In The Supreme Court of Florida

NO. 86,493

STATE OF FLORIDA,

Petitioner,

v.

JOSEPH J. HALL,

Respondent.

ON DISCRETIONARY REVIEW FROM AN OPINION OF
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

NANCY A. DANIELS
Public Defender
Second Judicial Circuit

FRED PARKER BINGHAM II
Assistant Public Defender
Florida Bar No. 0869058

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

COUNSEL FOR RESPONDENT

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CASE NO. 1

THE STATE OF FLORIDA,

Petitioner,

v.

JOSEPH J. HALL,

Respondent.
_____/

PRELIMINARY STATEMENT

This is a discretionary review of a decision of the First District Court of Appeal reversing Respondent's. Appellant was sentenced pursuant to the sentencing guidelines in which three prior convictions, then on appeal, were scored.

Citations in this brief to designate record references are as follows:

"R. ___" — Record on Direct Appeal, Vol. I.

"T. ___" — Transcript of trial proceedings, Vols. II & III.

All other citations will be self-explanatory or will otherwise be explained.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

On October 21, 1994, the jury found Mr. Hall guilty of three counts of battery on a law enforcement officer [Counts 1 through III). [R. 104].

Mr. Hall was previously convicted of three counts of battery on law enforcement officers and he appealed those convictions to the First District Court (Case No. 94-773). That appeal was pending at the time of sentencng.[1] The three appealed convictions were scored as prior record on the Sentencing Guidelines Scoresheet in this case [R. 105]. The resulting point total was 231 points as scored, placing Mr. Hall in the 7th cell under category 4 (Rule 3.988(d)). This cell has a recommended range of 7 to 9 years with a permitted range of 5½ to 12 years incarceration.

Immediately following the entry of the verdict, the court adjudicated Mr. Hall guilty and imposed a sentence of 5 years on each count, the maximum permitted by statute for a third degree felony, the counts to run concurrent with each other and consecutive to any other active sentence being served. [R. 108-117].

[1]As of this date, the appeal of those convictions are still pending.

SUMMARY OF ARGUMENT

The District Court's decision reversibing the trial court because it scored three prior convictions which were on appeal was correct. Convictions are not final if they are on appeal. They do not become final until affirmed and a mandate is issued. This same notion of finality is applied to post-conviction cases and to habitual felony offender cases. There is no reason that the same notion of finality should not be applied in guideline sentencing cases as well. The fundamental notion underlying the use or scoring of prior convictions in both sentencing schemes is to increased or enhance the sentence for new offenses. Likewise, the underlying notion precluding the use of cases on appeal is that those convictions are not final and, in the event of a reversal, would likely require a resentencing in the new case due to the reversal of a prior case. The idea of finality is that until that occurs, the determination of guilt has not be finally determined. Not infrequently convictions are reversed on appeal for insufficiency of the evidence to sustain them, or for other errors requiring a retrial and re-determination of guilt. Until the issue of guilt has been finally determined by affirance on appeal, the results of a trial should not be used to increase punishment, whether by habitualized sentencing, or relative to guidleline sentencing. The decision of the district court was correct and this Court should approve the decision accordingly.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN SCORING THREE PRIOR CONVICTIONS WHICH WERE THEN ON APPEAL AND NOT YET FINAL, AND THE DISTRICT COURT'S REVERSAL OF THE SENTENCES DUE TO THIS ERROR WAS CORRECT

Mr. Hall was previously convicted of three counts of battery on law enforcement officers. These three convictions were scored as prior record on the Sentencing Guidelines Scoresheet in this case [R. 105]. The resulting point total was 231 points as scored, placing Mr. Hall in the 7th cell under category 4 (Rule 3.988(d)). This cell has a recommended range of 7 to 9 years with a permitted range of 5½ to 12 years incarceration. However, Mr. Hall had appealed those convictions to the First District Court (Case No. 94-773), and the appeal of those convictions was pending at the time of sentencing in this case.[2] Had the three convictions then on appeal not been scored, the point total would have been 209 points, placing Mr. Hall in the 6th cell, with a recommended range of 5½ to 7 and a permitted range of 4½ to 9 years.

It was reversible error to score as "prior record" the convictions which were then on appeal. Convictions on appeal are not final convictions, although a judgment entered in the trial court is a "final judgment" which may be the subject of an appealed.

Petitioner, adopting the arguments presented in its brief in this Court in

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[2]As of the date of this brief, the appeal of those convictions is still pending in this Court.

State v. Peterson, No. 85,583, apparently maintains that a conviction is final for all purposes because a judgment of the lower court is considered final as that term is used in determining whether the judgment may be appealed. The petitioner erroneously confuses two separate concepts.

It is well recognized that convictions rendered in the trial court are not final if pending upon appeal, and do not become final until the judgment is affirmed on appeal and mandate issued. The notion of finality at this stage is uniformly applied, for example, in post-conviction proceedings under Fla. R. Crim. P. 3.850. *Huff v. State*, 469 So. 2d 1247 (Fla. 1990). *See also, Brown v. State*, 617 So. 2d 1105 (Fla. 1st DCA 1993); *Jones v. State*, 602 So. 2d 606 (Fla. 1st DCA 1992); *Cook v. State*, 596 So. 2d 483 (Fla. 1st DCA 1992); *Miller v. State*, 601 So. 2d 604 (Fla. 4th DCA 1992).

The same notion of finality had been applied with respect to convictions on appeal for the purporse of imposing habitual felony offender sentences. *Breeze v. State*, 641 So. 2d 450 (Fla. 1st DCA 1994); *Baxter v. State*, 617 So. 2d 338, 339 (Fla. 1st DCA 1993); *Delguidice v. State*, 554 So. 2d 35 (Fla. 4th DCA 1990); *Anderson v. State*, 632 So. 2d 132 (Fla. 4th DCA 1994).

The state contends that Rule 3.701, when it refers to the term "conviction" does not impose a requirement of "finality" in the sense that term is used relative to appealed cases. If there is any latent ambiguity in the meaning of the term or in the rule, the rule of lenity requires that the rule be construed in the manner most favorable to the defendant. § 775.021(1), Fla. Stat. Under such a construction,

"conviction" may only mean a conviction which had become final either upon the failure to appeal within the requiste time limit or following affirance upon appeal or discretionary review. Until either of these events has occurred, it is settled law in Florida that a conviction is not considered final. It is not true that a finding by and jury and adjudication by the trial court irrevocably settle the fact of guilt. That may not be settled until an appeal, if taken, has been decided. Not infrenquently an appellate court will make a determination that the state's evidence was legally insufficient to sustain a conviction, and the appellatge court will reverse the conviction and remand to the trial court with directions to discharge the accused.

Non-final convictions may not be scored for guidelines sentencing purposes any more than convictions on appeal may be considered as predicate offenses when deciding whether to impose a habitual offender sentence. *Breeze v. State*, 641 So. 2d 450 (Fla. 1st DCA 1994); *Baxter v. State*, 617 So. 2d 338, 339 (Fla. 1st DCA 1993). *See also Delguidice v. State*, 554 So. 2d 35 (Fla. 4th DCA 1990); *Anderson v. State*, 632 So. 2d 132 (Fla. 4th DCA 1994).

Of course it is essential that a conviction be final before imposing a habitualized sentence, as the state noted in its *Peterson* brief at 10. But that is not the essential purpose of requiring that a conviction be final (i.e., by being affirmed on appeal for habitualized sentencing purposes). The essential purpose of use of prior convictions under both the habitual offender statute and the sentencing guidelines statutes and rules is the same: to visit upon those convicted of subsequent felony offenses the consequences of their continuing course of

criminality by considering or weighing their prior convictions. Recidivists and multiple violators are then punished more severly.[3] The scoring of prior criminal convictions in the sentencing guidelines scoresheet results in increased range of potential penalties for a new conviction. In a similar manner, and for precisely the same reason, prior felony convictions (or even a single prior violent conviction of a specificied kind) may be used to increase the potential penalty for a newly convicted offense by qualifying the offender for an enhanced sentence. The relevancy of prior convictions in both sentencing schemes is the same: they are used to increase or enhance new sentences for recidivists and multiple violators.

Likewise, under either sentencing scheme, it is improper, or should be improper, to increase (or enhance) punishment based upon a conviction which is not final because the conviction may be reversed. It may be reversed due to sufficiency of the evidence to conviction, in which case it would be patently improper to punish more severely for a legally unjustified "conviction." If reversed for some other error other than sufficiency of the evidence, the case would be remanded for a retrial. In either event, there was a conviction, but it was not a legal conviction after the appeal is decided. Thus, a "conviction" in the trial court may not be a conviction at

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[3]Not every multiple violator is a recidivist, although it can be said that every recidivist is a multiple violator; except, of course, where the most recent conviction was based upon a act committed before the act giving rise to a conviction prior in time, in which case the individual is not a recidivist with respect to the most recent conviction, but may have been a recidivist with respect to the prior conviction. *See Thorp v. State*, 555 So. 2d 361, 363 (Fla. 1990), and *Falzone v. State*, 496 So. 2d 894, 896 (Fla. 2d DCA 1986). Given the foregoing, we will respectfully abandon the use of the word "recidivist" as unworkable.

all in the end. A literal reading of the rule, as the state would give it, would also support the argument that even such a conviction could then be scored. That, of course, is a preposterous notion. Reason and the Constitutions forbid it, we trust. However, if a non-final conviction had been scored in the sentencing for a subsequent offense (or used for enhancemed sentencing), the likelihood is that the sentencing on the other conviction would then also have to be reversed and redone if a conviction upon which it was based has later been reversed. Obviously, neither the original case or the current case would have any finality until the convictions on which the sentence was determined have been affirmed.

The law has always sought finality in judicial actions, a point of ultimate repose.[4] The law believes in legal fictions, and applies them. However, the concept that a conviction that has been appealled is not final is not legal fiction. Although admittedly the appellate reversal rates of convictions may be relative low, reversals are sufficiently common that no reliance may be placed upon the mere fact that a trial court entered a judgment of conviction where liberty interests of the defendant are concerned. This notion is universally true whether the new sentencing comtemplated is under the guidelines or as a habitual felony offender.

The are no reasons behind habitualized sentencing or guideline sentencing which should distinguish one sentencing scheme from the other relative to the use

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[4]This is so even to the extent that we are willing in many instances to be legally blinded to prejudicial errors in the trial which resulted in a conviction because of our doctrine of procedural bar, the severity of which is only relieved by the concept of fundamental error applyied in a very limited number of cases.

or scoring of prior convictions which are on appeal. *Thorp v. State*, 555 So. 2d 361 (Fla. 1990), which held that it was permissible to score a prior conviction although that offense was committed after the present one, does not undermine the argument that the fundamental purpose for the scoring of prior final convictions as a sentence determinor is to punish multiple violators more severely than first time violators. In fact, *Thorp* would make clear that habitualized sentencing is not distinguishable as a recidivist sentencing scheme because, in the strictest sense, a recidivist scheme would only allow consideration of offenses committed earlier than that one pending sentence. Under *Thorp*, the sequence of the commission of the offenses is not relevant so long as there exist the required number and type of prior felony offenses.[5]

If the state's premise that convictions are final for the purpose of guideline sentencing when rendered in the trial court (notwithstanding that they are taken on appeal), but are not final not for habitualized sentencing, an anamolous situation could easily arise. For example, if the felony convictions needed to qualify a defendant for habitualized sentencing are on appeal and not final, this would require imposition of a guideline sentence; but then those same convictions may nevertheless, under the state's argument, be scored to increase the sentencing guidelines range, applying different rules of finality to each sentencing scheme.

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[5]Generally, of course, a qualifying felony conviction which may be used as a predicate for habitualized sentencing must be within 5 years of the commission of the latter felony, and now may not be a conviction for the purchase or possession of a controlled substance.

When it is recognized that the fundamental purpose of consideration of prior convictions is to increase the penalties for new offenses, treating them differently as to finality makes no sense.

For the foregoing reasons, this Court should affirm the District Court's decision. On resentencing, the three convictions should not be scored again because they had not yet become final at the time of the original sentencing under authority of *Breeze v. State*, at 451.

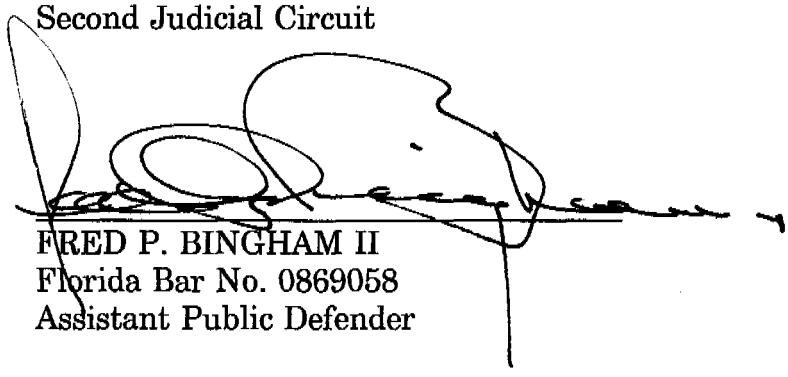
Respondent notes that petitioner has adopted — without expressed limitation — the entirety of the arguments in the *Peterson* brief. That brief also includes an argument based upon the fact that Peterson entered a plea, which is not the circumstance in *Hall*. Because facts and argument in the *Peterson* brief appears irrelevant and inapplicable to the case sub judice, Mr. Hall will not respond to it.

CONCLUSION

Respondent, JOSEPH J. HALL, based on the foregoing arguments, respectfully urges the Court to affirm the decision of the First District Court of Appeal, and to grant such other relief the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



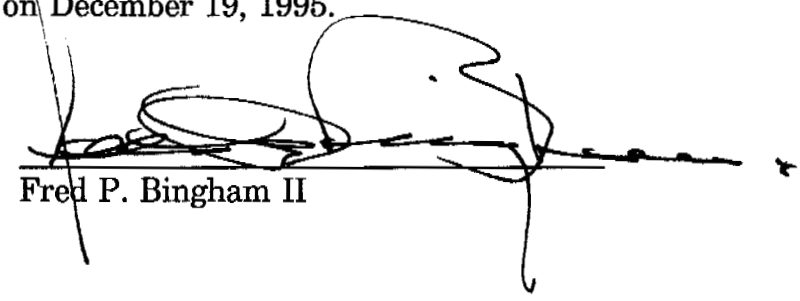
FRED P. BINGHAM II
Florida Bar No. 0869058
Assistant Public Defender

Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to Sonya Roebuck Horbelt, Esq., Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Respondent by U.S. Mail, first-class postage prepaid, on December 19, 1995.



Fred P. Bingham II