017

FILED
JUN 19 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

In The Supreme Court of Florida

CASE NO. 87,686

KENNETH B. ROBINSON,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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 PETITIONER

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,686

KENNETH B. ROBINSON,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

_____/

PRELIMINARY STATEMENT

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

"R. __" — Record on Direct Appeal, Vol. I;

"T. __" — Transcript of proceedings, Vols. II and III;

"ST. __" — Supplemental transcript of hearing on motion for severance of trials, Supplemental Vol. I;

"App. __" — Appendix;

"AB. __" — Respondent's Answer Brief.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING THAT PETITIONER WAS QUALIFIED FOR SENTENCING AS A HABITUAL FELONY OFFENDER BASED UPON A GEORGIA CONVICTION FOR "ROBBERY BY SUDDEN SNATCHING." THAT OFFENSE DOES NOT CONTAIN THE SAME ELEMENTS OF ROBBERY OR OF ANY OTHER SIMILAR OR ANALOGOUS FELONY UNDER FLORIDA LAW. RATHER, THE ELEMENTS OF THAT OFFENSE ARE ANALOGOUS TO PETIT THEFT IN FLORIDA, A MISDEMEANOR OFFENSE.

First, the state properly concedes, given the Georgia definition of the offense, that "on its face, the Georgia crime of 'robbery by sudden snatching' does not require force to overcome the victim's resistance, like the Florida statute." [AB. 11]. The state also properly concedes that the elements of the out-of-state conviction determine whether Florida has a parallel or analogous criminal offense for the purposes of habitual offender sentencing [AB. 7]. Section 775.084(1)(c), Fla. Stat.

However, the mainstay of the state's argument is that the Georgia offense of "robbery by sudden snatching" is nevertheless analogous to Florida's robbery by force because of the language taken from *Hickey v. State*, 53 S. E. 1026 (Ga. 1906), that "if in the effort to take the money or valuables by a sudden snatching, some degree of resistance is made by the owner, while the act may be robbery by force . . . it is also robbery by sudden snatching." [AB. 9]. Thus, the state argues, "robbery by sudden snatching" includes force sufficient to overcome resistance despite the Georgia cases establishing authoritatively that no force beyond that necessary to exert in the effort to acquire possession of the property taken and that no resistance need be offered or

overcome to constitute this offense, which *Hickey* itself held.

What *Hickey* so clearly is saying, however, is that the statutory offense of "robbery by sudden snatching" is a necessarily included offense to the separate statutory offense of "robbery by force." Both offenses are separately defined by subsection of the Georgia robbery statute.

A necessarily included offense, Fla. R. Crim. P. 3.510(b), is by definition "an essential aspect of the major offense," one in which "the burden of proof of the major crime cannot be discharged, without proving the lesser crime as an essential link in the chain of evidence," *Brown v. State*, 206 So. 2d 377, 382 (Fla. 1968). This means that the statutory elements of a necessarily included offense must be subsumed within the statutory elements of the charged offense. The greater offense cannot be proven without necessarily proving all of the elements of the included offense; but the opposite is not true. Proof of only so much force as necessary to exert control and transfer the property taken, but without resistance and without force overcoming resistance, is "robbery by sudden snatching," but such evidence fails to prove "robbery by force" under the Georgia and Florida statutes because resistance is not shown as overcome by the force employed, however slight. To the contrary, proof of the use of force, however slight, sufficient to overcome resistance will support a conviction of robbery by force under the Georgia statute — as it would under Florida's statute — but very obviously would also show an amount of force necessary to acquire mere physical possession of the property taken was also used.

This distinction in the Georgia law is the identical distinction this Court made

in *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922), with regard to what constitutes robbery by force, when the Court held that "All the force that is required to make the offense a robbery is such force that is actually sufficient to overcome the victim's resistance," however slight that force may be. *See also Edwards v. State*, 224 Ga. 684, 164 S.E.2d 120 (Ga. 1968). The state has relied on *Johnson v. State*, 612 So. 2d 689 (Fla. 1st DCA 1993), which fully quoted the standard set down in *Montsdoca*. Robbery by sudden snatching in Georgia requires that "*No force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession*," *Hickey*. This same concept is what distinguishes petty theft from robbery in Florida. This Court has held that the only element that distinguishes robbery from larceny or theft is that the property must have been taken from the person or custody of another by means of force, violence, assault or putting in fear. *Royal v. State*, 490 So. 2d 44, 46 (Fla. 1986), *receded from on other grounds*, *Taylor v. State*, 608 So. 2d 804 (Fla. 1992). The nature of the force required to constitute robbery has been clearly defined by this Court in *Montsdoca v. State* as follows: "The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force that is actually sufficient to overcome the victim's resistance." The distinction between robbery by force and theft was emphasized by this Court in *McCloud v. State*, 335 So. 2d 257, 258-259 (Fla. 1976), where it said:

> In *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922), the 'nice' distinction between robbery and larceny was explained to be the addition to mere taking of a contemporaneous or precedent force, violence, or of an inducement of fear for one's physical safety. Any degree of force suffices to convert larceny into a robbery.

> Where no force is exerted upon the victim's person, as in the case of a pickpocket, only a larceny is committed. *See Colby v. State*, 46 Fla. 112, 35 So. 189 (1903).

In a similar vein, where property is not taken from the victim's person, but in the victim's presence — such as suddenly snatching money from an open till, or suddenly snatching a server's tip from a table, or suddenly snatching merchandise in a store and departing with it — such a taking would constitute theft, not robbery by force, in Florida. The identical circumstances in Georgia would constitute "robbery by sudden snatching."

For these reasons and those argued in the initial brief, the trial court erred in imposing a habitual offender sentence on petitioner based upon the Georgia conviction of "robbery by sudden snatching," a non-qualified predicate offense.

Trial counsel's seeming concession that Mr. Robinson qualified for habitual offender sentencing, after having argued successfully that the Georgia conviction did not constitute a qualified offense for habitual sentencing, is simply inexplicable. It may have constituted ineffective assistance on the face of this record. Clearly, whether this offense qualified was a pure matter of law, and a matter on which Mr. Robinson himself was not qualified to determine whether counsel's apparent concession was legally proper or supportable. Certainly, it is not a subject matter on which Mr. Robinson personally would have had any impute. Nor would he have recognized that defense counsel's inexplicable and patently incorrect "concession" was legally incorrect and totally at odds with counsel's own legal arguments on the issue with regard to

habitual violent felony offender qualifications. *Consider, e.g., Nixon v. State*, 572 So. 2d 1336 (Fla. 1990)(Nixon argues that counsel's concession of guilt resulted in a "complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel" and therefore constitutes ineffective assistance per se under the United States Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)); *Wiley v. Sowders*, 647 F.2d 642 (6th Cir.) (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), *cert. denied*, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981); *People v. Hattery*, 109 Ill.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985) (defense counsel is per se ineffective where counsel concedes defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), *cert. denied*, 478 U.S. 1013, 106 S.Ct. 3314, 92 L.Ed.2d 727 (1986); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), *cert. denied*, 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995).

Certainly counsel's apparent concession that petitioner qualified as a habitual felony offender, after successfully arguing that he did not qualify as a habitual *violent* felony offender based upon the same non-qualifying out-of-state offense, is as equally egregious as a concession of guilt in the absence of petitioner's consent to the strategy (one which is simply insupportable as reasonable). Given the circumstances, petitioner should not be held to have invited or waived the error in the absence of a record of a

knowing and intelligently consented to the concession. The record, however, will not support such a determination.

Even if it may be viewed that counsel's "concession" may have "invited the error," the imposition of a habitual felony offender sentence in the absence of the required statutory predicates results in an illegal sentence that nevertheless must be corrected on appeal. In *Watkins v. State*, 622 So. 2d 1148, 1149 (Fla. 1st DCA 1993), *disapproved of on other grounds*, *White v. State*, 666 So. 2d 895 (Fla. 1996), Watkins entered into a plea agreement, apparently agreeing to imposition of a habitual offender sentence. The court said in *Watkins*:

> Although appellant is precluded from raising issues arising before the entry of his plea, (Footnote omitted) he is not prevented from raising issues regarding the illegality of his sentence. *Robinson v. State*, 373 So. 2d 898 (Fla. 1979). *See also Ford v. State*, 575 So. 2d 1335 (Fla. 1st DCA), *review denied*, 581 So. 2d 1310 (Fla. 1991). If the necessary predicate convictions are absent, a habitual felony offender sentence is illegal. Williams v. State, 591 So. 2d 948, 950 (Fla. 1st DCA 1991), *quashed on other grounds*, 599 So. 2d 998 (Fla.1992). Moreover, no contemporaneous objection is required to appeal from an illegal sentence. *Id.* at 950. Finally, the fact that appellant agreed to accept a HVFO sentence does not preclude review, because if the sentence is determined illegal, the trial court had no authority to enter it, regardless of the plea agreement. *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986) (a trial court cannot impose an illegal sentence pursuant to a plea bargain). *Accord Cribbs v. State*, 599 So. 2d 246, 247 (Fla. 1st DCA 1992); *Thompson v. State*, 599 So.2d 244, 245 (Fla. 1st DCA 1992).

See also Gahley v. State, 605 So. 2d 1309 (Fla. 1st DCA 1992).

The state contends that upon remand, the trial court should be allowed to

impose "a sentence it could lawfully impose, rather than the mandatory guidelines sentence." [AB. 5]. By this, it would appear the state might then possibly seek to obtain another bite at the apple, i.e., to impose a new habitual offender sentence or a habitual violent felony offender sentence based upon a conviction or convictions never submitted, considered, or relied upon by state or the trial court during the first sentencing proceedings.

Petitioner contends that the reasoning underpinning *Pope v. State*, 561 So. 2d 554 (Fla. 1990), would forbid reimposition of a new habitual offender sentence based upon an entirely new and different predicate conviction (if it exists) which was available to the state at the time of the initial sentencing, but not presented. *See Banks v. State*, 591 So. 2d 282 (Fla. 1st DCA 1991); *Taylor v. State*, 576 So. 2d 968, 969 (Fla. 5th DCA 1991)(the action proposed by the state "constitutes punishment more harsh than the sentence reversed on the first appeal (the habitual violent felony offender includes a 10-year minimum mandatory sentence) and is therefore prone to discourage appeals in violation of constitutional due process and the dictates of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).").

Petitioner requests that this court vacate his habitual felony offender sentence and remand for sentencing under the guidelines with the scoresheet corrected to properly reflect the Georgia conviction at issue here.

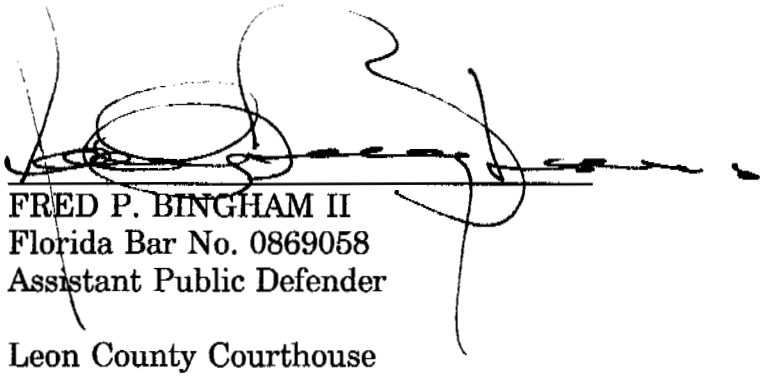
As to the remaining issues, petitioner will respectfully rely on his initial brief.

CONCLUSION

Petitioner, KENNETH B. ROBINSON, based on all of the foregoing, respectfully urges the Court to vacate his conviction and sentence, to remand the case for a new trial and/or for a new guideline sentencing, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



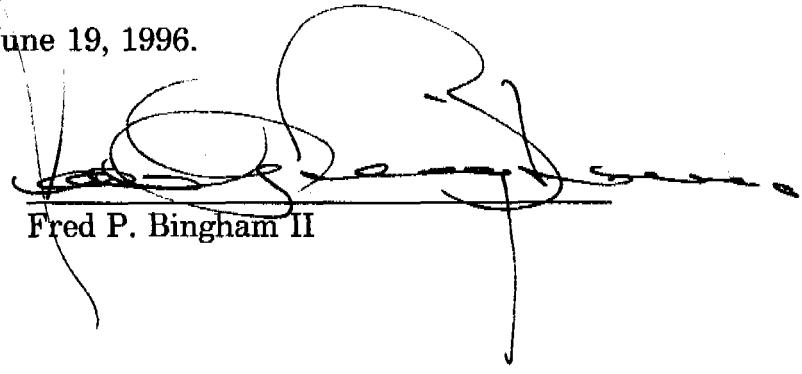
FRED P. BINGHAM II
Florida Bar No. 0869058
Assistant Public Defender

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

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Thomas Crapps, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Petitioner by U.S. Mail, first-class postage prepaid, on June 19, 1996.



Fred P. Bingham II