W0014

IN THE SUPREME COURT OF THE STATE OF FLORIDA

RONALD WALKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

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CASE NO. 86,962

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Ronald Walker, was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellant in the Fourth District Court of Appeal. Respondent, the State of Florida, was the prosecution and the appellee, respectively. In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

"R"	Record on appeal
"T"	Transcript of trial

STATEMENT OF THE CASE AND FACTS

Petitioner, Ronald Walker, and a codefendant, William Lee, were informed against for delivery of cocaine on March 16, 1993 (R 68). On June 22, 1993, the State noticed its intent to declare Mr. Walker a habitual felony offender (R 70).

Mr. Walker subsequently pled guilty to the crime charged, with the understanding that he would be sentenced to a term of five and a half years incarceration to be followed by nine and a half years probation (R 5-6). If he violated his probation, he could be sentenced to up to thirty years (R 5-6) as a habitual offender (R 14). The consequences of a habitual offender sentence were reviewed (R 15). Together with his attorney, Mr. Walker had read and understood a written plea form advising him of his rights (R 9). The trial court accepted Mr. Walker's guilty plea as freely and voluntarily made (R 13-14, 16).

Prior to sentencing, Mr. Walker moved to withdraw his plea (R 21-22), based on his continuous maintenance of his innocence, which he gave up only on his prior counsel's advice that he did not have a viable defense to the charge against him (R 24). Evan Kleinman, Mr. Walker's original trial counsel, agreed that he did not discuss defenses with Mr. Walker, because the depositions in the case suggested that the officers saw Mr. Walker in a hand to hand transaction (R 54). This testimony would have been inconsistent with Mr. Walker's account that he remained inside his house throughout the transaction, of which he was unaware (R 57).

The trial court denied Mr. Walker's motion to withdraw his plea (R 63, 82). Mr. Walker was adjudged guilty of delivery of cocaine (R 71) and sentenced, on July 8, 1994, to serve five and a half years in prison to be followed by nine and a half years probation (R 73). The probation order contained the proviso that if Mr. Walker violated his probation, he was to be treated as a habitual offender (R 74). Mr. Walker was given credit of 45 days time served on his prison sentence (R 77). The sentencing guidelines had recommended a sentence of five and half to seven years in prison (R 78).

On direct appeal from the judgment of conviction and sentence, the Fourth District Court of Appeal rejected Mr. Walker's contention that the sentence imposed was illegal, as it erroneously mixed elements of a habitual offender sentence and a non-habitual offender sentence. The district court of appeal noted that its decision in the instant case was in accord with that announced by the First District Court of Appeal in King v. State, 648 So. 2d 183 (Fla. 1st DCA 1995), rev. granted, Case No. 85,026.

On February 12, 1996, this Court accepted jurisdiction over the instant cause, and this brief on the merits follows.

SUMMARY OF THE ARGUMENT

Mr. Walker was sentenced to a prison term imposed under the sentencing guidelines, followed by probation which, if violated, would result in a habitual offender sentence. This combination of sentencing guidelines and habitual offender sanctions was illegal. It contravenes the statutory separation of the two types of sanctions, each of which is assigned different spheres of operation which the court below has improperly confused. It also results in a double jeopardy violation by sentencing the defendant twice, once under the sentencing guidelines and again under the habitual offender statute, for the same offense.

ARGUMENT

POINT I

MR. WALKER'S SENTENCE TO A PRISON TERM UNDER THE SENTENCING GUIDELINES FOLLOWED BY HABITUAL OFFENDER PROBATION IS AN ILLEGAL HYBRID SENTENCE WHICH WAS WITHOUT STATUTORY AUTHORITY AND BARRED BY THE DOUBLE JEOPARDY CLAUSE.

The Second District Court of Appeal has consistently held that a trial judge is without power to sentence a defendant to a hybrid split sentence, with eligibility for gain time on the incarceration portion but with the probation portion retaining habitual offender treatment. Shaw v. State, 637 So. 2d 254 (Fla. 2d DCA 1994). A defendant must be treated as a habitual offender for both portions of his split sentence, or for neither. Pankhurst v. State, 632 So. 2d 142 (Fla. 2d DCA 1994); Burrell v. State, 612 So. 2d 594 (Fla. 2d DCA 1992). Where the defendant was not habitualized on the incarceration portion of his split sentence, a trial court errs in treating him as a habitual offender upon revocation of his probation. Pankhurst v. State, 632 So. 2d 594; Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993).

What is the legal basis for these holdings? By its adoption of the sentencing guidelines, Florida has expressed its determination that equally placed defendant will be treated equally. R. Crim. P. 3.701(b).[1] Departure from the guidelines recommendation is not favored, but only intended to apply when extraordinary circumstances exist to reasonably justify aggravating the sentence. Wemmet v. State, 567 So. 2d 882 (Fla. 1990).

The habitual offender statute arises from quite different concerns. In enacting this statute, the legislature has expressed its concern that qualified offenders be shut away for

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[1] "The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decision...."

extended period of time. Thus, depending on the number and kind of the defendant's prior convictions, the maximum permissible term of his sentence is generally doubled, Section 775.084(4)(a), Fla. Stat. (1993) and he is not eligible to receive gain time. Section 775.084(4)(e), Fla. Stat. (1993).

The sentencing guidelines and the habitual offender statute operate in completely separate spheres. One is not to be confused with the other, nor do they act in combination with each other. Thus, it has been held that an offense for which a defendant has been classified and sentenced as a habitual offender may not be scored as the primary offense when arriving at a guidelines sentence on other charges, Ricardo v. State, 608 So. 2d 93 (Fla. 2d DCA 1992); Alloway v. State, 593 So. 2d 1193 (Fla. 1st DCA 1992); Wyche v. State, 576 So. 2d 884 (Fla. 1st DCA 1991), and that while a judge may sentence a defendant either under the sentencing guidelines or as a habitual offender, he may not depart from the guidelines on the grounds that the defendant is a habitual offender. Whitehead v. State, 498 So. 2d 863 (Fla. 1986). Indeed, since Whitehead was decided, the legislature has made it clear that a sentence as a habitual offender is taken totally out of the guidelines:

> A sentence imposed under this section is not subject to s. 921.001....

Section 775.084(4)(e), Fla. Stat. (1993).

On the other hand, the mere fact that a defendant, by virtue of his prior record, meets the criteria for habitualization does not automatically require that sentence be imposed pursuant to the habitual offender statute. In Burdick v. State, 594 So. 2d 267 (Fla. 1992), this Court held that, although a trial court's *finding* that a defendant meets the qualifications of a habitual offender is virtually ministerial, given the requisite proof, see, King v. State, 597 So. 2d 309 (Fla. 2d DCA). rev. denied, 602 So. 2d 942 (Fla. 1992), the trial court nevertheless has *discretion* as to whether to impose a habitual offender sentence. Thus, the trial judge, having found a defendant to meet the qualifications of a habitual offender, may decide 1) to sentence

him to an enhanced term as a habitual offender; 2) to sentence him pursuant to the sentencing guidelines, without regard to the habitual offender statute; or 3) to sentence him as a habitual offender, but to a term of years less than the maximum provided by the habitual offender statute. Burrell v. State, 610 So. 2d 504, 596 (Fla. 2d DCA 1992). Each of these options is statutorily authorized, and each of them is a permissible alternative sanction. The middle option represents a choice to utilize the sentencing guidelines. The other two involve the habitual offender statute. None involves both the guidelines and habitual offender sentencing.

The disposition in the instant case does not represent any of these permissible options. Instead, it constitutes a *combination* of them, encompassing a guidelines (R 78) prison sentence of five and a half years in prison, the term recommended by the sentencing guidelines (R 78), which was *not* imposed pursuant to the habitual offender statute and for which he was eligible to receive gain time, to be followed by a term of "habitual offender probation," for which the penalty, if he violated, was sentencing as a habitual offender. Mr. Walker's sentence thus represents an attempt to punish him *both* pursuant to the sentencing guidelines *and* as a habitual offender.

This is in contradiction to the habitual offender statute, which expressly provides that where the trial court makes a determination that it is not necessary to sentence the defendant as a habitual offender even though he meets the statutory qualifications for such a sentence, "sentence shall be imposed without regard to this section." Section 775.084(4)(c), Fla. Stat. (1993). It also ignores Fla. R. Crim. P. 3.701(d)(14), which provides: "The sentence imposed after revocation of probation or community control may be included within the original cell [of the guidelines range] or may be increased to the next higher cell [of the guidelines range] without requiring a reason for departure," and "Sentences imposed after revocation of probation or community control must be in accordance with the guidelines." There is no provision in this framework for the imposition of a habitual offender sentence. Finally, the crime for which Appellant was sentenced was "punishable as provided in s. 775.082, 775.083, *or* s. 775.084."

These sanctions are listed in the *alternative*, not in the conjunctive. Their combination to form the hybrid imposed in the instant case is thus not authorized by law.

This Court has clearly warned "that sentencing alternatives should not be used to thwart the guidelines. Poore v. State, 531 So. 2d 161, 165 (Fla. 1988)." Disbrow v. State, 642 So. 2d 740 (Fla. 1994) [no exemption from guidelines "mentioned ... any place ... in section 948.01"]; Lambert v. State, 545 So. 2d 838 (Fla. 1989); Poore, 531 So. 2d at 165 ["the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation"]. The sentencing scheme imposed in the present case represents just such an impermissible attempt to circumvent the constraints of the sentencing guidelines by confusing the very different and differently-focussed sanctions represented by the sentencing guidelines and the habitual offender statute.

Not only is there no statutory authorization for the sentencing scheme employed in the instant case, but constitutional concerns also prohibit its utilization. When a trial judge exercises his discretion to determine that, although the defendant meets the criteria for habitualization, an enhanced sentence is nevertheless not appropriate, he has effectively *acquitted* the defendant of a habitual offender sentence. Davis v. State, 587 So. 2d 580, 581 (Fla. 1st DCA 1991); see, Brown v. State, 521 So. 2d 110, 112 (Fla.), cert. denied 488 U. S. 912, 109 S. Ct. 270, 102 L. Ed. 2d 258 (1988); Donald v. State, 562 So. 2d 792, 795 (Fla. 1st DCA 1990), review denied, 576 So. 2d 291 (Fla. 1991). The Double Jeopardy Clause protects against "multiple punishments for the same offense." North Carolina v. Pearce, 395 U. S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Once the defendant has been acquitted of an enhanced sentencing provision, the prohibition against double jeopardy contained in the Florida and United States Constitutions protects him against the subsequent imposition of that harsher sentencing alternative.

Thus, in Grimes v. State, 616 So. 2d 996, 998 (Fla. 1st DCA 1993) (corrected opinion), the appellate court held

> [W]e find that the trial court elected not to categorize Grimes as an habitual offender, and that such election constituted a determination that may not now be revisited without treading on appellant's constitutional right to be free of facing double jeopardy. Further, under these cases, it is immaterial whether the trial court erroneously concluded that he could not sentence Grimes as an habitual offender.

This Court has reached a similar conclusion in related circumstances, finding that where it determines that a trial judge should have accepted the jury's recommendation of life imprisonment in a capital prosecution, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes and may not be subjected to death sentence again on retrial. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991).

Consequently, once Mr. Walker was sentenced pursuant to the sentencing guidelines, the trial court was prohibited by the bar of jeopardy and the lack of statutory authority from sentencing him as a habitual offender at the same time.

Nor could Appellant's agreement to such a sentence as part of the plea negotiations in this case legitimize the illegal disposition. A defendant cannot, by his agreement to such a sentence, confer authority on the court to circumvent the law. Burrell v. State, 612 So. 2d 594. An illegal sentence may be challenged at any time. Fla. R.Crim.P. 3.800(a). Thus, where the defendant pled guilty to a habitual offender sentence, the appellate court was not precluded from reviewing the propriety of the sentence, since if the sentence was illegal, then the trial court had no authority to impose it, regardless of the plea. Watkins v. State, 622 So. 2d 1148 (Fla. 1st DCA 1993). And a defendant may appeal an illegal habitual offender sentence when he violates probation, even if he did not challenge his habitual offender status at the time he was placed on probation. Perkins v. State, 616 So. 2d 580 (Fla. 2d DCA 1993).

Therefore, the illegal hybrid sentence imposed in the instant case must be corrected by striking the reference to the habitual offender statute from Appellant's probation and treating the entire sentence as one imposed pursuant to the sentencing guidelines.

CONCLUSION

Based on the foregoing argument and the authorities cited, Appellant requests that this Court reverse the judgement and sentence below and remand this cause with directions to strike the reference to the habitual offender statute from Appellant's probation order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOAN FOWLER, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 8th day of MARCH, 1996.

Of Counsel