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 RESPONDENT 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 State of Florida was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbols "R." and "T." will refer to the record on appeal and the transcripts of the proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's statement of the case and facts as substantially correct. Any additional facts will be reflected in the Argument section with appropriate record citations.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN RELYING ON SECTION 775.0845 TO ENHANCE THE OFFENSE OF ROBBERY FROM A SECOND DEGREE FELONY TO A FIRST DEGREE FELONY BASED UPON THE DEFENDANT'S USE OF A MASK.

SUMMARY OF THE ARGUMENT

The legislative intent of §775.0845 requires trial judges to impose increased punishments for defendants who commit crimes while wearing masks. To effectuate this legislative intent, it is necessary to enhance the degree of the primary offense to the next higher degree of offense and to use the enhanced degree of offense as the primary offense at conviction on a defendant's sentencing guidelines scoresheet. This allows trial judges to impose increased punishments for those defendants who commit crimes while wearing masks. To simply increase the statutory maximum to the next higher degree of offense, as the Defendant contends, would, in cases where the guidelines sentence for offenses are below the statutory maximum, not permit the trial judge to actually impose increased punishments. This would contravene the legislative intent of §775.0845.

ARGUMENT

THE TRIAL COURT PROPERLY RELIED ON SECTION 775.0845 TO ENHANCE THE OFFENSE OF ROBBERY FROM A SECOND DEGREE FELONY TO A FIRST DEGREE FELONY BASED UPON THE DEFENDANT'S USE OF A MASK.

In the instant case, the jury found the Defendant guilty of robbery with a hood and/or a mask. (R. 28; T. 859). Additionally, the trial court adjudicated the Defendant guilty of robbery with a hood and/or a mask, in violation of §§812.13(2)(c), 777.011 and 775.0845, Fla. Stats. (1993). (R. 44; T. 862). The only issue on appeal is whether §775.0845 operates to enhance the crime of robbery from a second degree felony to a first degree felony such that the primary offense at conviction on the Defendant's sentencing guideline scoresheet should reflect a first degree felony. The State submits that it does, and the trial court therefore properly imposed a guidelines sentence of four and a half years.

The Defendant argues that although §775.0845 "represents a functional extension of the statutory maximum for conviction . . ., 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." (Petitioner's brief at 5). As will be demonstrated below, the Defendant's argument is misplaced because if his reading of §775.0845 is given effect, the Defendant's actual penalty for committing the offense of robbery with a mask would not have been increased, in contravention of the legislature's intent as expressed in §775.0845, Fla. Stat. (1993).

In analyzing the meaning of a statute, "[i]t is a fundamental

rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute." State v. Webb, 398 So. 2d 820, 824 (Fla. 1981); see also, Speights v. State, 414 So. 2d 574, 576 (Fla. 1st DCA 1982); State v. Miller, 468 So. 2d 1051, 1053 (Fla. 4th DCA 1985), pet. for rev. denied, 479 So. 2d 118 (Fla. 1985). Moreover, "construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided." Webb, 398 So. 2d at 824; see also, Drury v. Harding, 461 So. 2d 104, 108 (Fla. 1984); Dorsey v. State, 402 So. 2d 1178, 1183 (Fla. 1981); Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) (citation omitted); Speights, 414 So. 2d at 578; Miller, 468 So. 2d at 1053.

Additionally, "[a]lthough there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature." S.R. v. State, 346 So. 2d 1018, 1019 (Fla. 1977) (citing, Neal v. Bryant, 149 So. 2d 529 (Fla. 1962)). Moreover, where the word "shall" refers to the imposition of a legislatively intended penalty, it is mandatory. State v. Gelber, 573 So. 2d 92, 93 (Fla. 3d DCA 1991).

Section 775.0845 provides as follows:

> 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.

§775.0845(4), Fla. Stat. (1993) (emphasis added). As made evident by the language of the statute, it is clear that the legislature intended to require increased punishments for all individuals who commit crimes while concealing their identity. Also, since the legislature stated that the penalty "shall be increased" for any defendant who commits a crime while concealing his or her identity, it is clear that it is mandatory for a trial court to increase a defendant's punishment. S.R., 346 So. 2d at 1019; Gelber, 573 So. 2d at 93. Finally, it should be noted that the language used in §775.0845 mandates an actual increase in a defendant's punishment for the use of a mask during the commission of a crime -- not a potential increase in a defendant's punishment.

The Defendant's interpretation of §775.0845, however, contravenes the legislative intent of actually increasing the punishment for all defendants who commit crimes with masks. In fact, the Defendant's reading of §775.0845 renders the statute virtually meaningless, in violation of the rules of statutory construction. Drury, 461 So. 2d at 108; Dorsey, 402 So. 2d at 1183; Ellis, 622 So. 2d at 1001; Webb, 398 So. 2d at 824; Speights, 414 So. 2d at 578; Miller, 468 So. 2d at 1053. That is, in situations where a defendant's guidelines sentence is below the statutory maximum, as will be the case the majority of the time, simply allowing for a greater statutory maximum does not actually increase a defendant's punishment for the commission of a crime with a mask, as §775.0845 mandates. In essence, if the Defendant's reading of

§775.0845 is given effect, only a defendant's potential punishment will be increased where the State charges a defendant with §775.0845.

Moreover, given the Defendant's reading of §775.0845, there are only two situations in which a defendant can actually receive an enhanced punishment for committing a crime with a mask. That is, if a defendant has a considerable number of prior felonies which can be included as prior offenses on the defendant's scoresheet, it is possible that the scoresheet point total could provide for a prison sentence which would exceed the statutory maximum for the primary offense at conviction. In such a situation, however, a defendant is actually being punished for his prior offenses -- not necessarily for committing a crime with a mask. The legislature certainly did not intend to limit the operation of the mask statute to repeat offenders.

Similarly, if a defendant has committed a large number of crimes which are part of the same transaction or occurrence and which can be considered additional offenses at conviction for guidelines scoring purposes, it is possible that a defendant's scoresheet point total could provide for a prison sentence which would exceed the statutory maximum for the primary offense at conviction. The State submits, however, that both of the above described situations in which a defendant's guidelines scoresheet provides for a sentence which exceeds the statutory maximum for the primary offense at conviction are exceptions rather than the norm.

Therefore, if the Defendant's reading of §775.0845 is given

effect, only defendants who have lengthy criminal histories or defendants who commit extended crime sprees will be punished for committing a crime with a mask. Since the legislature clearly intended to punish all defendants who commit crimes with masks, it is evident that the Defendant's interpretation of §775.0845 is inconsistent with the legislature's intent.

The instant case illustrates how the Defendant's interpretation of §775.0845 is inconsistent with the legislature's intent and how the State's interpretation is consistent with the legislature's intent. For example, if the Defendant's robbery conviction had not been enhanced from a second degree felony to a first degree felony, the Defendant would have scored only fifty points for the primary offense at conviction, and he would have scored a total of fifty-seven points. Given this point total, the maximum sentence the trial court could have imposed would have been three and a half years. Fla. R. Crim. P. 3.998(c). This is far below the fifteen year statutory maximum for a second degree felony. §775.082(3)(c), Fla. Stat. (1993).

Furthermore, given the Defendant's interpretation of §775.0845, the statutory maximum for the commission of a robbery with a mask would have been increased from fifteen to thirty years. §775.032(3)(b), Fla. Stat. (1993). Nevertheless, the trial court could still have only imposed a maximum sentence of three and a half years, and the Defendant's actual punishment would not have been increased, in violation of the legislature's clear intent that all individuals who commit crimes while wearing masks should be

more severely punished.

On the other hand, because the trial court categorized the Defendant's robbery conviction as a first degree felony, the Defendant's point total was seventy-seven points. (R. 49). This permitted the trial court to impose an increased sentence of four and a half years. Fla. R. Crim. P. 3.998(c). Hence, if the Defendant's conviction for the offense of robbery with a mask had not been enhanced from a second degree felony to a first degree felony, the Defendant's actual punishment for the crime for robbery with a mask would not have been increased to four and a half years. That is, the Defendant's conviction for robbery with a mask would not have been "punishable as if it were a felony of the first degree." §775.0845(4), Fla. Stat. (1993).

Rather, the Defendant would have been punished as if he had been convicted of a second degree felony, and the mask statute would have been rendered meaningless. By enhancing the degree of the Defendant's primary offense at conviction, the trial court fulfilled the legislative intent of §775.0845 and increased the Defendant's actual punishment for committing a robbery with a mask.

Although the above analysis discussed the mask statute in the context of the pre-1994 sentencing guidelines, the analysis is equally applicable to the 1994 sentencing guidelines. That is, under the 1994 guidelines, the Defendant's interpretation of §775.0845 still merely increases a defendant's potential sentence without increasing the actual sentence.

On the other hand, although the 1994 guidelines do not have

separate point values for different degrees of offenses, it is possible to utilize §921.0013, Fla. Stat. (1994) to enhance a defendant's primary offense at conviction by assigning it an offense level appropriate for an offense of the next higher degree. For example, if the present case had been scored pursuant to the 1994 guidelines, the Defendant's robbery conviction would been properly scored as a level 7 offense rather than a level 6 offense. See Fla. R. Crim. P. 3.702(c); §§921.0012 and 921.0013(3), Fla. Stats. (1994). By scoring a defendant's primary offense at conviction on a 1994 guidelines scoresheet in this manner, it is possible to increase a defendant's actual sentence for the commission of a crime with a mask, as §775.0845 mandates.

In affirming the trial court's judgment and sentence, the Third District relied on First District's case of Jennings v. State, 498 So. 2d 1373 (Fla. 1st DCA 1986) which gave effect to the legislative intent of §775.0845 that all defendants who commit crimes with masks be more severely punished. In Jennings, the court held that "[t]he 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." Id. at 1374. The court therefore found that the lower court properly reclassified the defendant's act of burglary of a dwelling from a second degree felony to a first degree felony based upon the defendant's use of a mask in the commission of his crime. Id.

Additionally, the Jennings court rejected the defendant's

argument that "the mask statute, like the habitual offender statute, does not require reclassification of the degree of crime, but only increases the penalty." Id. Rather, the court held that the habitual offender statute and the mask statute are two entirely different statutes.

That is, the court found that although the habitual offender statute does not permit the reclassification of crimes upward for scoresheet purposes, it specifically delineates how a defendant's sentence should be increased. Id. (citing, 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)). On other hand, the mask statute requires that a defendant be punished as if he or she were convicted of an offense of the next higher degree. Jennings, 498 So. 2d at 1374.

For example, the habitual offender statute provides that if a defendant qualifies as a habitual offender, the trial court shall sentence a defendant convicted of a second degree felony "for a term of years not exceeding thirty." §775.084(4)(a)2, Fla. Stat. (1993). By contrast, the mask statute provides that if a defendant has been convicted of a second degree felony with a mask, the crime "shall be punishable as if it were a felony of the first degree." §775.0845(4), Fla. Stat. (1993).

Moreover, the Jennings court properly relied on committee note (d)(10) to Fla. R. Crim. P. 3.701 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." Jennings, 498 So. 2d at 1374. Since §775.0845's title is "Wearing mask while committing offense; enhanced penalties," it is clear that the mask statute is an enhancement statute as envisioned by sentencing guidelines commission.

As such, committee note (d)(10) clearly applies to the mask statute and supports the First and Third Districts' holdings that the mask statute requires trial courts to enhance the degree of a defendant's offense for the purpose of guidelines scoring. Also, the fact that the statute's title contains the phrase "enhanced penalties" is further evidence that the legislature intended that the Defendant's crime be enhanced from a second degree felony to a first degree felony, as described in Jennings and in committee note (d)(10). See e.g. State v. Bussey, 463 So. 2d 1141, 1143 (Fla. 1985) (The classification of a law or part of a law in a particular title or chapter of Florida Statutes is not determinative on the issue of legislative intent, though it may be persuasive in certain circumstances).

In the instant case, based upon the authority of Jennings, 498 So. 2d at 1374; §775.0845(4), Fla. Stat. (1993); and Fla. R. Crim. P. 3.701, committee note (d)(10), the Defendant's primary offense at conviction for robbery with a mask was correctly enhanced from a second degree felony to a first degree felony. Moreover, the Defendant's primary offense at conviction was properly scored as a first degree felony. The trial court gave effect to the legislative intent that all individuals who commit crimes with masks

should be more severely punished, and the court therefore properly imposed a guidelines sentence of four and a half years.

Policy concerns also support the First and Third Districts' interpretation of §775.0845. That is, the First and Third Districts' interpretation of §775.0845 serves as a warning to criminals that if they commit crimes while concealing their identities, they will be punished more severely. However, if the Defendant's interpretation of §775.0845 is given effect, criminals will be encouraged to wear masks while they commit their crimes. That is, not only will it be more burdensome for the State to prove its cases against these criminals because identity will be more difficult to establish, but in most instances, there will be no actual increase in the punishment for the commission of a crime with a mask. Clearly, it is not in the public interest to encourage criminals to commit crimes with masks.

On the other hand, the Defendant has relied on the decisions of the Fifth and Second Districts as support for his argument. That is, in 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, 726 (Fla. 2d DCA 1993) the Fifth and Second Districts have held that §775.0845 is an enhanced penalty statute that does not operate to reclassify the degree of a felony. Both Archibald and Woods cite Spicer as authority for their holdings.

The State submits that Spicer, Archibald and Woods were all wrongly decided because in concluding that §775.0845 does not

reclassify the degree of an offense, the Second and Fifth Districts ignored the basic rules of statutory construction which dictate that a court should give effect to legislative intent even though it may contradict the strict letter of the statute, and that a court should not interpret a statue such that the statute is rendered meaningless. Ellis, 622 So. 2d at 1001; Drury, 461 So. 2d at 108; Dorsey, 402 So. 2d at 1183; Webb, 398 So. 2d at 824; Miller, 468 So. 2d at 1053; Speights, 414 So. 2d at 578.

That is, as previously discussed, in those situations where a defendant's sentencing guidelines provide for a sentence well below the statutory maximum for the primary offense at conviction (as exists in the instant case), simply providing for a greater statutory maximum in no way enhances the defendant's punishment. Hence, the Second and Fourth Districts' reading of §775.0845 not only subverts the legislative intent of increasing the punishment for all defendants who commit crimes with masks, but it also renders the mask statute meaningless.

Moreover, in Spicer, the Second District erroneously concluded that the mask statute "is similar to the habitual offender statute in that neither of the enhanced penalty statutes reclassify the degree of the offense."[1] Spicer, 615 So. 2d at 726 (citing, Dominguez v. State, 461 So. 2d 277 (Fla. 5th DCA 1985)). As

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[1] The court actually states that §775.0875 is similar to the habitual offender statute. This reference to §775.0875 is most likely a typographical error because the court stated in the preceding sentence that §775.0875 is a reclassification statute. It is clear, given the context of the entire opinion, that the court was attempting to compare the mask statute with the habitual offender statue.

previously discussed, the habitual offender statute and the mask statute are entirely different statutes. Briefly, the habitual offender statute specifically delineates how a defendant's sentence should be increased, whereas the mask statute requires that a defendant be punished as if he or she were convicted of an offense of the next higher degree. Jennings, 498 So. 2d at 1374. Thus, Spicer and its progeny improperly interpreted §775.0845.

Additionally, the Defendant argues that First and Third Districts improperly interpreted §775.0845 because the "inception of §775.0845 preceded the inception of the sentencing guidelines. . . . 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." (Petitioner's brief at 7). This argument is flawed for two reasons.

First, while it is true that §775.0845 was enacted prior the implementation of the sentencing guidelines, See Ch. 81-249, §2, Laws of Fla.; Ch. 84-328, Laws of Fla., it is nevertheless presumed that the legislature had knowledge of §775.0845 when it adopted the sentencing guidelines. State v. Dunmann, 427 So. 2d 166, 168 (Fla. 1983) (There is a general presumption that the legislature passes statutes with knowledge of prior existing laws). Thus, the legislature intended for the mask statute to operate in conjunction with the sentencing guidelines. See Fla. R. Crim. P. 3.701, committee note (d)(10); Carawan v. State, 575 So. 2d 161, 168 (Fla. 1987) (citations omitted) (Court construing statute has obligation

to adapt an interpretation that harmonizes two related statutory provisions while giving effect to both).

Second, the Defendant's attempt to analogize the habitual offender statute with the mask statute is not only inappropriate, but it also does not support his contention that §775.0845 simply extends the statutory maximum. That is, the habitual offender statute is specifically exempted from the operation of the sentencing guidelines, §775.084(4)(e), Fla. Stat. (1993), whereas the mask statute operates within the guidelines. Moreover, as discussed above, the habitual offender and the mask statutes are two entirely different statutes with the former specifically extending a sentence by years and the latter enhancing an offense by degree. Finally, the mask statute, which was not drafted to punish repeat offenders, addresses defendants who have committed crimes with masks, whereas the habitual offender statute addresses defendants who have committed prior offenses within a certain time period.

It should also be pointed out that the enhancement portion of Florida's hate crime statute, §775.085(1)(a)-(d), Fla. Stat. (1994), uses the exact same language as the mask statute. As such, the final outcome of this case will affect not only how courts utilize the mask statute in sentencing defendants who commit crimes with masks, but it will also affect how courts utilize the hate crime statute in sentencing defendants who commit crimes based upon prejudice. The State submits that if this Court approves of the decisions of Second and Fifth Districts in Spicer, Archibald and

Woods, both the mask statute and the hate crime statute will be rendered meaningless in violation of the legislature's intent. On the other hand, if this Court approves of the Third District's decision in this case and of the First District's opinion in Jennings, both the mask statute and the hate crime statute will operate as the legislature intended them to.

* * *

In sum, the legislature clearly intended that §775.0845 would actually increase a defendant's punishment where he or she has committed a crime while concealing his or her identity. On the other hand, the language of §775.0845 indicates that the legislature did not draft the mask statute such that it would merely increase a defendant's potential punishment where a he or she has committed crime while wearing a mask or a hood.

In the present case, since the Defendant's guidelines sentence for a second degree felony would have been well below the statutory maximum of fifteen years, increasing the statutory maximum to thirty years would not have actually increased his punishment. Therefore, to effectuate the legislative intent of §775.0845, it was proper to enhance the Defendant's conviction for robbery from a second degree felony to a first degree felony and to utilize the reclassified offense as the Defendant's primary offense at conviction on his sentencing guidelines scoresheet. Jennings, 498 So. 2d at 1374; §775.0845(4), Fla. Stat. (1993); Fla. R. Crim. P. 3.701, committee note (d)(10). This allowed the trial court to fulfill the legislative intent of §775.0845 and to actually increase the

Defendant's punishment for the commission of a robbery with a mask. As such, the trial judge properly imposed a guidelines sentence of four and a half years.

CONCLUSION

Based upon the arguments and authorities cited herein, the trial court properly relied on §775.0845 to enhance the Defendant's conviction for robbery from a second degree felony to a first degree felony based upon his use of a mask during the commission of a robbery. Additionally, it was proper to utilize the Defendant's reclassified offense as the primary offense at conviction on his sentencing guidelines scoresheet. Hence, this Court should affirm the decision of Third District Court of Appeal in the instant case and approve of the First District's opinion in Jennings v. State, 498 So. 2d 1373 (Fla. 1st DCA 1986). Moreover, this Court should disapprove of the decisions in Archibald v. State, 646 So. 2d 298 (Fla. 5th DCA 1993); Spicer v. State, 615 So. 2d 725 (Fla. 2d DCA 1993); and Woods v. State, 654 So. 2d 606 (Fla. 5th DCA 1995).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this 20th day of September, 1995, to Bruce A. Rosenthal, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

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