IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,269

ROBERT DUNHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

SUMMARY OF THE ARGUMENT

Petitioner seeks review by this Court based on the fact that King v. State, 648 So. 2d 183 (Fla. 1st DCA 1994), rev. granted, 659 So. 2d 1087 (Fla. 1995) is currently pending before this Court. The State submits this Court should decline to accept jurisdiction to review the instant case because the Fourth District Court of Appeal withheld issuing the mandate in this appeal pending resolution of the issue by this Court in King. See Appendix. This is the procedure this Court suggested the District Courts follow, Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). Since the issue is already before the Court in King, there is no need for this Court to accept jurisdiction over an additional case to answer the same issue already pending before the Court.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE HAS BEEN STAYED PENDING THIS COURT'S DECISION IN KING V. STATE 648 So. 2d 183 (Fla. 1st DCA 1994), rev. granted, 659 So. 2d 1087 (Fla. 1995), THUS THIS COURT NEEDS NOT ACCEPT YET ANOTHER CASE TO RESOLVE THE SAME ISSUE

Although this Court has jurisdiction to review the District Court's opinion in the instant case, see Jollie v. State, 405 So. 2d 418 (Fla. 1981), the State submits that this Court should decline to take jurisdiction over the case.

The last sentence in the District Court's opinion reads as follows:

> Recognizing that the habitual offender sentencing issue is presently before the supreme court on a certified question in King, we withhold issuing the mandate in this appeal pending resolution of the issue by the supreme court.

See Appendix. This is the procedure this Court suggested the District Courts follow when the issue is already pending before this Court, Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). Petitioner seeks review by this Court based on the fact that King v. State, 648 So. 2d 183 (Fla. 1st DCA 1994), rev. granted, No. 85,026 (Fla. May 25, 1995), is currently pending before this Court. The State submits that simply because King is pending here, there

is no need for this Court to also take jurisdiction over the instant case. The Fourth District's opinion in the instant case "pairs" this case with King until this Court renders its opinion in King. Thus making it unnecessary for this Court to accept jurisdiction over an additional case to answer the same issue already pending before the Court in King.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1995

ROBERT DUNHAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 94-3460

L.T. CASE NO. 89-24360CF10A
and 90-21805CF10A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed January 3, 1996

Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Attorney General, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

STONE, J.

The judgment and sentence are affirmed. Appellant's probation was revoked, as violated by his moving his residence without permission and by failing to report for several months. Although the evidence presented concerning whether he lived at his designated residence was substantially hearsay, we consider portions of his testimony to be sufficient corroboration. Therefore, we affirm the revocation order.

Appellant's probation officer testified that she went to a residence address furnished by Appellant. Nobody was home, but

the officer was told by a third party that Appellant's mother lived there alone. She spoke to Appellant's mother on two occasions and was advised that Appellant did not actually reside at the mother's house, but called to check in often. Appellant testified, insisting that he did reside at his mother's house, but that he also lived in "the streets" and stayed with his sister or other women who he used to support his drug habit.

In Brown v. State, 659 So. 2d 1260 (Fla. 4th DCA 1995), this court determined that a probation violation for changing a residence without consent may not be predicated simply on hearsay statements made to a probation officer/witness by residents at the given residence address, even if family members, that the probationer does not live at that residence. We do not further address Brown, as here there is the factor, apparently not present in Brown, of Appellant's own testimony. See McPherson v. State, 530 So. 2d 1095 (Fla. 1st DCA 1988); McNealy v. State, 479 So. 2d 138 (Fla. 2d DCA 1985). We also note that the trial court made it clear that he was revoking Appellant's probation on either of the charges in the warrant.

Appellant was sentenced, as a habitual offender, to life in prison for kidnapping and to concurrent 30 year sentences for robbery, burglary, and possession of a firearm by a felon. The probation was initially imposed as a split sentence, pursuant to a negotiated plea of 5 years in prison followed by 5 years probation.

That sentence was well below the sentencing guidelines. Incident to his initial plea, Appellant acknowledged that in the event of a subsequent violation, he could be sentenced as a habitual offender. Although the prison sentence imposed at that time did not indicate it was a habitual offender sentence, by agreement, a separate order was entered classifying him as a habitual offender and reserving the right to sentence him as such should he violate probation.

We acknowledge conflict with Shaw v. State, 637 So. 2d 254 (Fla. 2d DCA), rev. denied, 648 So. 2d 724 (Fla. 1994). In Shaw, the defendant was also given a split sentence incident to a plea and, as here, subsequently violated probation and was sentenced upon revocation as a habitual offender. In Shaw, the trial court initially specifically imposed the habitual offender sentence only on the probationary portion of the sentence. The court, in Shaw, deemed this an improper "hybrid" sentence because the burden of habitual status was not imposed on the imprisonment portion of the split sentence. See also Pankhurst v. State, 632 So. 2d 142 (Fla. 2d DCA 1994); Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993); Burrell v. State, 610 So. 2d 594 (Fla. 2d DCA 1992). However, we can discern no reason for precluding a defendant from agreeing to the type of split sentence condition imposed here, notwithstanding its "hybrid" characteristics. This issue has been resolved adversely to Appellant in King v. State, 648 So. 2d 183, 184 (Fla. 1st DCA 1994), rev. granted, 659 So. 2d 1087 (Fla. 1995);

See also Anderson v. State, 637 So. 2d 971, 972 n.1 (Fla. 5th DCA 1994).[1] This court followed King in Walker v. State, 661 So. 2d 954 (Fla. 4th DCA 1995).

In King, the First District recognized that by restricting the trial court's ability to impose this type of split sentencing scheme, courts will be less willing to impose the more lenient sentence than might otherwise be imposed, thereby depriving defendants of the benefit of a substantially shorter prison sentence and the second chance represented by the probation option. The court, in King, recognized that this sentencing issue was likely to arise under one of four ways, saying:

> The first is when the trial judge entirely fails to address the issue of habitual offender status at the initial sentencing. . . . The second situation occurs when the trial judge addresses the issue of habitual offender status but, because of some deficiency, determines that a defendant does not qualify for an habitual offender sentence. The third situation occurs when the trial judge validly finds a defendant to be an habitual felony offender but elects, within his discretion, to impose a sentence other than that provided by the habitual felony offender statute. The fourth situation occurs when the trial judge, after proper notice and proof of an adequate factual basis, makes a finding that the defendant is an habitual felon, and imposes an habitual felony offender sentence.

Id. at 185. Regarding the third situation, the court, in King,

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[1]Although Appellant did not appeal the illegal provision when initially announced, he is not precluded from raising it at this time. See Shaw; Watkins v. State, 622 So. 2d 1148 (Fla. 1st DCA 1993); Perkins v. State, 616 So. 2d 580 (Fla. 2d DCA 1993); Davis.

recognized that no sound reasoning exists for foreclosing a trial judge's sentencing options under these circumstances. Additionally, we note that even if a "hybrid" sentence might be improper initially, Appellant may waive such a claim where the sentence imposed is incident to a negotiated plea bargain. See Brown v. State. See also Novaton v. State, 634 So. 2d 607 (Fla. 1994); Melvin v. State, 645 So. 2d 448 (Fla. 1994). Recognizing that the habitual offender sentencing issue is presently before the supreme court on a certified question in King, we withhold issuing the mandate in this appeal pending resolution of the issue by the supreme court.

POLEN and SHAHOOD, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appendix to Respondent's Brief on Jurisdiction" has been forwarded by Courier to: TATJNA OSTAPOFF, Assistant Public Defender, Counsel for Petitioner, Criminal Justice Bldg./6th Floor, 421 Third Street, West palm Beach, FL 33401, this 12th day of February, 1996.

Georgina Jiménez-Rosa
Of Counsel