IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,155

JOSE CABAL,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, JOSE CABAL, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the Appellee in the lower court. The parties will be referred to as they stood before the lower court. The designation "R." will refer to the record on appeal, and the designation "T." will refer to the separately bound transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

The defendant, Jose Cabal, was tried with a co-defendant on an information charge that on July 29, 1993, they committed strong-armed robbery[1] with a mask.[2] (R. 9-10; T. 1 et seq.)[3] The evidence established that after shopping on the afternoon of July 29, 1993, the victim Pellecchia was about to enter his Southwest Dade residence when two males wearing hoods (pillow cases with eyeholes cut out) approached him, wrestled him to the ground, took his gold Rolex watch, and drove away. (T. 355-65, 384-86, 407-10, 515.) Shortly thereafter, police observed a vehicle fitting the description of the ensuing BOLO, and after a high speed chase, the car was stopped, resulting in the arrest of the defendant passenger and the co-defendant driver. (T. 487-95.) Based on the recency and course of the chase route; the car and physical descriptions match; and that a license plate on the stopped vehicle was recently and partially attached, the defendant and co-defendant were circumstantially linked as being the robbers. (T. 384-86, 407-10, 418, 421, 428-29, 454-55, 487-95, 515, 520-21; 557-58, 564-65.)

The defendant was found guilty of robbery with a mask (R. 28), and was adjudicated guilty of that offense graded as a first-degree felony. (R. 44.) The defendant was sentenced, within a permitted sentencing guidelines range computed with the gradation of offense as first-degree felony, to four-and-a-half years imprisonment. (R. 47, 49; T. 880.) On appeal, the Third District rejected the

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[1] § 812.13(2)(c), Fla. Stat. (1993).

[2] By information reference (R. 9) to § 775.0845, Fla. Stat. (1993).

[3] The information, as amended, duplicatively charged both defendants in each of two counts with the singular offense (R. 9-10). In recognition of this, at the outset of trial the State nol prossed the second count. (T. 38-41.)

defendant's contention that the offense could only be graded and scored within the guidelines as a second-degree felony, and affirmed certifying conflict:

> We affirm based on the authority of Jennings v. State, 498 So. 2d 1373 (Fla. 1st DCA 1986). We also certify conflict with Woods v. State, 654 So. 2d 606 (Fla. 5th DCA 1995), Archibald v. State, 646 So. 2d 298 (Fla. 5th DCA 1994), and Spicer v. State, 615 So. 2d 725 (Fla. 2d DCA 1993).
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> Affirmed; conflict certified.

Cabal v. State, 656 So. 2d 290 (Fla. 3d DCA 1995.)

Timely notice to invoke the discretionary review jurisdiction of this Court was thereupon filed.

SUMMARY OF ARGUMENT

Section 775.0845, relating to commission of criminal offenses while wearing a mask, only operates to extend the available statutory maximum to the next specified grade of offense, and not, as do other statutes, to reclassify the offense itself or to permit such reclassification in guidelines scoring. The offense of strong-arm robbery, while wearing a mask, entails a statutory maximum of thirty years imprisonment, but itself remains a second-degree felony and must be so scored under the sentencing guidelines.

ARGUMENT

THE OFFENSE OF STRONG-ARMED ROBBERY WHILE WEARING A MASK IS PROPERLY GRADED, AND IS PROPERLY SCORED UNDER THE SENTENCING GUIDELINES, AS A SECOND-DEGREE FELONY, NOT A FIRST-DEGREE FELONY.

The defendant was convicted of strong-arm robbery, which is graded as a felony of the second degree, § 812.13(2)(c), Florida Statutes (1993), while wearing a mask. § 775.0845, "Wearing mask while committing offense; enhanced penalties(,)" provides in pertinent part:

> The penalty for any criminal offense . . . shall be increased as provided in this section if, while committing the offense, the offender was wearing a hood, mask, or other device that concealed his identity.
>
> * * *
>
> (4) A felony of the second degree shall be punishable as if it were a felony of the first degree.

It is the central contention of the appellant that while the statute represents a functional extension of the statutory maximum for conviction in such circumstances, it neither raises the gradation of offense in and of itself nor allows a higher gradation of offense to be assumed for guidelines scoring purposes.

First, there is a clear distinction in Florida law between classification (gradation) of offenses, § 775.081, and penalties, § 775.082. While some criminal statutes provide for reclassification of the degree of offense (i.e., for re-gradation) upon a specified predicate, see, e.g., §§ 775.087(1) and 775.0875, other statutes, such as the subject statute herein (§ 775.0845), simply provide for "enhanced penalties," i.e., for a given degree of offense to be "punishable as if it were" a next higher degree offense. As has been appropriately stated, "we [should be] critical of the commingling of the terms 'reclassification' and 'enhancement'. . . . Admittedly, in some instances such a distinction may be without a difference in

its practical effect, but the legislature has chosen to make a distinction. . . . Reclassification speaks to the degree of the crime charged(.)" Cooper v. State, 455 So. 2d 588, 589 (Fla. 1st DCA 1984), rev. den., 464 So. 2d 554 (Fla. 1985).

As further appropriately observed in Spicer v. State, 615 So. 2d 725 (Fla. 2d DCA 1993), holding that invocation of the subject mask statute does not reclassify strong-arm robbery to a first-degree felony and therefore the habitual offender statute can only be applied to such offense as a second-degree felony:

> Penal statutes must be construed in terms of their literal meaning. *State v. Jackson*, 526 So. 2d 58 (Fla. 1988). Words used by the legislature will not be expanded to broaden the definition of such statutes. *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991). If the legislature had intended section 775.0845 to reclassify offenses, it would have so stated, as it did in section 775.087, Florida Statutes (1989): "Possession or use of weapon; aggravated battery; felony *reclassification*," and in section 775.0875, Florida Statutes (1989): "Unlawful taking, possession, or use of a law enforcement officer's firearm; crime *reclassification*; . . ." (Emphasis added.) In fact, section 775.0875 is similar to the habitual offender statute, in that neither of the enhanced penalty statutes reclassify the degree of the offense. *See Dominguez v. State*, 461 So. 2d 277 (Fla. 5th DCA 1985).

Id. at 726.

The Committee Note to Florida Rule of Criminal Procedure 3.701(d)(10)[4] states: "If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category." For the same reason that an early commission comment to this note, which comment had not itself been adopted, in referring both to the habitual offender statute and the instant mask statute confuted enhancement (extension) of sentence with reclassification, and was therefore recognized as "patently

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[4] The Committee Notes were initially adopted as part of the guidelines. See The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 -- Sentencing Guidelines), 451 So. 2d 824 (Fla. 1984).

erroneous"[5] and thereafter eliminated,[6] Jennings v. State, 498 So. 2d 1373 (Fla. 1st DCA 1986), which applied § 775.0845 as a reclassification statute, was incorrectly decided and should be rejected by this Court.

Jennings cursorily, on the basis of language added to the Committee Note in 1985,[7] held that the mask statute "reveals language that distinguishes it to from the habitual offender statute" and which requires that each offense "shall be punishable *as if it were reclassified upward* as an offense of the next higher degree." Id. at 1374.

Jennings cited, inter alia, Dominguez v. State, which lends no support whatsoever to its result. Moreover, Jennings overlooks the, at best, inherent ambiguity in the language of the approved Committee Note. In interposing the words "enhancement" and "reclassification", the Committee Note necessarily refers to those statutes which by their terms operate as a reclassification of the offense, not those which, as do both the mask statute and the habitual offender statute, simply permit an extension of the available maximum sentence. See, e.g., Spicer v. State, id.

The inception of § 775.0845 preceded the inception of the sentencing guidelines. Ch. 81-249, § 2, Laws of Fla. Therefore, as enacted the mask statute clearly had reference, in contradistinction to extant reclassification statutes, only to extending the statutory maximum, just as did the habitual offender statute. The

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5 See Cuthbert v. State, 459 So. 2d 1098, 1099 n.2 (Fla. 1st DCA 1984), rev. den., 467 So. 2d 1000 (Fla. 1985).

6 See Dominguez v. State, 461 So. 2d 277, 278 n.5 (Fla. 5th DCA 1985).

7 See The Florida Bar: Amendment to Rules of Criminal Procedure, 468 So. 2d 220, 225 (Fla. 1985).

imprecision and ambiguity in the language of the Committee Note to Rule 3.701(d)(10) must, as appropriately recognized in Spicer, as a penalty provision be construed in favor of the defendant. See also Lamont v. State, 610 So. 2d 435 (Fla. 1982).

Any presumed disparity or inequity in treating robbery with a mask only partially more severely than robbery, i.e., allowing extension of the statutory maximum[8] but not re-gradation of the offense for adjudicatory or guidelines scoring purposes, is not a basis to read in what extant sentencing provisions do not, as demonstrated by the foregoing analysis, so provide. As this Court has repeatedly observed, that is a matter for legislative consideration or redress.

See, e.g., Armstrong v. State, 656 So. 2d 455 (Fla. 1995) (upon holding that under applicable statutes consecutive county jail sentences which exceed one year for misdemeanors, unlike felonies, are permitted):

> We acknowledge that under this interpretation it is possible that a person convicted of two felonies would be sentenced to only one year in county jail, depending upon the sentencing guidelines, whereas a person committing two misdemeanors may receive consecutive one-year terms. However, we find that it is properly within the purview of the Legislature to weigh the various policy considerations and determine whether defendants should be sentenced to more than a year in county jail if convicted of multiple misdemeanors.

Id. at 56-57.

See also Lamont v. State, 610 So. 2d 435 (Fla. 1992):

> We agree with the district court below that it does not appear rational that the habitual offender statute subjects career criminal who commit less serious felony offenses to enhanced punishment but does not do the same for those who commit the most serious offenses. However, as

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[8] A trial court can, of course, sentence to the (extended) statutory maximum either where the total scoring reaches or exceeds it, or where there are grounds for departure. Fla. R. Crim. P. 3.701(d)(10), (11).

> recognized by the dissent below, section 775.084 by its plain terms contains no extended term of imprisonment for life felony convictions.

Id. at 437.

See also State v. Barnes, 595 So. 2d 22, 24 (Fla. 1992) (recognizing that while it would make more sense for the habitual offender act to require prior convictions to be sequential, that is not a basis for a court to alter the terms of the statute; "The sequential conviction requirement provides a basic, underlying reasonable justification for the imposition of the habitual sentence, and we suggest that the legislature re-examine this area of the law to assure that the present statute carries out its intent and purpose."); Nephew v. State, 580 So. 2d 305, 306 n.1 (Fla. 1st DCA 1991) (recognizing, upon rejecting an argument of unconstitutional vagueness of the twenty-five year mandatory minimum sentence provision for attempted murder of a law enforcement officer, that a defendant could receive a lesser sentence for completing a particular gradation of murder than for attempting the same offense; "This . . . perhaps warrants re-visitation by the Legislature[.]"), cause dismissed, 593 So. 2d 1052 (Fla. 1992).

The controlling principle is that set forth in Perkins v. State, 576 So. 2d 1310 (Fla. 1991):

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. . . . This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. . . . Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.
>
> . . .
>
> The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. . . . This principle can be honored only if criminal statutes are

> applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers.

Id. at 1312-13. (Citations omitted.)

The erroneous reclassification to, and use in guidelines scoring of, a first-degree rather than a second-degree felony is both injurious to the defendant because the reduction of the corresponding twenty points would place him within the next lower permitted range (R. 49; Fla. R. Crim. P. 3.988(c)), and is cognizable as fundamental error apparent on the face of the record. See, e.g., Gordon v. State, 603 So. 2d 512 (Fla. 1st DCA 1992); Cerrato v. State, 576 So. 2d 351 (Fla. 3d DCA 1990); Cox v. State, 530 So. 2d 464 (Fla. 5th DCA 1988); Hall v. State, 483 So. 2d 549 (Fla. 1st DCA 1986).

CONCLUSION

Based on the foregoing, strong-armed robbery with a mask is properly graded as a second-degree felony, and scored as such under the sentencing guidelines. Therefore, this Court should approve Woods v. State, 654 So. 2d 606 (Fla. 5th DCA 1995); Archibald v. State, 646 So. 2d 298 (Fla. 5th DCA 1994), and Spicer v. State, 615 So. 2d 725 (Fla. 2d DCA 1993); should disapprove the lower court's decision and that of Jennings v. State, 498 So. 2d 1373 (Fla. 1st DCA 1986), and reverse and remand for resentencing within the next lower permitted sentencing guidelines range.

Respectfully submitted,

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By: _____
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Keith S. Kromash, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 31st day of August, 1995.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPEME COURT OF FLORIDA

CASE NO. 86,155

JOSE CABAL,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

_____/

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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Terry Chambers, in pro. per.

Robert A. Butterworth, Atty. Gen., for appellee.

Before JORGENSON, GERSTEN, and GREEN, JJ.

REVISED OPINION

PER CURIAM.

Terry Chambers appeals from the trial court's denial of his motion for post conviction relief. Based upon the State's proper confession of error, we reverse the sentence and remand.

Defendant entered a plea of guilty on various charges in exchange for a sentence of seventeen years incarceration as an habitual felony offender. The plea covered two separate cases. In Case No. 90–15219, the trial court ordered defendant imprisoned for a term of seventeen years for burglary of a structure, a third degree felony offense. *See* § 810.02(3), Fla.Stat. (1993). In Case No. 90–3649, the trial court sentenced defendant to a term of ten years for four counts of burglary and one count of grand theft; the sentences were to run concurrently.

As conceded by the State, the sentence imposed in Case No. 90–15219 is illegal and must be reversed. "The maximum sentence which may be imposed for a third-degree felony conviction . . . after properly declaring the defendant an habitual violent felony offender is 'a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.' § 775.084(4)(b)(3), Fla. Stat. (1989)." *Smith v. State*, 625 So.2d 985, 986 (Fla. 3d DCA 1993). Accordingly, on remand the trial court shall resentence defendant in Case No. 90–15219 to a term of ten years or less. As defendant bargained for a term of seventeen years combined on the two cases, the trial court shall also appropriately adjust the sentence imposed in Case No. 90–3649, and provide that the two terms shall be served concurrently.

We find no merit in defendant's remaining point.

Affirmed in part; reversed in part; remanded with directions.

Jose CABAL, Appellant,

v.

The STATE of Florida, Appellee.

No. 95–99.

District Court of Appeal of Florida, Third District.

June 28, 1995.

An Appeal from the Circuit Court for Dade County; Carol R. Gersten, Judge.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Asst. Public Defender, for appellant.

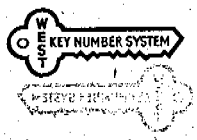
Robert A. Butterworth, Atty. Gen. and Keith S. Kromash, Asst. Atty. Gen., for appellee.

Before HUBBART, GERSTEN and GODERICH, JJ.

PER CURIAM.

We affirm based on the authority of *Jennings v. State*, 498 So.2d 1373 (Fla. 1st DCA 1986). We also certify conflict with *Woods v. State*, 654 So.2d 606 (Fla. 5th DCA 1995), *Archibald v. State*, 646 So.2d 298 (Fla. 5th DCA 1994), and *Spicer v. State*, 615 So.2d 725 (Fla. 2d DCA 1993).

Affirmed; conflict certified.



During its deliberations, the jury posed the following questions: "Principal As To Burglary! What Would Be A Definition? And Would The Defendant Have To Have Been Inside?" The defense reminded the trial court that the principal instruction applied only to the grand theft, not the burglary charge. The trial court decided to reread the standard jury instruction on the law of principals. Thereafter, the jury returned guilty verdicts on both charges. The trial court sentenced Mr. Lovette on March 17, 1994, and he filed a timely notice of appeal on April 12, 1994.

[1, 2] The trial court committed reversible error in instructing the jury on the principal theory because there was no evidence that Mr. Lovette acted in concert with anyone in committing the theft or the burglary. The only evidence of any concerted effort would have been with respect to dealing in stolen property, i.e., that Mr. Lovette traded for crack cocaine the items that presumably the neighbors had stolen. He was not charged with that offense. It is obvious from the questions posed during its deliberations that the instruction confused the jury. Additionally, this instruction could have misled the jury to think that it had to convict Mr. Lovette of both charges if it found he helped the neighbors sell the stolen items. Therefore, we reverse Mr. Lovette's convictions and remand for a new trial. *See Hair v. State*, 428 So.2d 760 (Fla. 3d DCA 1983).

[3] Mr. Lovette also argues that the trial court erred in denying his motion for judgment of acquittal on the grand theft charge because the state failed to present prima facie evidence on the value of the stolen items. While the state's proof on the value of the stolen items was limited, the victim did testify that each television was worth $250. Thus, the combined value of the stolen televisions exceeded the $300 threshold sufficient for a jury to conclude beyond a reasonable doubt that Mr. Lovette committed grand theft. In this regard, we especially note that at no point during the victim's testimony or cross-examination did defense counsel object to or attack her competency to testify on value or the value she gave to the televisions. *See Ramirez v. State*, 448 So.2d 1 (Fla. 3d DCA 1984). *See generally Negron v. State*, 306 So.2d 104 (Fla.1974), *receded from on other grounds, Butterworth v. Fluellen*, 389 So.2d 968 (Fla.1980). Accordingly, we affirm on this issue.

Reversed and remanded for a new trial consistent with this opinion.

RYDER, A.C.J., and ALTENBERND and QUINCE, JJ., concur.

WEST KEY NUMBER SYSTEM

Stanley WOODS a/k/a Anthony D. Clark, Appellant,

v.

STATE of Florida, Appellee.

No. 94–743.

District Court of Appeal of Florida, Fifth District.

April 28, 1995.

Defendant was convicted in the Circuit Court of Flagler County, Kim C. Hammond, J., of robbery and armed robbery, and he appealed. The District Court of Appeal, Harris, C.J., held that: (1) enhancement based on fact that defendant wore mask during robbery was not proper where such enhancement factor was not charged in information or found to be so by jury, and (2) knife in defendant's possession during armed robbery could not serve as basis for minimum mandatory sentence under provision dealing with possession of firearm or "destructive device."

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

1. Criminal Law ⇐1208.6(5)

Sentence for robbery could not be enhanced based on fact that defendant wore mask since such factor was not charged in

information and jury did not make such finding. West's F.S.A. § 775.0845.

2. Criminal Law ⇐1208.6(1)

Even though fact that defendant wore mask during robbery would justify enhancement if properly pled and proved, it would not reclassify offense from second-degree felony to first-degree felony.

3. Criminal Law ⇐1208.6(2)

Where defendant had only knife in his possession during armed robbery, he could not receive minimum mandatory term under statutory provision dealing with possession of firearm or "destructive device." West's F.S.A. § 775.087(2).

James B. Gibson, Public Defender, and James T. Cook, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Lori E. Nelson, Asst. Atty. Gen., Daytona Beach, for appellee.

HARRIS, Chief Judge.

Stanley Woods was convicted of both robbery (Shell Station) and armed robbery (Pizza Hut). We affirm the convictions but reverse for resentencing.

[1, 2] On Woods' scoresheet, the armed robbery was scored as the primary offense. The "additional offense at sentencing" (the Shell robbery), a second degree felony, was scored as though it had been reclassified as a first degree felony because Woods wore a mask during the robbery. *See generally* section 775.0845, Florida Statutes (1993). We find that to be error. Although the testimony indicated that he did, in fact, wear a mask during the Shell robbery, this enhancement factor was not charged in the information nor did the jury make such a finding. In addition, even though the mask, if properly pled and proved, would justify enhancement, it does not "reclassify" the offense. *See Archibald v. State*, 646 So.2d 298 (Fla. 5th DCA 1994); *Spicer v. State*, 615 So.2d 725 (Fla. 2d DCA 1993). The subtraction of the erroneous points results in a lower guideline range.

[3] We also find the court erred in including a minimum mandatory term pursuant to section 775.087(2) in Woods' sentence for armed robbery. This provision requires as a condition for such minimum mandatory sentence that the defendant have in his possession a firearm or "destructive device" (bomb). In this case, Woods had only a knife in his possession during the Pizza Hut robbery.

AFFIRMED in part; REVERSED in part and REMANDED for resentencing.

W. SHARP and GOSHORN, JJ., concur.

Anthony L. WHITEHURST, Appellant,

v.

STATE of Florida, Appellee.

No. 95-01281.

District Court of Appeal of Florida, Second District.

April 28, 1995.

Defendant appealed from order entered in the Circuit Court of Polk County, Daniel T. Andrews, J., denying his motion to declare his concurrent sentences coterminous and to award him additional jail credit. The District Court of Appeal held that: (1) portion of order regarding jail credit had to be reversed due to trial court's failure to attach portions of record refuting defendant's allegations, and (2) where concurrent sentences in different cases were involved, defendant was only entitled to credit against each sentence for time spent in jail for charge that resulted in that sentence.

Affirmed in part, reversed in part and remanded with directions.

No appearance for appellee.

THOMPSON, Judge.

The state appeals the trial court's order granting Louis Soukup's motion for new trial. We affirm the entry of the order because the state has not borne its burden of proving beyond a reasonable doubt that there is no possibility that the cumulative effect of the errors below contributed to appellee's conviction. *Jackson v. State*, 575 So.2d 181, 189 (Fla.1991) (citing *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986)); *Seaboard Air Line R.R. Co. v. Ford*, 92 So.2d 160, 165 (Fla.1956). We hold the trial judge did not abuse his discretion by granting a new trial. *State v. Hamilton*, 574 So.2d 124, 126 (Fla.1991); *Baptist Memorial Hosp., Inc. v. Bell*, 384 So.2d 145 (Fla.1980); *Castlewood Int'l Corp. v. LaFleur*, 322 So.2d 520, 522 (Fla.1975).

AFFIRMED.

HARRIS, C.J., concurs.

DAUKSCH, J., concurring in conclusion only without opinion.

William ARCHIBALD, Appellant,

v.

STATE of Florida, Appellee.

No. 94–130.

District Court of Appeal of Florida, Fifth District.

Dec. 16, 1994.

Appeal from the Circuit Court for Brevard County; Harry Stein, Judge.

James B. Gibson, Public Defender, and Susan A. Fagan, Asst. Public Defender, Daytona Beach, for appellant.

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

COBB, Judge.

On this appeal, the defendant maintains that the court erred in reclassifying his conviction for aggravated battery with a deadly weapon while wearing a mask (Count II) from a second degree felony to a first degree felony and then imposing a life sentence as a violent habitual offender. §§ 775.084, 775.0845, 784.045(1)(a)2, (2), (1993).

As authority, the defendant cites *Spicer v. State*, 615 So.2d 725 (Fla. 2d DCA 1993). In *Spicer*, the court held that section 775.0845(4), Florida Statutes (1989) was an enhanced penalty statute and did not operate to reclassify the degree of felony. The *Spicer* court specifically found that the lower court erred in reclassifying an offense to a first degree felony then sentencing to life under the habitual offender statute. The state recognizes *Spicer* as authority, but claims that any error would be harmless under these facts since the defendant could have received a permitted guideline sentence of life.

We reject the argument of the state and find that the trial court was in a classic either/or situation but erroneously elected both options, substantially altering the punishment of the defendant since violent offender habitualization affects gain time, controlled release eligibility, as well as other areas.

Accordingly, the sentence as to Count II is reversed and remanded to the trial court for resentencing. In all other respects, the convictions and sentences are affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

DIAMANTIS and THOMPSON, JJ., concur.

591 So.2d 1055 (Fla. 2d DCA1991), we certify to the Florida Supreme Court the following question of great public importance:

IF A TRIAL COURT IMPOSES A TERM OF PROBATION ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE?

Affirmed.

SCHOONOVER, A.C.J., and THREADGILL and BLUE, JJ., concur.

Douglas Wayne SPICER, Appellant,

v.

STATE of Florida, Appellee.

No. 92–00323.

District Court of Appeal of Florida, Second District.

Feb. 10, 1993.

Rehearing Denied April 5, 1993.

Defendant was convicted before the Circuit Court, Highlands County, Jesse C. Barber, Senior Associate Judge, of robbery with a mask, and he appealed. The District Court of Appeal, Patterson, J., held that statute providing that if a mask was worn during commission of robbery, offense "shall be punishable as if it were a felony of the first degree" does not reclassify offense from second-degree to first-degree felony, for purposes of habitual offender sentencing.

Reversed and remanded.

1. Statutes ⇐241(1)

Penal statutes must be construed in terms of their literal meaning.

2. Statutes ⇐241(1)

Words used by legislature will not be expanded to broaden definition of penal statutes.

3. Criminal Law ⇐1202.2

Statute providing that if a mask was worn during commission of robbery, offense "shall be punishable as if it were a felony of the first degree" does not reclassify offense from second-degree to first-degree felony, for purposes of habitual offender sentencing. West's F.S.A. §§ 775.082(3)(c), 775.084(4)(a)(1), 775.0845.

James Marion Moorman, Public Defender, and Julius Aulisio, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Susan D. Dunlevy, Asst. Atty. Gen., Tampa, for appellee.

PATTERSON, Judge.

Spicer and a codefendant were charged with armed robbery with a mask, trafficking in illegal drugs, and possession of a controlled substance. Spicer was convicted by a jury of the lesser offense of robbery with a mask and acquitted on the remaining charges. The state filed the required notice, seeking to have him sentenced as a habitual offender.

Robbery is a second-degree felony punishable by up to fifteen years' imprisonment. §§ 812.13(2)(c) and 775.082(3)(c), Fla.Stat. (1989). If, however, a mask was worn during the commission of the robbery, section 775.0845(4), Florida Statutes (1989), provides that the offense "shall be punishable as if it were a felony of the first degree," permitting a maximum penalty of thirty years.

In this case, the trial court interpreted section 775.0845(4) as requiring robbery with a mask to be reclassified as a first-degree felony. The court then used the first-degree conviction to sentence Spicer to life imprisonment under the habitual of-

fender statute, section 775.084(4)(a)(1), Florida Statutes (1989). Spicer argues that although section 775.0845 is an enhanced penalty statute, it does not reclassify the degree of felony. Thus, he argues that he can be sentenced as a habitual offender only for a second-degree felony. We agree and reverse.

[1-3] Penal statutes must be construed in terms of their literal meaning. *State v. Jackson*, 526 So.2d 58 (Fla.1988). Words used by the legislature will not be expanded to broaden the definition of such statutes. *Perkins v. State*, 576 So.2d 1310 (Fla.1991). If the legislature had intended section 775.0845 to reclassify offenses, it would have so stated, as it did in section 775.087, Florida Statutes (1989): "Possession or use of weapon; aggravated battery; felony *reclassification;*" and in section 775.0875, Florida Statutes (1989): "Unlawful taking, possession, or use of a law enforcement officer's firearm; crime *reclassification;* ...." (Emphasis added.) In fact, section 775.0875 is similar to the habitual offender statute, in that neither of the enhanced penalty statutes reclassify the degree of the offense. *See Dominguez v. State*, 461 So.2d 277 (Fla. 5th DCA 1985).

The trial court was therefore placed in an "either-or" situation. The court could use the enhanced penalty provisions of section 775.0845 and impose a guidelines sentence not exceeding thirty years or it could use the second-degree felony conviction to sentence Spicer as a habitual offender to a maximum of thirty years' imprisonment.

Accordingly, we vacate the sentence imposed. Since Spicer does not contend that he does not meet the criteria to be sentenced as a habitual offender and the trial court has elected to make that determination, on remand the trial court may resentence Spicer as a habitual offender to a maximum of thirty years.

Reversed and remanded.

CAMPBELL, A.C.J., and THREADGILL, J., concur.

William KING and Julia King, his wife, Appellants/Cross-Appellees,

v.

Leslie PEARLSTEIN, M.D., and Edward White Memorial Hospital, Appellees/Cross-Appellants.

No. 91-00332.

District Court of Appeal of Florida, Second District.

Feb. 10, 1993.

Appeal from the Circuit Court for Hillsborough County; James A. Lenfestey, Judge.

Raymond T. Elligett, Jr., of Schropp, Buell & Elligett, P.A., and James F. Pingel, Jr., of Lau, Lane, Pieper & Asti, P.A., Tampa, for appellants/cross-appellees.

Charles W. Hall of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., St. Petersburg, for appellee/cross-appellant, Leslie Pearlstein, M.D.

John W. Boult of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for appellee/cross-appellant, Edward White Memorial Hosp.

PATTERSON, Judge.

Reversed and remanded for further proceedings consistent with *Pearlstein v. King*, 610 So.2d 445 (Fla. Dec. 24, 1992).

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

REVERSED and REMANDED for proceedings consistent with this opinion.

SHIVERS and ZEHMER, JJ., concur.

Leonard JENNINGS, Appellant,

v.

STATE of Florida, Appellee.

No. BL–199.

District Court of Appeal of Florida, First District.

Dec. 23, 1986.

Defendant was convicted in the Circuit Court for Columbia County, Wallace Jopling, J., of burglary of a dwelling with an assault while masked, aggravated assault with deadly weapon while masked, battery while masked and exhibiting sexual organs while masked, and trial court imposed sentence of five years for aggravated assault, four years for burglary, one year for battery and one year for misdemeanor, all to run concurrently, and defendant appealed. The District Court of Appeal, Joanos, J., held that: (1) defendant's act of burglary of dwelling, a second-degree felony, was correctly reclassified to first-degree felony, because during commission of offense defendant was wearing "device that concealed his identity"; (2) trial judge correctly based defendant's sentence on primary offense of aggravated assault with knife while masked, which was accurately reclassified from third-degree to second-degree felony; and (3) any error arising from presence of two score sheets before lower court was harmless.

Affirmed.

1. Criminal Law ⇐1202.1

Habitual offender status does not permit reclassification of crimes upward for score sheet purposes; only penalty is enhanced, in terms of years, and degree of offense remains the same. West's F.S.A. § 775.084.

2. Burglary ⇐10

Defendant's act of burglary of dwelling, a second-degree felony, was correctly reclassified to first-degree felony, because during commission of offense defendant was wearing "device that concealed his identity." West's F.S.A. § 775.0845.

3. Criminal Law ⇐1208.6(1)

Trial judge correctly based defendant's enhanced sentence on primary offense of aggravated assault with knife while masked, which was accurately reclassified from third-degree to second-degree felony. West's F.S.A. § 775.0845(3).

4. Criminal Law ⇐1177

Although trial court erroneously had two score sheets before it at sentencing, where penalty actually imposed reflected sentence as based on primary offense, which was correctly enhanced by mask statute, any error arising from presence of two score sheets before lower court was harmless. West's F.S.A. § 775.0845.

Michael E. Allen, Public Defender and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Norma Mungenast, Asst. Atty. Gen., Tallahassee, for appellee.

JOANOS, Judge.

Jennings appeals his sentences which are based on the mask enhancement statute. We affirm.

Appellant was charged with burglary of a dwelling with an assault while masked; aggravated assault with a deadly weapon while masked; battery while masked and exhibiting sexual organs while masked. Appellant was found guilty as charged on all counts. The record contained two sentencing guidelines sheets: one based on a category 5 burglary offense, reflecting a

total of 96 points and calling for a sentence of 3½ to 4½ years; and the second sheet based on the primary offense, a category 4 aggravated assault, reflecting 196 points and calling for a prison sentence of 4½ to 5½ years. The court did not indicate which of the two scoresheets it used to impose the following sentences: 5 years in prison for aggravated assault, 4 years in prison for burglary, 1 year for battery, and 1 year for the misdemeanor, all to run concurrently.

[1, 2] Appellant argues that the lower court erred by reclassifying the degree of aggravated assault and battery upward based on the fact that appellant wore a mask while committing these felonies. Appellant contends that the mask statute, like the habitual offender statute, does not require reclassification of the degree of crimes, but only increases the penalty. We disagree. Appellant is only correct in stating that the habitual offender status pursuant to § 775.084, Florida Statutes (1985) does not permit the reclassifying of crimes upward for scoresheet purposes. The statute's language clearly reveals that only the penalty is enhanced, i.e., in terms of years. The degree of offense remains the same. See *Cuthbert v. State*, 459 So.2d 1098 (Fla. 1st DCA 1984), *pet. for rev. denied* 467 So.2d 1000 (Fla.1985); *Hall v. State*, 483 So.2d 549 (Fla. 1st DCA 1986). However on its face, § 775.0845, Florida Statutes (1985), the mask statute, reveals language that distinguishes it from the habitual offender statute. The language of the mask statute requires that each offense, i.e., misdemeanor or felony, shall be punishable *as if it were reclassified upward* as an offense of the next higher degree. Therefore for example, the trial court was correct in reclassifying appellant's act of burglary of a dwelling, a second degree felony, to a first degree felony, because during the commission of the offense appellant was wearing a "device that concealed his identity." Section 775.0845(4), Florida Statutes (1985). *See also Dominguez v. State*, 461 So.2d 277 (Fla. 5th DCA 1985).

As the State suggests, the Florida Supreme Court has adopted committee note (d)(10) to Rule 3.701, Fla.R.Crim.P. which explains that if an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. The note goes on to distinguish the habitual offender statute where the maximum allowable sentence is increased as provided by operation of statute. See *The Florida Bar: Amendment to Rules of Criminal Procedure*, 468 So.2d 220, 225 (Fla.1985).

[3, 4] We find that the scoresheets were not prepared in error. Also the trial judge correctly based appellant's sentence on the primary offense of aggravated assault with a knife while masked, which was accurately reclassified from a third degree to a second degree felony pursuant to Section 775.0845(3), Florida Statutes (1985), and recommended the most severe sentence of five years incarceration. See Rule 3.701(d)(3)(b), Florida Rules of Criminal Procedure. We further find that, although the trial court erroneously had two scoresheets before it at sentencing, under these circumstances where the penalty actually imposed reflects the sentence as based on the primary offense, which was correctly enhanced by the mask statute, any error arising from the presence of two scoresheets before the lower court is harmless. Therefore we affirm the sentences.

AFFIRMED.

MILLS and SHIVERS, JJ., concur.

Roy McCULLUM, Appellant,

v.

The STATE of Florida, Appellee.

No. 86–2211.

District Court of Appeal of Florida, Third District.

Dec. 23, 1986.

Defendant appealed from order of the Circuit Court, Dade County, Ellen J. Mor-