IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus

CASE NO. 85,921

ROY PHANEUF,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case and facts but would add that the written plea agreement was amended, after Respodent's pleas of guilty had been entered, to include the provisions that:

> c. That a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony Offender, and:
>
> * * *
>
> (2) That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of 10 years imprisonment and a mandatory minimum of ---- years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> * * *

(R 23) (Emphasis supplied.)

SUMMARY OF THE ARGUMENT

The trial court's sua sponte filing of a notice to sentence Respondent pursuant to the habitual offender statute improperly usurped the State Attorney's exclusive executive power to prosecute criminal cases. The State did not file its own notice to seek habitual offender sanctions and its role of prosecuting Respondent as an habitual offender was improperly assumed by the trial court.

ARGUMENT

RESPONDENT WAS IMPROPERLY SENTENCED AS AN HABITUAL OFFENDER BASED ON THE TRIAL COURT'S SUA SPONTE ISSUANCE OF A NOTICE AND ORDER WHICH WAS NOT FILED UNTIL AFTER THE ENTRY OF RESPONDENT'S PLEA.

Respondent recognizes that this Honorable Court has held that the plea form in this case, amended after Respondent's guilty pleas had been entered, satisfies the requirement that a defendant receive written notice of the possibility of habitualization before his or her plea is accepted. State v. Blackwell, 20 Fla. L. Weekly 354 (Fla. July 20, 1995). Respondent agrees with Petitioner that this case is "identical to State v. Blackwell and those cases consolidated with Blackwell[,]" because the procedure followed in this case is the same technique employed by Volusia County Circuit Judge John Watson in the cases that accompanied Blackwell, i. e., the habitual offender sentencing proceedings were initiated not by the prosecuting attorney from the State Attorney's Office but by the judge.

Following the entry of each defendant's plea in State v. Blackwell et al., and in this case two months after the pleas, Judge Watson entered a "NOTICE AND ORDER FOR SEPARATE PROCEEDING TO DETERMINE IF DEFENDANT IS HABITUAL FELONY OFFENDER OR HABITUAL VIOLENT FELONY OFFENDER PURSUANT TO FLORIDA STATUTE 775.084 AND FOR SENTENCING HEARING." (R 25-26) Respondent filed a motion to strike the trial court's sua sponte institution of habitual offender proceedings, noting that the State had not sought enhanced sentencing for Respondent and that the notice had not been filed

until after the entry of Respondent's plea. (R 27-28)

The motion to strike also argued that, "The Court in instituting these habitual offender proceedings against the defendant has in fact become an arm of the prosecution of the case and is in fact adopting prosecution tactics. . . . "

The Fifth District Court of Appeal held in Toliver v. State, 605 So. 2d 477 (Fla. 5th DCA 1992), review denied, 618 So. 2d 212 (Fla. 1993), that it is proper for the trial judge to file the notice for habitual offender sentencing. Section 775.0841, however, provides that " . . . The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend and prosecute career criminals and to incarcerate them for extended terms." s. 775.0841, Fla. Stat. (1991). (Emphasis supplied.) The habitual offender statute's statement of "Legislative findings and intent" clearly expresses that the habitual offender sentencing statute is to be implemented by prosecutors, not trial judges, who are not mentioned in the statement.

Similarly, in Steiner v. State, 591 So. 2d 1070 (Fla. 2d DCA 1991), Judge Lehan, concurring specially, wrote:

> "In addition to this procedural problem, the wisdom and propriety of the notice issuing from the trial court is also questionable. The far better practice would be for such a notice to originate from the state. . . . Two, the appearance of impartiality of a sentencing judge may be compromised when he or she has already filed a notice to invoke a sentencing enhancement procedure, the imposition of which was discretionary

> in the first place. Three, the decision whether to invoke the habitual offender statute appears to be within the province of the prosecutor rather than the trial court, just as is the initial decision to invoke the death penalty. In fact, it may be concluded that the legislature contemplated that it would be up to the state to seek imposition of a habitual offender sentence: "All reasonable **prosecutorial** efforts shall be made to persuade the court to impose [a habitual offender sentence]." Ch. 88-131, s. 5(d), Laws of Fla. (1988) (emphasis added). Four, in negotiating a plea agreement, the state may look to the habitual offender statute as an effective bargaining tool. . . . "

Id., 591 So. 2d at 1072, footnote 2.

The offense in this case was alleged to have occurred in January of 1994, following the June 17, 1993, effective date of Section 775.08401, Florida Statutes (1993). (R 19-20, 21-22) Judge Harris wrote in the case of another defendant sentenced by Judge Watson in Santoro v. State, 644 So. 2d 585 (Fla. 5th DCA 1994):

> The judge's ability to initiate habitual offender treatment has been placed in doubt by the enactment of section 775.08401, Florida Statutes (1993), which requires the "state attorney in each judicial district" to adopt uniform criteria to determine the eligibility requirements in determining which multiple offenders should be pursued as habitual offenders in order to ensure "fair and impartial application of the habitual offender statute." It appears that this statute, effective June 17, 1993, may very well have "repealed" Toliver v.

> State, 605 So. 2d 477 (Fla. 5th DCA 1993), which permitted the sentencing judge to initiate habitual offender consideration. It now appears that the legislature has determined that it is only the state attorney, in order to ensure "fair and impartial application," who can seek habitual offender treatment of a defendant -- and then only if the defendant meets . . . circuit-wide uniform criteria.

Id., 644 So. 2d at 586, fn. 4.

Article II Section 3 of the Florida Constitution provides:

> **SECTION 3. Branches of government.**--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

In State v. Bloom, 497 So.2d 2 (Fla. 1986), this Honorable Court held that under this provision,

> [T]he decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute. Art. II s. 3, Fla. Const. . . .

Id., 497 So.2d at 3. But see, Art. V s. 17, Fla. Const. (State attorneys defined as the "prosecuting officer" under "Judiciary" provision of the constitution).

In King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), the Fifth District Court of Appeal stated that either the State or the trial court may suggest habitual offender classification. This statement was made, however, in the context of rebuffing a defendant's

challenge that the habitual offender statute was void for vagueness. The First District Court of Appeal, on the other hand, in upholding the constitutionality of Section 775.084, reiterated that the executive branch is properly given the discretion to choose which available punishments to apply to convicted offenders, citing State v. Bloom, supra. Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990). A trial court has no authority to reduce a mandatory minimum sentence for drug trafficking unless the State first files a motion to reduce the sentence based on the defendant's providing substantial assistance to law enforcement. See, e. g., State v. Cuesta, 490 So.2d 239 (Fla. 2d DCA 1986); State v. Bateman, 423 So.2d 577 (Fla. 2d DCA 1982), petition for review denied, 446 So.2d 97 (Fla. 1984). Similarly, Respondent maintains that a trial court does not have the authority to sua sponte seek and impose an extraordinary penalty, i. e., a doubling of the statutory maximum, except upon the prosecution's instigation or "suggestion."

Presumably, there have been other cases in Judge Watson's court wherein habitual offender sentencing proceedings were initiated by the prosecutor, as was apparently intended by the Legislature, and wherein the prosecutor filed the notice of habitualization **prior** to the entry of the defendants' pleas. In this case, however, the prosecutorial decision to seek an enhanced sentence for Respondent was made by the judge. Respondent submits that his being sentenced as an habitual offender upon the trial court's own motion was unauthorized and illegal. His sentence

followed by probation must be reversed and this cause remanded to the trial court for resentencing pursuant to the sentencing guidelines.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Honorable Court approve the District Court's decision to vacate the sentence in this case and remand this cause to the trial court for resentencing within the sentencing guidelines.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
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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, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Roy Phaneuf, P. O. Box 158 - M/B 974, Lowell, Florida 32663-0158, this second day of October, 1995.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus CASE NO. 85,921

ROY PHANEUF,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
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RESPONDENT'S BRIEF ON THE MERITS

A P P E N D I X

that was granted by the lower court and which is on appeal. We conclude the summary judgment cannot be sustained on the basis of *res judicata*. *Res judicata* does not bar the Orange County proceeding for two reasons. First of all, the dismissal with prejudice does not constitute the kind of adjudication on the merits that would support a *res judicata* claim.[6] Second, the pending motion to amend the amount of the final judgment in the Orange County case cannot be barred by the dismissal of the claim in Hillsborough County that Bay Financial perpetrated a fraud on the Orange County court.

No order of the lower court ever struck or denied the original motion to amend the amount of the judgment, it merely granted defendant's leave to amend it. The unamended motion asking the court to alter the amount of judgment to which Bay Financial was entitled is still pending.

We have no basis to determine whether there is any merit to defendants' claim that the bank has obtained a judgment in an amount to which it was not entitled, but we are obliged to reverse the summary judgment based on *res judicata* and remand this matter for the motion to be disposed of.

W. SHARP, J., concurs and concurs specially, with opinion.

DAUKSCH, J., dissents, with opinion.

W. SHARP, Judge, concurring and concurring specially.

I agree with Judge Griffin that Bay Financial is not entitled to a summary judgment as a matter of law, based on *res judicata* principles. However, based on the status of the pleadings (since no affidavits were filed in support or opposition to the motion for summary judgment) Hook has also created an issue of fact by his answer and amended motion to alter the final judgment as to the amount of the judgment. Thus, summary judgment in this case was improper for both reasons.

DAUKSCH, Judge, dissenting.

I would affirm the actions of the trial judge because appellant's belated and inadequate motion for set-off was properly denied and this case can and should be finalized here and now. To send it back for the trial judge to ultimately do just that is wasteful.

Roy PHANEUF, Appellant,

v.

STATE of Florida, Appellee.

No. 94–1580.

District Court of Appeal of Florida, Fifth District.

June 9, 1995.

Defendant was convicted in the Circuit Court, Volusia County, John W. Watson, III, J., and appeal was taken, challenging sentence imposed. The District Court of Appeal held that if probation is imposed as portion of sentence, monetary conditions may not be converted to community service hours.

Vacated and remanded.

Criminal Law ⇐982.5(1)

If probation is imposed as portion of sentence, monetary conditions may not be

6. *JFK Medical Center, Inc. v. Price*, 647 So.2d 833 (Fla.1994); *Capital Bank v. Needle*, 596 So.2d 1134 (Fla. 4th DCA 1992); *Makar v. Investors Real Estate Mgt. Inc.*, 553 So.2d 298 (Fla. 1st DCA 1989); *Liachoff v. Marien*, 376 So.2d 468 (Fla. 4th DCA 1979), *cert. denied*, 386 So.2d 639 (Fla.1980); *Miami Super Cold Co. v. Giffin Indust., Inc.*, 178 So.2d 604 (Fla. 3d DCA 1965); *City of Boca Raton v. Sharp*, 107 So.2d 271 (Fla. 2d DCA 1958); *Mabson v. Christ*, 104 Fla. 606, 140 So. 671 (1932).

converted to community service hours. West's F.S.A. § 27.3455.

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

Robert A. Butterworth, Atty. Gen., Tallahassee, and Ann M. Childs, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

We vacate the sentence imposed upon Roy Phaneuf and remand for resentencing. *Thompson v. State*, 638 So.2d 116 (Fla. 5th DCA), *rev. granted, State v. Blackwell*, 649 So.2d 234 (Fla.1994) (Table).

If probation is imposed as a portion of the sentence, monetary conditions may not be converted to community service hours. *See Price v. State*, 620 So.2d 1105 (Fla. 4th DCA 1993) (trial court erred in ordering defendant to perform community service in lieu of payment of costs; section 27.3455 authorizing community service in lieu of payment of costs was amended in 1986 to eliminate this alternative); *Parks v. State*, 595 So.2d 1056 (Fla. 4th DCA 1992) (same); *Bush v. State*, 579 So.2d 362 (Fla. 4th DCA 1991) (same); *Sims v. State*, 520 So.2d 675 (Fla. 5th DCA 1988) (same); *Hansley v. State*, 514 So.2d 1135 (Fla. 5th DCA 1987) (same); *Rowe v. State*, 558 So.2d 174 (Fla. 5th DCA 1990) (state concedes court without authority to impose community service in lieu of costs under section 27.3455); *State v. Muoio*, 438 So.2d 160 (Fla. 2d DCA 1983) (trial judge may not impose community service in lieu of mandatory fine imposed by section 316.193; all statutory references to community service work indicate such service be considered as extra sanction or additional condition of probation).

REVERSED AND REMANDED.

HARRIS, C.J., PETERSON and GRIFFIN, JJ., concur.

M.B., a child, Appellant,

v.

STATE of Florida, Appellee.

No. 94-02520.

District Court of Appeal of Florida, Second District.

June 9, 1995.

Appeal from the Circuit Court for Pinellas County; Crockett Fannell, Judge.

James Marion Moorman, Public Defender, Bartow, and Allyn Giambalvo, Asst. Public Defender, Clearwater, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Robert J. Krauss, Sr. Asst. Atty. Gen., Tampa, for appellee.

BLUE, Judge.

In this appeal filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), we affirm the defendant's conviction for criminal mischief, a first-degree misdemeanor. We reverse his sentence of indefinite community control because it exceeds the maximum sentence that can be imposed for a first-degree misdemeanor. *See* § 39.054, Fla.Stat. (1993); *T.S.W. v. State*, 489 So.2d 1146 (Fla. 2d DCA 1986). We remand for resentencing to correct the sentence of community control to a period of time not to exceed one year.

Affirmed in part, reversed in part and remanded for resentencing.

DANAHY, A.C.J., and PATTERSON, J., concur.