute numbers. The First District Court of Appeal has distinguished "D.U.I. manslaughter" from "manslaughter" in part on the basis that the former is not "consciously" violent[1].

ISSUE II: If the necessary predicate convictions are absent, an habitual felony offender sentence is illegal, and an illegal sentence, even though previously affirmed on direct appeal, may be corrected at any time.

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[1] Watkins v. State, 622 So. 2d 1148 (Fla. 1st DCA 1993).

ARGUMENT

ISSUE I

D.U.I. MANSLAUGHTER, AND MANSLAUGHTER BY CULPABLE NEGLIGENCE ARE NOT "CONSCIOUSLY VIOLENT" CRIMES AND PRIOR CONVICTIONS THEREOF THUS CANNOT SUPPORT A FINDING THAT A DEFENDANT QUALIFIES FOR SENTENCING AS AN HABITUAL VIOLENT FELONY OFFENDER.

At his sentencing in 1990, Petitioner objected to being classified as an habitual violent felony offender because the 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. (R 64, 66) If the necessary predicate convictions are absent, a habitual felony offender sentence is illegal. Williams v. State, 591 So. 2d 948 (Fla. 1st DCA 1991), quashed on other grounds, 599 So. 2d 998 (Fla. 1992); s. 775.084, Fla. Stat. (1993).

At the 1990 sentencing, the trial judge observed that:

> THE COURT: The manslaughter count appears to be based upon culpable negligence in the operation of a motor vehicle.
>
> MR. BEVIS [Prosecutor]: That's exactly correct.
>
> MR. EDDINGTON [Defense counsel]: That's certainly distinctive from an intentional violent act.
>
> MR. BEVIS: The way I'm reading the statute, it doesn't distinguish.

(R 66) The prosecutor recalled that Petitioner had struck a bicyclist with his car. (R 65) The judge also stated that he did

not know of "any other way manslaughter can be committed other than by culpable negligence." (R 67)

In his motion to correct his illegal sentence as an habitual violent felony offender, Petitioner cited 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.** In the 1994 order denying the motion to correct the illegal sentence, the trial court held that Watkins did not apply because (1) DUI manslaughter is codified under a different statute than manslaughter by culpable negligence and (2) killing a human being by culpable negligence is included within the same statute that defines manslaughter by act or procurement. ss. 316.193(3), 782.07, Fla. Stat. (1993). (R 37-39)

The First District Court of Appeal in Watkins had noted (1) that the offense of "manslaughter" appears under the homicide statute and "DUI manslaughter" is listed under traffic offenses and (2) that "DUI manslaughter," like Petitioner's manslaughter conviction, is not a consciously violent type of crime. It is upon the reasoning under the second part of Watkins' holding that Petitioner relies and which supports his contention that the trial court improperly classified him as an habitual violent felony offender in 1990:

> . . . Moreover, we note that all the predicate offenses enumerated in section 775.084(1)(b)(1) involve intent. DUI manslaughter, by virtue

> of the fact that the defendant is intoxicated or under the influence of intoxicants, does not require intent. As a consequence, a defendant's intoxication could negate such an intent. Thus, we conclude that DUI manslaughter is not a consciously violent type of crime like those enumerated within section 775.084(1)(b)(1). . . .

Watkins v. State, 622 So. 2d at 1150. (Emphasis supplied.) (R 21-22)

It is the **nature** of the prior felony and not its enumeration in the statutes that qualifies a prior conviction as a "violent" felony for purposes of habitual violent felony offender sentencing. See, e. g., Ross v. State, 601 So. 2d 1190 (Fla. 1992) ("The entire focus of the [habitual violent felony offender] statute is not on the present offense, but on the criminal offender's prior record."). In Ross, this Honorable Court upheld the rationality of including aggravated assault as a felony qualifying a defendant for sentencing under Section 775.084(1)(b)1. by observing that:

> [Aggravated assault] consists of any assault with a deadly weapon or with an intent to commit a felony. s. 784.021(1), Fla. Stat. (1987). We find it not merely plausible, but entirely understandable, that the legislature included aggravated assault in the list of felonies considered to be **especially violent**, thereby warranting enhanced punishment for future recidivism.

Id., 601 So. 2d at 1192. (Emphasis supplied.)

The significance of Watkins' holding is that DUI manslaughter is not an "especially violent" felony, because it is not "consciously violent." In the 1994 order denying Petitioner's

motion to correct his illegal sentence, the Volusia County trial court found the different statutory numbers assigned to the crimes of D.U.I. manslaughter and manslaughter by culpable negligence to be pivotal to his decision to deny Petitioner's motion to correct his sentence and he found the **factual nature** of Petitioner's 13-year-old prior conviction to be "irrelevant[2]." (R 39) The focus should be exactly reversed, from the numbers and titles of the statutes defining the various types of manslaughter to the nature of the crimes actually committed.

There is actually no reason to conclude that DUI manslaughter is not "manslaughter" so as to exclude it from the definition of manslaughter. Had the First District Court of Appeal been considering a prior conviction as old as Petitioner's, in fact, they would have been confronted with the same crime of DUI manslaughter as in Watkins but one which was defined:

> . . . and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter, and on conviction be punished by existing law relating to manslaughter.

s. 860.01(2), Fla. Stat. (1975). D.U.I. manslaughter, thus, is manslaughter. It is not the fact that D.U.I. manslaughter is defined under a separate statute from other types of manslaughter but it is its elements that make it not "consciously violent."

The offense of manslaughter in 1976 and today includes two

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[2] "The factual predicate underlying [Petitioner's] manslaughter conviction - that he struck a bicyclist while driving his car - is irrelevant." (R 39)

distinct crimes: "manslaughter by act or procurement," which requires proof that the defendant had the requisite **intent** to commit an unlawful act, and "manslaughter by culpable negligence," where the underlying conduct constitutes culpable negligence and there is **no intent** to commit an unlawful act. Taylor v. State, 444 So. 2d 931, at 934 (Fla. 1983). Taylor held that there can be a crime of attempted manslaughter but only where if death had resulted the defendant would have been guilty of **voluntary** manslaughter. There can be no corresponding attempt crime for manslaughter by culpable negligence, this Honorable Court said, because of the fact that "there can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence." Id., 444 So. 2d at 934. Put differently, manslaughter by culpable negligence, like D.U.I. manslaughter, is not a "consciously violent" type of crime.

Culpable negligence is of "a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them." Preston v. State, 56 So. 2d 543, 544 (Fla. 1952); State v. Greene, 348 So. 2d 3 (Fla. 1977). (Emphasis supplied.) It is the reckless acts of those who commit

manslaughter by culpable negligence or D.U.I. manslaughter[3] that provide proof equivalent to evidence of intent sufficient to punish defendants for the unintended results of their recklessness. It should be noted, moreover, that in Tollefson v. State, 525 So. 2d 957 (Fla. 1st DCA 1988), when a defendant was adjudicated guilty of both D.U.I. manslaughter and manslaughter by culpable negligence, the District Court held that, because "[o]nly one homicide conviction and sentence may be imposed for a single death[,]" the case would be remanded for entry of an amended judgment and sentence for "only one count of manslaughter[,]" without specifying which type of manslaughter was appropriate. Id., 525 So. 2d at 962, 963.

The trial court's decision to deny Petitioner's motion to correct his illegal sentence and part of the Watkins Court's analysis depended on the fact that D.U.I. manslaughter is charged under a separate section of the Florida Statutes from "regular" manslaughter. Petitioner suggests that the numerical distinction drawn by the trial court, and by the first part of the Watkins decision, between "D.U.I. manslaughter" and "manslaughter," is irrelevant to the determination of whether D.U.I. manslaughter and manslaughter by culpable negligence are "especially" or "consciously" violent felonies. There is no reason to think that

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[3] "Choosing to drive while legally drunk is itself an act of reckless disregard of the life or safety of others." State v. Smith, 638 So. 2d 509, at 513 (Fla. 1994), Justice Kogan concurring.

"While becoming intoxicated might be a reckless act in itself . . . " Higdon v. State, 465 So. 2d 1309, at 1313 (Fla. 5th DCA 1985), Judge Dauksch dissenting.

"D.U.I. manslaughter" is not "manslaughter;" but the second part of the Watkins Court's analysis, i. e., the **nature** of the crimes, demonstrates why both D.U.I. manslaughter and manslaughter by culpable negligence should be excluded from the habitual violent felony offender statute's list of "especially" violent felonies.

Manslaughter by act or procurement and manslaughter by culpable negligence are separate crimes defined within a single subsection. s. 782.07, Fla. Stat. (1993). Manslaughter by culpable negligence is defined by a different subsection than is D.U.I. manslaughter. s. 316.193(3), Fla. Stat. (1993). All three offenses constitute the crime of "manslaughter." In the order denying Petitioner's motion to correct his illegal sentence, the trial court focused on the fact that manslaughter by culpable negligence is included within the definitions of Section 782.07 and D.U.I. manslaughter is not. (R 37) Interestingly, none of the felonies listed in the habitual violent felony offender statute are designated by their statutory sections. The trial judge assumed that "manslaughter" in Section 775.084(1)(b)1. refers to Section 782.07 but it actually does not. Except for the **nature** of the crimes, therefore, there is no reason to include or exclude either D.U.I. manslaughter or manslaughter by culpable negligence in or from the list of "especially violent" prior felonies. s. 775.084(1)(b)1., Fla. Stat. (1993). Contrary to the trial court's conclusion, therefore, Petitioner maintains that "The factual predicate underlying [Petitioner's] manslaughter conviction - that he struck a bicyclist while driving his car - " is entirely

relevant, and indeed is crucial, to determining whether he qualifies for sentencing as an habitual violent felony offender. (R 39)

Canales v. State, 571 So. 2d 87 (Fla. 5th DCA 1990), upheld an habitual violent felony offender sentence as valid where the prior "violent" felony was approximately the equivalent of D.U.I. manslaughter. The issue in Canales, however, was whether the prior violent felony qualifying a defendant for HVO 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. The decisions in Canales and Watkins, supra, did not rule specifically on the same question of law; but the reliance on Canales by the Fifth District Court of Appeal in its affirmance of the denial of Petitioner's motion to correct his illegal sentence has created a direct legal conflict in the decisions of District Courts of this State. The conflict should be resolved on the basis of the First District Court of Appeal's reasoning in Watkins, supra, and Petitioner's illegal sentence as an habitual violent felony offender must be vacated and corrected.

ISSUE II

IF THE NECESSARY PREDICATE CONVICTIONS ARE ABSENT, AN HABITUAL FELONY OFFENDER SENTENCE IS ILLEGAL, AND AN ILLEGAL SENTENCE, EVEN THOUGH PREVIOUSLY AFFIRMED ON DIRECT APPEAL, MAY BE CORRECTED AT ANY TIME.

In its decision in this case, 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).

White v. State, 651 So. 2d 726 (Fla. 5th DCA 1995).

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), this Honorable 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. See also, Ferguson v. State, 594 So. 2d 864 (Fla. 5th DCA 1992) ("A court having jurisdiction can always act to correct an illegal sentence.")

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.

Petitioner's sentence was illegal because the prior conviction relied upon for his classification as an habitual violent felony offender was not a "violent" offense contemplated by Section 775.084(1)(b)1. Because the sentence was illegal, even though it has previously been affirmed, per curiam, it can be corrected at any time. The trial court's order denying Petitioner's motion to correct his illegal sentence must be reversed.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the District Court's decision in this cause, reverse the trial court's order denying Petitioner's motion to correct his illegal sentence, and remand this cause to the trial court for resentencing.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, 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 4th day of August, 1995.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

NATHANIEL WHITE,

Petitioner,

versus

CASE NO. 85,603

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

A P P E N D I X

Nathaniel WHITE, Appellant,

v.

STATE of Florida, Appellee.

No. 94–1276.

District Court of Appeal of Florida, Fifth District.

Feb. 24, 1995.

Rehearing Denied March 24, 1995.

Defendant appealed from order of the Circuit Court, Volusia County, John W. Watson, III, J., denying his motion to correct illegal sentence. The District Court of Appeal, W. Sharp, J., held that where defendant in prior direct appeal challenged violent habitual felony offender sentence on very grounds he subsequently sought to raise in context of appeal from denial of motion to correct illegal sentence, and District Court of Appeal upheld sentencing in prior per curiam decision on direct appeal, law of the case doctrine precluded defendant from raising issue again.

Affirmed.

1. Criminal Law ⇐1180

Where defendant in prior direct appeal challenged violent habitual felony offender sentence on very grounds he subsequently sought to raise in context of appeal from denial of motion to correct illegal sentence, and District Court of Appeal upheld sentencing in prior per curiam decision on direct appeal, law of the case doctrine precluded defendant from raising issue again. West's F.S.A. RCrP Rule 3.800.

2. Criminal Law ⇐1180

Per curiam decision by District Court of Appeal, even without opinion, establishes law of the case on the same issues and facts which were raised or could have been raised.

James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Robin Compton Jones, Asst. Atty. Gen., Daytona Beach, for appellee.

W. SHARP, Judge.

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).

[1, 2] 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.

1. § 775.084(1)(b)(1), Fla.Stat. (1989).

2. § 860.01, Fla.Stat. (1977).