IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,380

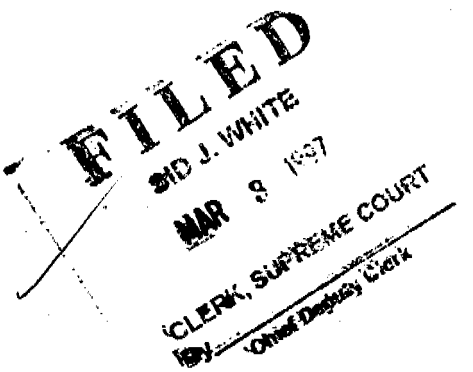
THE STATE OF FLORIDA,

Petitioner,

-vs-

JIMMY HUDSON,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, JIMMY HUDSON, was the defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbol "Ex." followed by a page number where appropriate will refer to the documents contained in the appendix to the State's Response filed in the Third District Court of Appeal. The symbol "App." will refer to the documents contained in the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

On December 29, 1992, the Defendant was charged by information with armed robbery, aggravated battery and grand theft. (Ex. A) On the same day, the State filed its Notice of Intent to Seek Enhanced Penalty. (Ex. B)

On February 8, 1993, the Defendant entered a written plea agreement. (Ex. C) The plea agreement provided that the State would enter a nolle prosequi to the charges of aggravated battery and grand theft and that the Defendant would be "sentenced within the guidelines with respect to the felony charge unless he were found to qualify as a habitual violent felony offender (which finding the Defendant agrees not to contest) in which case that the Defendant be subject to a period of incarceration not to exceed twelve (12) years . . . ." (Ex. C) During the plea colloquy, the trial court reviewed each of the provisions of the plea with the Defendant. (Ex. D)

A sentencing hearing was held on February 26, 1993. (Ex. E) Based on his prior convictions, the court found the Defendant to be a habitual violent felony offender. (Ex. E at 6, Ex. F) The Defendant admitted that his record was pretty bad but claimed that he was "young and wild." (Ex. E at 8) The Defendant denied that he was a violent criminal. (Ex. E at 8) The trial court

adjudicated the Defendant guilty of armed robbery. (Ex. E at 10; Ex. G) The trial court sentenced the Defendant to 12 years imprisonment but did not include a minimum mandatory provision in this sentence. (Ex. E at 10; Ex. G)

On April 1, 1993, Florida Department of Corrections contacted the trial court asking for clarification because the sentence did not include a minimum mandatory provision. (Ex. H) The Department wrote:

> We have set up the record in accordance with Florida Statutes, section 775.084 as outlined above but could only show a 12 year mandatory sentence. If this action is not in accordance with the Court's intent, please provide this office with an amended sentence which does not sentence this offender as a habitual Violent" felony offender.

(Ex. H) On July 29, 1993, the trial court held a hearing regarding the letter. (Ex. I) The Defendant was present and stated that he did not want to vacate his plea. (Ex. I at 4) The State recommended that the sentence stay as ordered. (Ex. I at 4) The trial court neither imposed a twelve years minimum mandatory sentence nor entered an amended sentence sentencing the Defendant as a habitual felony offender rather than a habitual ***violent*** felony offender. Instead, the trial court remanded the Defendant to the custody of the Department of Corrections pursuant to the original

negotiation between counsel and the sentence previously imposed. (Ex. I at 4)

On May 25, 1995, the Defendant filed a motion for post conviction relief, claiming that the trial court's imposition of a minimum mandatory term on resentencing breached his plea agreement. (Ex. J) On July 6, 1995, the trial court denied the Defendant's motion, asserting that it had never imposed a minimum mandatory provision. (Ex. K)

On May 15, 1996, the Defendant filed a motion to correct illegal sentence, alleging the same grounds for relief raised in his earlier motion. (Ex. L) On June 3, 1996, the trial court denied the Defendant's motion without evidentiary hearing. (Ex. M)

The Defendant appealed the denial of this motion to the Third District Court of Appeal. The Third District found that the trial court had never imposed a minimum mandatory provision and affirmed the trial court's denial of the Defendant's motion. (App. A) However, the Third District stated that the Department of Corrections could not enforce the minimum mandatory provision because the imposition of such a minimum mandatory provision was discretionary and because its imposition would violate double jeopardy. (App. A)

QUESTIONS PRESENTED

WHETHER THE LOWER COURT ERRED IN FINDING THAT THE IMPOSITION OF A MINIMUM MANDATORY TERM IN A HABITUAL VIOLENT FELONY OFFENDER SENTENCE WAS DISCRETIONARY?

SUMMARY OF THE ARGUMENT

The Legislature intended the imposition of minimum mandatory provisions in habitual violent felony offender sentences to be mandatory. The lower court's finding that the imposition was not mandatory was erroneous because it was based on this Court's interpretation of the legislative history of another section of the statute. The legislative history of that section does not apply to the interpretation of this section, and an examination of the legislative history of this section demonstrates an intent to make the imposition mandatory.

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING THAT THE IMPOSITION OF A MINIMUM MANDATORY PROVISION IN A HABITUAL VIOLENT FELONY OFFENDER SENTENCE WAS DISCRETIONARY.

Section 775.084(4)(b), Fla. Stat. (1993), states:

> (b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
>
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(Emphasis added).

In interpreting this section, the Third District read the language "such offender shall not be eligible for release" as allowing the trial court in its discretion to impose a minimum mandatory term when the trial court elected to sentence a defendant as a habitual violent felony offender.

The Third District based its holding on *Zequeira v.* State, 671 so. 2d 279 (Fla. 3d DCA 1996), which in turn relied upon ***Walshingham v. State, 602 So.*** 2d 1297 (Fla. 1992). In ***Walshingham,*** the Court held that the imposition of a habitual offender sentence was discretionary, based upon ***Burdick v. State, 594 So.*** 2d 267 (Fla. 1992). ***Burdick*** in turn relied upon State v. ***Brown, 530 So.*** 2d 51 (Fla. 1988).

In ***Brown,*** the Court was confronted with the issue of whether the use of the word "shall" in §775.084(4)(a) required a court to sentence a defendant as a habitual offender if he qualified. The Court looked at the session laws that first added the word 'shall" in 1975. The Court determined that the legislature had used the word 'may" in the session law and that the word was changed to "shall" in an editorial mistake.

In contrast, the legislative history of Chapter 88-131, Laws of Florida, which first enacted the habitual violent felony offender penalties, indicates that the word "shall" was used in enacting §775.084(4)(b)(1), (2) & (3). Ch. 88-131, § 6, at 708-09, Laws of Fla. The use of the word "shall" demonstrates that the Legislature intended for the imposition of the minimum mandatory provisions to be mandatory. ***See* City *of Miami v. Save Brickell Ave., Inc.,*** 426 So. 2d 1100 (Fla. 3d DCA 1983); *Fixel v. Clevenger,*

285 So. 2d 687 (Fla. 3d DCA 1973). Had the Legislature intended for the minimum mandatory provisions to **be** discretionary, it would have used the permissive word "may."

Further, the Senate Staff **Analysis** of the act that became Ch. 88-131, **Laws of Fla.,** stated that the Legislature intended the **overall** length of a habitual felony offender sentence or a habitual violent felony sentence to be discretionary:

> The maximum penalties which may be imposed pursuant to this section are: third degree felonies, 10 years; second degree felonies, 30 years: and first degree felonies, life.

Senate Staff Analysis and Economic Impact Statement for Committee Substitute for Committee Substitute for Senate Bill 307 at 1 (Jun. 2, 1988). In contrast, the **Analysis** shows that the imposition of a minimum mandatory provision in a habitual violent felony offender sentence was **not** discretionary:

> Both habitual felony offenders and habitual felony offenders would be subject to the enhanced penalties currently in place, **however, in the case of an habitual violent offender, there would be minimum mandatory sentences of 5 years for a third degree felony, 10 years for a second degree felony and 15 years for a first degree felony.**

Id. at 2 (emphasis added). If the Legislature had intended for the minimum mandatory provision of a habitual violent felony offender sentence to be discretionary, it could have used the type of

discretionary language used in discussing the overall length of the sentence. As it did not do so, it intended the imposition of the minimum provision to in fact be mandatory. Thus, the lower court erred when it found that the imposition of such provisions was discretionary, and this Court should quash that portion of the lower court's opinion.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that the Court to quash the decision of the lower court.

Respectfully Submitted,

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CERTIFICATE F _____ SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of February, 1997, to Jimmy Hudson, DC# 063803, Charlotte Correctional Institution, 33123 Gil Well Road, Punta Gorda, Florida 33955 .

SANDRA S. JAGGARD
Assistant Attorney General

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APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

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SANDRA S. JAGGARD
Assistant Attorney General

APPENDIX A

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

L96-1-3113-T1

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

JIMMY HUDSON, **

Appellant **

vs. ** CASE NO. 96-1927

THE STATE OF FLORIDA, ** LOWER
TRIBUNAL NOS. 92-1731
Appellee. ** 92-1563

Opinion filed November 6, 1996.

An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Monroe County, Richard J. Fowler, Judge.

Jimmy Hudson, in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before BARKDULL, NESBITT and JORGENSON, JJ.

PER CURIAM

The defendant filed a motion to correct illegal sentence contending that the trial court improperly amended his sentence to add a minimum mandatory term pursuant to the habitual violent

felony offender statute. See Fla. Stat. § 775.084 (4) (1995). The state and the defendant had agreed that he would plead guilty in exchange for a twelve year sentence should he be found to qualify as a habitual violent felony offender. The presentence investigation report showed that he did so qualify and he was sentenced to twelve years in prison. There was no mention of a minimum mandatory portion of the sentence in either the written plea agreement, the colloquy at sentencing or the sentencing documents. After the defendant began serving his sentence, the Department of Corrections wrote to the trial judge and stated that the sentencing documents did not refer to a mandatory term but they had set up the defendant's record to show a twelve year mandatory sentence pursuant to Florida Statute section 775.084.[1] The defendant filed a motion to correct illegal sentence and the trial judge ruled that the sentence previously imposed by the court would remain in effect.

Since the state maintains and the record shows that the defendant's sentence has never been amended from the original sentence imposed, we affirm. However, this affirmance is without prejudice to the defendant to again challenge his sentence should the Department of Corrections seek to enforce a mandatory term.

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[1] We know of no authority for the Department of Corrections to add additional conditions to a sentence. This is a court function. See Slay v. Singletary, 676 So. 2d 456 (Fla. 1st DCA 1996); Thomas v. State, 612 So. 2d 684 (Fla. 5th DCA 1993); Wilson v. State, 603 So. 2d 93 (Fla. 5th DCA 1992).

Washington v. State, 662 So. 2d 1027 (Fla. 5th DCA 1995). The imposition of minimum mandatory terms under the habitual offender statute is permissive, not mandatory, so the sentence imposed is not illegal.[2] See State v. Morales, 678 So. 2d 510 (Fla. 3d DCA 1996); Zequeira v. State, 671 So. 2d 279 (Fla. 3d DCA 1996). Furthermore, if the trial judge had resentenced the defendant to a greater term of imprisonment subsequent to the entry of a jurisdictionally permissible term, it would have constituted double jeopardy. Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996); Gonzalez v. State, 596 So. 2d 721 (Fla. 3d DCA 1992).

Affirmed.

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[2]We recognize conflict with other districts on this point, see White v. State 618 So. 2d 354 (Fla. 1st DCA 1993); Sims v. State, 605 So. 2d 997 (Fla. 2d DCA 1992); Martin v. State, 608 so. 2d 571 (Fla. 5th DCA 1992), although the Fourth District has also held that the imposition of mandatory minimum terms is discretionary. See Green v. State, 615 So. 2d 823 (Fla. 4th DCA 1993).