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FILED

SID J. WHITE

AUG 28 1995

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

NATHANIEL WHITE,

Petitioner,

v.

Case No. 85,603

STATE OF FLORIDA,

Respondent.

RESPONDENT'S MERITS BRIEF

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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SUMMARY OF ARGUMENTS

POINT I: The trial court correctly denied the defendant's motion to correct an illegal sentence. The defendant's 1977 conviction for manslaughter provided the necessary underlying conviction for habitual violent felony offender status. Manslaughter is one of the enumerated offenses that was designated by the Legislature in the habitual offender statute. If the Legislature had intended to exclude manslaughter by culpable negligence from the list of qualifying offenses, it could easily have done so. Since there is no such distinction, a manslaughter conviction provides the grounds to habitualize, regardless of the underlying facts of the crime. Because he had a prior conviction for one of the enumerated qualifying offenses, the defendant's sentence was correct and legal.

POINT II: The trial court and appellate court correctly determined that this issue had already been decided. The defendant raised the exact issue -- whether manslaughter can provide the grounds for a violent felony offender habitualization -- on direct appeal. He is challenging that ground again under the auspices of a motion to correct an illegal sentence. The appellate court has ruled that the manslaughter conviction was a proper ground to qualify the defendant as an habitual violent felony offender. The appellate court's ruling on that very issue and that exact ground is law of the case.

ARGUMENTS

POINT I

THE TRIAL COURT CORRECTLY SENTENCED THE DEFENDANT AS AN HABITUAL VIOLENT FELONY OFFENDER AFTER DETERMINING THAT THE DEFENDANT HAD A PRIOR CONVICTION FOR MANSLAUGHTER, AN ENUMERATED OFFENSE UNDER THE HABITUAL OFFENDER STATUTE.

It has long been established that where the Legislature has defined a crime in specific terms, the courts are without authority to define it differently. *State v. Jackson*, 526 So. 2d 58 (Fla. 1988). When the language of a penal statute is clear, plain, and without ambiguity, effect must be given to it accordingly. *Graham v. State*, 472 So. 2d 464 (Fla. 1985). Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning. *Id.* at 465. Statutes that are penal in character must be strictly construed. *Jones v. State*, 629 So. 2d 215 (Fla. 5th DCA 1993).

Section 775.084(1)(b), Fla. Stat. (1989), Florida's Habitual Offender Statute, designates what qualifications are necessary for a trial court to find a defendant to be an habitual violent felony offender. The statute provides that

"Habitual violent felony offender" means a defendant from whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:

1. The defendant has previously been convicted of a felony or an attempt or conspiracy

to commit a felony and one or more of such *convictions* was for:

- a. Arson,
- b. Sexual battery,
- c. Robbery,
- d. Kidnapping,
- e. Aggravated child abuse,
- f. Aggravated assault,
- g. Murder,
- h. ***Manslaughter***,
- i. Unlawful throwing, placing, or discharging of a destructive device or bomb,
- j. Armed burglary, or
- k. Aggravated battery;

(emphasis added). The definition of habitual violent felony offender clearly includes a defendant who has previously been convicted of manslaughter -- it is one of the enumerated felonies which may serve as a predicate offense for classifying a defendant as an habitual violent felony offender under Section 775.084(1)(b)(1), Fla. Stat. (1989).

The statutory definition of manslaughter is

The killing of another human being by the act, procurement, ***or culpable negligence*** of another, without lawful justification according to the provisions of Chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.08, or §775.084.

(emphasis added). The definition specifically includes the killing of a human being by the culpable negligence of another. It likewise specifies that it can be the basis of punishment under

Section 775.084.

Both the statute defining manslaughter and the statute defining an habitual violent felony offender are plain and unambiguous. The manslaughter definition does not limit the application of Section 775.084 to exclude using manslaughter as a basis for a habitual violent felony offender. Nor does the habitual offender statute exclude convictions for *manslaughter by culpable negligence*.

The Legislature could easily have done exactly that if it had intended to set that limitation. The Legislature chose instead to include a conviction for manslaughter as a basis for finding a defendant to be an habitual violent felony offender. Appellate courts cannot now go behind the plain language of the statute.

In the instant case, Petitioner is asking this court to hold that he cannot be found to be an habitual violent felony offender based on his 1977 conviction for manslaughter. He argues that his conduct which led to his manslaughter conviction was actually driving a vehicle under the influence, and therefore was not violent conduct. (Petitioner's Brief On The Merits, p. 3). However, there is no evidence in the record that the defendant's crime was tantamount to DUI manslaughter. The sole evidence pertaining to that conviction comes from the trial judge and the prosecutor, who indicated on the record that it "appears to be based upon culpable negligence in the operation of a motor vehicle" in which a bicyclist was hit by the defendant's car. (Petitioner's Brief On The Merits, p. 3). There was no other evidence presented

to support that argument.

This court has held that "[a] conviction establishes only the elements of the crime, and does not include underlying facts or conduct which are not elements of the offense. *Dautel v. State*, 20 Fla. L. Weekly S388 (Fla. July 20, 1995). The defendant was convicted of manslaughter in 1977 and apparently received a 15 year sentence for that crime. (R.14). The court should not try to look beyond the face of the conviction in order to decide whether the defendant's crime was a "violent" one within the meaning of §775.084. The Legislature has already decided that a manslaughter conviction qualifies as a predicate offense for habitual violent felony offender status. Since the defendant had such a qualifying conviction, the trial court correctly found that the defendant was an habitual violent felony offender.

Even if this court determines that manslaughter should not qualify as a "violent" crime, the defendant's sentence is still not an illegal one in this case. While the court found him to be an habitual violent felony offender, the sentence imposed did not include the mandatory minimum sentence. The record shows that the defendant qualified as an habitual felony offender because of his two prior felony convictions. Because his sentence was within that allowed for habitual felony offenders, it is not illegal. Therefore, the trial court properly denied the motion to correct the sentence.

POINT II

THE ISSUE RAISED ON MOTION FOR ILLEGAL SENTENCE HAD ALREADY BEEN ADJUDICATED BY THE APPELLATE COURT ON THE DEFENDANT'S DIRECT APPEAL, AND THEREFORE WAS LAW OF THE CASE WHICH COULD NOT BE RELITIGATED.

While an illegal sentence can be challenged at any time, the issues regarding the propriety of the habitual offender sentence were raised, litigated, and ruled upon already by the appellate court. Petitioner claims that the underlying prior conviction used to habitualize him as a violent felony offender was not a qualifying offense. He argues that if it was not a proper qualifying offense, then his habitual violent felony offender sentence is an illegal one. He reasons that he can, therefore, raise the illegality of his sentence over and over again without any limit, until some court overturns the sentence. That argument is misplaced.

A motion to correct an illegal sentence cannot be used to relitigate issues which have already been determined by an appellate court. *Sanders v. State*, 621 So. 2d 723 (Fla. 5th DCA 1993). When a defendant has challenged the underlying grounds for his habitual offender sentence in a direct appeal, the appellate court's ruling becomes law of the case with regard to that particular issue. *Gaskins v. State*, 502 So. 2d 1345 (Fla. 2d DCA 1987). A per curiam affirmance does establish law of the case. *State v. Stabile*, 443 So. 2d 398 (Fla. 4th DCA 1984).

In the instant case, the defendant raised the exact issue on

direct appeal -- that manslaughter is not a sufficiently "violent" crime to qualify a defendant as an habitual violent felony offender. The issue was raised on direct appeal, and the appellate court issued a per curiam affirmance. The court, in effect, held that the underlying manslaughter conviction qualified the defendant as an habitual violent felony offender.

In his 3.800(a) motion, the defendant raised the exact same issue again. The issue has already been reviewed by an appellate court and ruled upon. He has raised no new grounds to challenge the legality of his sentence. The sole ground is one which the appellate court has already ruled is a valid ground to find him to be a violent felony offender. Therefore, that ground cannot be relitigated, no matter how many time the defendant argues that it makes his sentence illegal.

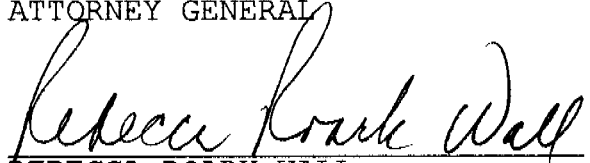
The trial court correctly denied the motion to correct an illegal sentence. The appellate court had already reviewed the exact issue and the very same grounds. The issue regarding this exact ground has already been decided and cannot be relitigated merely because the defendant does not like the outcome. The trial court's ruling, and the appellate court's decision, must be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully asks this court to uphold the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Merits Brief has been furnished by delivery to Brynn Newton, Assistant Public Defender for Petitioner, this 24th day of August, 1995.


Rebecca Roark Wall
Of Counsel