

ORIGINAL

AS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,047

THE STATE OF FLORIDA,

Petitioner,

-VS-

DAVID FRYE,

Respondent.

FILED
SID J. WHITE
MAR 8 1997
CLERK SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

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

BRIEF OF PETITIONER ON JURISDICTION

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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, DAVID FRYE, 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 "App." followed by a page number refers to the appendix to this brief, containing a conformed copy of the slip opinion of the District Court.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of a decision of the Third District Court of Appeal which remanded this case for resentencing so that the trial judge may exercise discretion in imposing the minimum mandatory term under the habitual violent felony offender statute. The Third District held that imposition of a minimum mandatory term under the habitual offender statute was discretionary. (App. 1) Furthermore, the Third District acknowledged that a conflict exists among the District Courts of Appeal on this issue. (App. 1)

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT
CONFLICTS WITH DECISIONS OF OTHER DISTRICT
COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal conflicts with the decisions of the First District Court of Appeal in *White v. State*, 618 so. 2d 354 (Fla. 1st DCA 1993), of the Second District Court of Appeal in *Sims v. State*, 605 So. 2d 997 (Fla. 2d DCA 1992) and of the Fifth District Court of Appeal in *Martin v. State*, 608 so. 2d 571 (Fla. 5th DCA 1992). The lower court's decision held that the imposition of a minimum mandatory term under §775.084(4) (b) (2), Fla. Stat. (1993), was discretionary while the decisions of the other districts held that the imposition of a minimum mandatory term was mandatory.

ARGUMENT

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.

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.

However, in interpreting this same language, the First, Second and Fifth Districts determined that imposition of minimum mandatory terms were required. This interpretation is consistent with the use of the mandatory "shall" in discussing minimum mandatory terms. As this conflict impinges on the legislature's intent to have

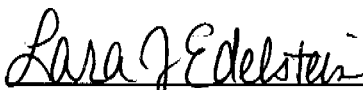
consistency in sentence, this Court should accept jurisdiction and resolve this conflict.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that the Court accept jurisdiction to review this cause.

Respectfully Submitted,

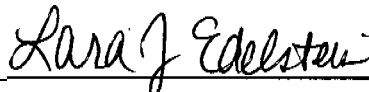
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CERTIFICATE - RVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this 27th day of February, 1997, to Kenneth P. Speiller, Special Assistant Public Defender, 1507 N.W. 14th Street, Miami, FL 33125.



LARA J. EDELSTEIN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner,

-vs-

DAVID FRYE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
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THIRD DISTRICT

APPENDIX TO
BRIEF OF PETITIONER ON JURISDICTION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this 2th day of February, 1997, to Kenneth P. Speiller, Special Assistant Public Defender, 1507 N.W. 14th Street, Miami, FL 33125.



LARA J. EDELSTEIN
Assistant Attorney General

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRDDISTRICT
JANUARY TERM, A.D. 1997

DAVID FRYE,	**	
Appellant,	**	
vs.	**	CASE NO. 96-1504
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL
Appellee.	**	CASE NO. 94-30736

Opinion filed February 26, 1997.

An appeal from the Circuit Court of bade County, Norman S. Gerstein, Judge.

Bennett H. Brummer, Public Defender, and Kenneth P. Speiller, special Assistant Public Defender, for appellant,

Robert A. Butterworth, Attorney General, and Lara J. Edelstein, Assistant: Attorney General, for appellee.

Before JORGENSON, COPE, and FLETCHER, JJ.

PER CURIAM.

Defendant David Frye was convicted by a jury on three counts of armed robbery and one count of armed burglary with assault or

battery. The trial court sentenced Frye to twenty-five years in state prison, with a fifteen-year mandatory minimum term as a habitual violent offender and a three-year mandatory minimum for possession of a firearm on each count to run concurrently. The record" reflects that the trial judge was under the mistaken impression that, when contoncing a defendant as an habitual offender, he had no discretion and was required to impose the mandatory minimum term. As the imposition of mandatory minimum terms is permissive, not mandatory, ¹ we remand the case for resentencing. Zequeira v. State, 671 so, 2d 279 (Fla. 3d DCA 1996). On remand, the trial judge is free to exercise the sentencing discretion permitted by the habitual violent offender statute.

We also note concerning resentencing that, as to the conviction for burglary with assault or battery (a life felony), at the time of the offense (August 25, 1994), life felonies were not subject to enhancement under the habitual violent offender; statute. Section 775.084, Florida Statutes (1993); Barnell v. State, 627 so. 2d 1246 (Fla. 3d DCA 1993), rev. denied, 637 So. 2d 236 (Fla.

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We acknowledge that other district courts have decided to the contrary. 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 3.992). The Fourth District Court has concluded, as we have, that mandatory minimum sentences under the habitual offender statute are discretionary. Green v. State, 615 So. 2d 823 (Fla. 4th DCA 1993).

..... As to the conviction for burglary with assault or battery
the sentence is vacated and remanded for imposition of a guideline

.....

Remanded for resentencing.