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IN THE SUPREME COURT OF THE STATE OF FLORIDA

RONALD WALKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 86,962

****

ON APPEAL FROM THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF FLORIDA

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 441510

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 134924
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
Telephone (407) 688-7755
Counsel for Respondent

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PRELIMINARY STATEMENT

Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the Appellee in the Florida Fourth District Court of Appeal. Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida and the Appellant in the Florida Fourth District Court of Appeal.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

AB = Appellant's Initial Brief on the Merits

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts (AB 2-3) for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief which are necessary to resolve the legal issues presented upon appeal.

SUMMARY OF THE ARGUMENT

Sentencing under the habitual offender statute is permissive rather than mandatory. A trial court may impose a habitual offender sentence following a violation of probation if the reasons for such a sentence existed at the time of the original sentencing. Here, the habitualization occurred at the time of sentencing, but the court exercised its discretion and, rather than sentencing Petitioner to a habitual offender incarcerative sentence, sentenced him to guidelines incarceration and habitual offender probation.

Petitioner waived any double jeopardy argument by engaging in a plea agreement which covered both the charge and the sentence. Further, since Petitioner was found to be a habitual offender at the time of sentencing, the fact that he was not incarcerated on that status did not 'acquit' him of anything.

ARGUMENT

PETITIONER'S SENTENCE TO A PRISON TERM UNDER THE GUIDELINES FOLLOWED BY HABITUAL OFFENDER PROBATION VIOLATES NEITHER FLORIDA LAW NOR THE DOUBLE JEOPARDY CLAUSE

This appeal follows the Court's granting of certiorari in the case of *King v. State,* 648 So. 2d 183 (Fla. 1st DCA), *rev. granted,* 659 So. 2d 1087 (Fla. 1995).

In this appeal, Petitioner urges this Court to follow the Second District Court of Appeal which held, in *Davis v. State,* 623 So. 2d 547 (Fla. 2d DCA 1993), that once a trial court finds that a defendant is a habitual offender, it may either sentence him as a habitual offender, or it may sentence him under the guidelines, but it cannot do both. Respondent respectfully disagrees with this position, and suggests that the better approach is found in the First District's holding in *King, supra,* which the Fourth District Court of Appeal followed in both the case at bar and in *Dunham v. State,* 21 Fla. L. Weekly D89 (Fla. 4th DCA January 3, 1996), *rev. granted,* Case No. 87,269 (Fla. April 24, 1996).

It is, of course, well settled that sentencing under the habitual offender statute is permissive rather than mandatory. *Geohagen v. State,* 639 So. 2d 611, 612 (Fla. 1994); *Burdick v. State,* 594 So. 2d 267 (Fla. 1992). Thus, if a trial court finds a particular defendant to be a habitual offender but nevertheless determines that a habitual offender sentence is not necessary for the protection of the public, it may impose an ordinary guidelines sentence. *State v. Rinkins,* 646 So. 2d 727 (Fla. 1994).

This Court has expressed its favor of a sentencing scheme which would allow a trial court

to give a defendant another chance where that is appropriate, and, at the same time, making such a chance the absolutely final last chance. Thus, the Court readily permitted a trial court to impose a departure sentence following a violation of probation where the reasons for that sentence existed at the time of the initial sentencing. *Williams v. State,* 581 So. 2d 114, 146 (Fla. 1991). Similarly, in *Snead v. State,* 616 So. 2d 964 (Fla. 1993), this Court made it clear that if the State had sought habitualization at the time of a defendant's original sentence, *and* if the reasons for departure from the guidelines had existed at that time, a subsequent habitual offender sentence for violation of probation would be permitted.

Respondent respectfully suggests that those are the very facts which are presented in the case at bar. Here, the reasons for habitualization existed at the time of the initial sentencing; indeed, those facts were acknowledged by Petitioner (R 14-15). In spite of that, the trial court did not sentence Petitioner to a habitual offender sentence; rather, it sentenced him to a reasonably short period of incarceration followed by habitual offender probation. Clearly, there is little if any difference between the sentence in the case at bar, and the sentence which this Court indicated it would have approved in *Snead*, if the habitual offender finding had been made *ab initio*.

Petitioner's reliance on double jeopardy principles is equally misplaced. Petitioner contends that when a trial judge determines that a habitual offender sentence is not appropriate, that judge "has effectively *acquitted* the defendant of a habitual offender sentence" (AB 8).

In the first place, it is well settled that a defendant who knowingly enters into a plea agreement covering both the charges and the sentence waives an otherwise viable double jeopardy claim. *Melving v. Statei,* 645 So. 2d 448 (Fla. 1994). At bar, Petitioner entered into such a plea agreement, and the sentence was clearly spelled out (AB 5; 14-15). Hence, the claim is waived.

The facts in the case at bar are inapposite to those in *Davis v. State,* 587 So. 2d 580 (Fla. 1st DCA 1991) and *Grimes v. State,* 616 So. 2d 996 (Fla. 1st DCA 1993), the cases on which Petitioner relies, in another way as well. In *Davis, supra,* the trial court did not make a proper finding at the time of the sentencing that the defendant was a habitual offender, and the issue on appeal was one of classification, not sentence. The identical facts existed in *Grimes* and, again, the issue on appeal was one of classification: that is, whether, once the trial court failed to classify a defendant as a habitual offender at the original sentencing, it had effectively acquitted him of that status.

At bar, Petitioner was properly classified as a habitual offender at the time of the initial sentence. The fact that the trial court chose not to impose such a sentence was merely ministerial, and, Respondent submits, did not acquit him of anything. *See: State v. Rucker,* 613 So. 2d 460, 462 (Fla. 1993).

The First District and Fifth District Courts of Appeal have spoken to the propriety of the imposition of a habitual offender sentence following a guidelines incarceration. Each of those courts has found no error in such a sentence when the facts which constituted the basis for habitualization and the notice thereof took place prior to the time of the initial sentencing. *See: King v. State,* 648 So. 2d 183 (Fla. 1st DCA 1994); *Anderson v. State,* 637 So. 2d 971, 972 n.1 (Fla. 5th DCA 1994). As stated by the First District, such a procedure "might well encourage a trial judge to give a defendant a second chance under appropriate circumstances, if the judge knows that when such confidence is betrayed, an habitual offence sentence can yet be imposed."

Clearly, a viable sentencing tool which has been found so useful by Florida's trial courts should not be sacrificed on the altar of rigidity. The hybrid sentence imposed in the case at bar is prohibited by neither law nor public policy, and it was properly affirmed by the Fourth District Court

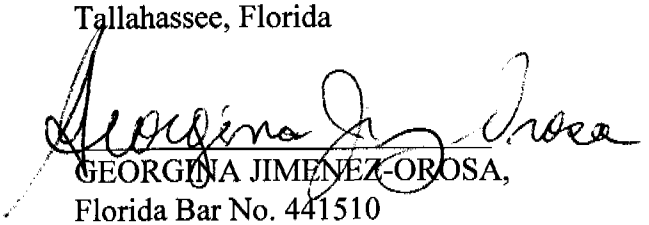
of Appeal below.

CONCLUSION

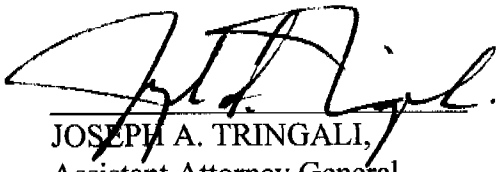
WHEREFORE based on the foregoing arguments and the authorities, Respondent respectfully contends that the Florida Fourth District Court of Appeal did not err, and that its opinion affirming the judgment of the trial court should itself be UPHELD.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida



GEORGINA JIMENEZ-OROSA,
Florida Bar No. 441510
Senior Assistant Attorney General
Bureau Chief



JOSEPH A. TRINGALI,
Assistant Attorney General
Florida Bar No.: 0134924
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
Telephone (407) 688-7759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished by courier to TATJANA OSTAPOFF, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on May 2, 1996.

JOSEPH A. TRINGALI
Assistant Attorney General
Counsel for Respondent