

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAY 20 1997

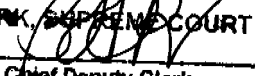
KENNETH HAROLD MOODY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CLERK, SUPREME COURT
By 
Chief Deputy Clerk

FSC CASE NO. 90,014

2nd DCA CASE NO. 96-03375

INITIAL BRIEF ON THE MERITS

KENNETH HAROLD MOODY DC#B-630782
CALHOUN CORRECTIONAL INSTITUTION
P.O. BOX 2000 DORM D2 1335
BLOUNTSTOWN, FLORIDA 32424-2000
PRO SE

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT.	4
ARGUMENT	
THE MANDATORY SENTENCING PROVISIONS OF 9775.084 (4)(b) , FLORIDA STATUTES (1995), ARE PERMISSIVE. THE SENTENCING COURT HAS DISCRETION TO IMPOSE THE NON-RELEASE PORTIONS OF THE SENTENCE AND IF IT WISHES TO DO SO, MUST ORALLY PRONOUNCE IT	5
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

PAGE

CASE AUTHORITIES

Burdi'ck v. State, 594 So.2d 267 (Fla.1992) 5-a

Green v. State, 615 So.2d 823 (Fla. 4th DCA 1993) 5, 7

Hill v. State, 652 So.2d 904 (Fla. 4th DCA 1995) 6

King v. State, 597 So.2d 309 (Fla. 2nd DCA 1992), rev, denied,
602 So.2d 942 (Fla.1992) 5, 6

Morales v. State, 678 So.2d 510 (Fla. 3rd DCA 1996) 6

Reber v. State, 611 So.2d 91 (Fla. 2nd DCA 1992) 7

Sims v. State, 605 So.2d 997 (Fla. 2nd DCA 1992) 5

White v. State, 618 So.2d 354 (Fla. 1st DCA 1993) 6

Zequeira v. State, 671 So.2d 279 (Fla. 3rd DCA 1996) 7, 8

OTHER AUTHORITIES

775.084 (4) (a), Florida Statutes (1995). 7

775.084. (4) (a)(1), Florida Statutes. 5, 6

§775.084(4) (b), Florida Statutes (1995) 3-5, 7

775.084 (4) (b) (1), Florida Statutes 5, 6

§775.084 (4) (b) (2), Florida Statutes 5

Art. I, § 2, Florida Constitution 7

Ch. 96-388 § 44 Laws of Florida 7

Fla.R.Crim.P. 3.850 2

Fourteenth Amendment U.S. Constitution. 7

IN THE SUPREME COURT OF FLORIDA

KENNETH HAROLD MOODY,

Petitioner,

V.

FSC CASE NO. 90,014

2nd DCA CASE NO. 96-03375

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Appellant in the Second District Court of Appeal, and the Defendant in the Criminal Division of the Circuit Court, Twelfth Judicial Circuit, in and for Sarasota County, Florida. Respondent was the prosecution in both jurisdictions. In the brief the Petitioner will be referred to as such or by name. The Respondent will be referred to as "the State."

References to the record will be as follows:

"T" - Transcript of plea and sentencing on August 23, 1994,

STATEMENT OF THE CASE

Petitioner was charged by information, pled and was adjudicated guilty in Sarasota County, Florida, before the Honorable Lee Haworth, Circuit Judge. On August 23, 1994, Petitioner was sentenced to concurrent ten-year habitual violent offender prison sentences for one count each of aggravated assault, possession of a firearm by a convicted felon, false imprisonment and aggravated battery with a deadly weapon. There was also a concurrent ten-year habitual felony offender sentence for one count of robbery with a deadly weapon. A ten year term of probation was to follow all of the habitual violent offender sentences.

Petitioner filed a timely motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 with the Circuit Court, The motion was denied by the Honorable Harry M. Rapkin, Circuit Court Judge and Petitioner timely appealed to the Second District Court of Appeal. The appellate court filed its opinion on December 18, 1996, and following the granting of Petitioner's motion for rehearing, its revised opinion on February 19, 1997.

Petitioner requested that the Florida Supreme Court accept jurisdiction and review the decision and following jurisdictional briefs by the parties, jurisdiction was accepted by this court on May 2, 1997. This brief on the merits follows.

STATEMENT OF THE FACTS

Petitioner was sentenced ten years in prison as an habitual violent felony offender followed by ten years of probation on four counts and to ten years in prison as an habitual felony offender on the remaining count. During oral pronouncement of the sentence the judge did not specifically impose any mandatory minimum restrictions on the habitual violent offender sentences. (T 27-29)

In his motion for post-conviction relief, Petitioner sought to have the ten year mandatory restriction removed from his judgment and sentence as it did not conform to the oral pronouncement. The sentencing court denied the motion. The Second District Court of Appeal affirmed the denial claiming that to do so would render the sentence illegal because the mandatory sentencing provisions of 5775.084 4)(b), Florida Statutes (1995) were required to be imposed. However, the 2nd DCA recognized the conflict between districts with the 1st and 5th districts in accord with the 2nd. The 3rd and the 4th districts hold the view that imposition of the minimum terms of the habitual violent offender sentences are permissive.

Based on this conflict and a claim of unequal protection, Petitioner sought jurisdiction from the Florida Supreme Court and it was granted. This brief follows.

SUMMARY OF THE ARGUMENT

Imposition of the mandatory sentencing provisions of §775.084 (4)(b), Florida Statutes (1995), are permissive as the Florida Supreme Court held in *Burdick v. State, infra*, and followed by the Third and Fourth District Courts of Appeal. Because Petitioner was sentenced within the jurisdiction of the Second District Court of **Appeal**, which holds **the** sentencing provisions of §775.084(4)(b), Florida Statutes (1995) to be mandatory, he is **being** denied the equal protection afforded similarly situated convicted felons sentenced within the jurisdiction of the Third and Fourth Districts.

ARGUMENT

THE MANDATORY SENTENCING PROVISIONS OF §775.084 (4)(b), FLORIDA STATUTES (1995), ARE PERMISSIVE. THE SENTENCING COURT HAS DISCRETION TO IMPOSE THE NON-RELEASE PORTIONS OF THE SENTENCE AND IF IT WISHES TO DO SO, MUST ORALLY PRONOUNCE IT

Petitioner, Kenneth Harold Moody, maintains that his concurrent ten-year habitual violent felony offender prison sentences must be vacated because the ten-year mandatory provision imposed pursuant to §775.084(4)(b)(2), Florida Statutes, was not orally pronounced. The Second District Court of Appeal denied relief citing, Sims v. State, 605 So.2d 997 (Fla. 2nd DCA 1992), holding that, "A trial court is required to impose the minimum mandatory sentence under section 775.084(4)(B)(2), Florida Statutes (1989)." King v. State, 597 So.2d 309 (Fla. 2nd DCA 1992), rev. denied, 602 So.2d 942 (Fla.1992).

This court has previously stated in no uncertain terms that, "sentencing under sections 775.084.(4) (a)(1) and 775.084(4) (b)(1) is permissive, not mandatory." Burdick v. State, 594 So.2d 267 (Fla.1992). The Third and Fourth District Courts of Appeal recognize this court's authority and have consistently ruled to follow the precedent. See Green v. State, 615 So.2d 823 (Fla. 4th DCA 1993) (Because the trial court's writ.f.cn sentences differ from

its oral pronouncements and sentencing under section 775.084(4) **is** discretionary and **does** not require the imposition of mandatory minimum terms, we reverse appellant's sentences); ~~*Hill v. State*~~, 652 So.2d 904 (Fla. 4th DCA 1995); ~~*Morales v. State*~~, 678 So.2d 510 (Fla. 3rd DCA 1996); and ~~*Zequeira v. State*~~, 671 So.2d 279 (Fla. 3rd DCA 1996) (Sentencing under the habitual offender statute as well as the imposition of minimum mandatory terms is permissive, not mandatory.)

The Second DCA stands firm with the First and Fifth Districts in not applying this court's affirmative holding in *Burdick*, supra. These circuits rely on *King*, supra, and ~~*White v. State*~~, 618 So.2d 354 (Fla. 1st DCA 1993), in holding that *Burdick* was expressly limited to whether the maximum sentence of life for a non-violent felon is mandatory or permissive. Petitioner maintains that this court was specifically referring to both habitual felony offenders and habitual violent felony offenders in its holding when the following was written:

"We also hold that sentencing under section 775.084(4)(a)(1) and **775.084. (4) (b) (1)** is permissive, not mandatory, (emphasis added) *Burdick* at 271

If there is any doubt at all about this court's intentions in the *Burdick* decision it should be put to rest by Justice Overton's

statement in his dissent:

"it is clear to me that the legislative intent was to mandate a specific term of years for habitual offenders, regardless of whether the felony involved violence, and that the **legislature then granted the trial judge the discretion** to enhance that sentence to be without parole for a specific period of time if the defendant is a habitual violent offender and has committed a violent felony. Burdick at 272 (Emphasis added)

Further, section 775.084(4)(a) (1995), the habitual felony offender sentencing section, has now been amended by the legislature to conform with section 775.084(4)(b), the habitual violent felony offender section. In the present form they both now read may rather than shall. Ch. 96-388 § 44 Laws of Florida.

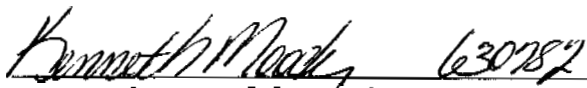
Petitioner seeks relief from this court in the form of resentencing. As in Zequirá, supra, and Green, supra, the written sentence must conform to the oral pronouncement, Reber v. State, 611 So.2d 91 (Fla. 2nd DCA 1992), and in this case, oral pronouncement did not include any mandatory time. To do otherwise would cause Petitioner to serve a greater portion of his sentence than those similarly situated in the Third and Fourth Districts. His equal protection rights guaranteed by the Fourteenth Amendment U.S. Constitution, and Art. I, § 2, Florida Constitution would be in jeopardy

Even assuming, arguendo, that this court wishes to recede from its own precedent, Petitioner contends that any future holding must be prospective only. Based on the holding already in effect, Petitioner urges this court to clarify the Burdick precedent regarding permissive sentencing on the mandatory portion of habitual violent offender sentences so that the First, Second and Fifth Districts will be in harmony with the Third and Fourth Districts on this issue.

CONCLUSION

WHEREFORE, in light of the foregoing, Petitioner prays this Honorable Court will clarify its position that mandatory sentencing under the habitual violent felony offender statute is permissive and find that the oral pronouncement in this case must stand and written sentencing orders corrected to reflect said oral pronouncement.

Respectfully submitted,


Kenneth Harold Moody DC#B-630782
Calhoun Correctional Institution
P.O. Box 2000 Dorm D2-133S
Blountstown, Florida 32424-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF ON THE MERITS has been furnished to: Dale E. Tarpley, Assistant Attorney General, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607, by U.S. Mail this 19 day of May, 1997.



Kenneth Harold Moody