IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL T. NEWELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 91,135

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case was before the Fifth District Court of Appeal on review of a summary denial of a motion for postconviction relief. Petitioner's complaint on 3.850 was that his habitual offender sentence was illegal because he alleged that the oral pronouncement of sentence did not impose a year mandatory minimum, but the written sentence did impose a mandatory ten year term of incarceration. (R 6) The trial court denied relief on the ground that to change the sentence as Petitioner requested would render the sentence illegal, because the ten year minimum mandatory sentence was required under the habitual offender act. (R 9)

On appellate review, without requesting a response from the State, the district court entered an order which read as follows:

> AFFIRMED. Lowe v. State, 605 So. 2d 505 (Fla. 5th DCA 1992), rev. denied, 613 So.2d 6 (Fla. 1992). Accord, Moody v. State, 22 Fla. L. Weekly D488 (Fla. 2d DCA Feb. 19, 1997), rev. granted, Case No. 90,014 (Fla. May 2, 1997)....

SUMMARY OF ARGUMENT

Petitioner is correct that the trial court was not required to sentence him to a mandatory minimum sentence under the habitual offender act. Recent cases from this Court reaffirm this ruling. Nevertheless, the State respectfully suggests that the decisions below should be affirmed because the correct result was reached.

Since 1992, it has been clear that habitual offender sentences are permissive, not mandatory. This issue could and should have been raised on direct appeal. A ten year habitual offender sentence is not illegal or beyond the statutory maximum, and as such, the sentence is not subject to collateral review. This Court's recent decisions reiterating prior decisions are not changes in the law subject to retroactive application. Therefore, the trial court correctly denied relief, albeit for the wrong reason. This case should be affirmed without prejudice for Petitioner to seek other avenues of relief.

ARGUMENT

THE ISSUE OF WHETHER THE TRIAL COURT INCORRECTLY BELIEVED THAT A MINIMUM MANDATORY SENTENCE WAS REQUIRED FOR AN HABITUAL OFFENDER SENTENCE SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, AND SO IS NOT PROPERLY RAISED FOR THE FIRST TIME ON COLLATERAL REVIEW.

Petitioner seeks review of the summary denial of his motion for postconviction relief, in which he alleged that his sentence was illegal because the trial court orally pronounced a ten year habitual offender sentence, yet the written sentence reflected that this ten years was a minimum mandatory term. The trial court denied relief, observing that to delete the mandatory minimum term would render the sentence illegal, No documents whatsoever were attached to the order denying relief. (R 9) The district court affirmed, with citations to Lowe v. State, 605 So.2d 505 (Fla. 5th DCA 1992), rev. denied, 613 So.2d 6 (Fla. 1992). Accord. Moody v. State, 22 Fla. L. Weekly D488 (Fla. 2d DCA Feb. 19, 1997), rev. granted, Case No. 90,014 (Fla. May 2, 1997).

Subsequently, this Court reiterated its prior holding that the mandatory minimum aspect of an habitual offender sentence was permissive, not mandatory. State v. Hudson, 698 So.2d 831 (Fla. 1997); Moody v. State, 699 So.2d 1009 (Fla. 1997). In these cases, this Court repeated its prior decision that the mandatory minimum portions of an habitual offender sentence were permissive, and not required to be imposed by the trial court. Burdick v. State, 592

SO.2d 276 (Fla. 1992); Walsingham v. St-ate, 602 So.2d 1297 (Fla. 1992).

The State does not dispute that the reason given by the trial court for summarily denying the motion for postconviction relief was incorrect. Since 1992, it has been clear that a trial court is not required to impose a mandatory minimum sentence upon habitual offenders. However, the State contends that summary relief was nevertheless proper for a different reason. Accordingly, Petitioner is unentitled to relief.

Petitioner's claim in the 3.850 was that the oral and written pronouncement of sentence conflicted because the oral announcement of sentence was simply ten years' incarceration, while the written sentence indicated that this term was a mandatory minimum. He alleged that the state improperly convinced the trial court that the mandatory minimum ten year sentence was required, and not discretionary. The sentence in this case was originally imposed on January 7, 1994. The direct appeal concluded in February, 1995. Newell v. State, 651 So.2d 716 (Fla. 5th DCA 1995).

The issue of whether or not the trial court improperly believed that the mandatory minimum sentence was mandatory, as opposed to permissive, and the issue of any alleged conflict in the oral and written sentence were issues that could and should have been raised on direct appeal. Burdick was decided over two years prior to the direct appeal in this case. Since the issues raised in the 3.850 motion were issues which could and should have been raised on direct appeal, the trial court correctly denied

collateral relief summarily.

Moreover, the imposition of a ten year sentence upon an habitual offender is not an illegal sentence which can be raised on collateral review pursuant to Davis v. State, 661 So.2d 1193 (Fla. 1995). Ten years is within the statutory maximum for an habitual offender, and hence, it is legal.

Finally, the State contends that Moody and Hudson are not changes in the law, but merely refinements of Burdick. Petitioner had the tools available to raise this claim in 1994; therefore, it cannot be maintained that Moody and Hudson created fundamental constitutional rights subject to retroactive application. Witt v. State, 387 So.2d 922 (Fla. 1981); State v. Callaway, 658 So.2d 983 (Fla. 1995).

The State recognizes that even though this claim is not properly raised in a 3.850, there are other available avenues of redress, namely, a Petition for Writ of Habeas Corpus filed in the fifth district alleging ineffective assistance of appellate counsel, Fla.R.App.P. 9.100. Given the incomplete record before this Court, however, the State contends that it is impossible to treat this case as what it could have been, or might have been, had the case evolved in a different manner procedurally. It is possible that this issue was in fact raised on direct appeal. It is possible that the sentencing transcript does not support Petitioner's contention that the trial court believed that he was required to impose a mandatory minimum sentence. None of the sentencing documents, or the transcripts, or the appellate briefs

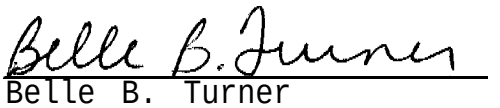
are contained in this record on appeal. Without this record support, it is not possible to determine exactly what happened at Petitioner's sentencing or which issues were raised on direct appeal. All that can be said for certain is that summary denial of the motion for postconviction relief was proper and should be affirmed.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to affirm the summary denial of the motion for postconviction relief.

Respectfully submitted,

Robert A. Butterworth
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing motion has been furnished by United States Mail to Paul T. Newell, DC# 122589, at Florida State Prison Workcamp, P.O. BOX 181, Starke, FL 32091 this 6th day of January, 1998.

Belle B. Turner
Assistant Attorney General

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PAUL T. NEWELL,

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STATE OF FLORIDA,

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_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
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APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1997

PAUL T. NEWELL,

Appellant,

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

v.

Case No. 97-1023

L.Ct # 93-4540

STATE OF FLORIDA,

Appellee.

Opinion filed June 20, 1997

3.850 Appeal from the Circuit Court
for Orange County,
Cynthia Z. Mackinnon, Judge.

Paul T. Neweil, Starke,
pro se.

No Appearance for Appellee.

PER CURIAM

AFFIRMED. Lowe v Stare. 605 So. 2d 505 (Fia. 5th DCA 1992), rev. denied, 613 So. 2d 6 (Fla. 1992). Accord, Moody v. State, 22 Fla. L. Weekly D488 (Fla. 2d DCA Feb. 19, 1997), rev. granted, Case No. 90.014 (Fla. May 2. 1997); White v. State, 618 So. 2d 354 (Fla. 1st DCA 1993). Contra: State v. Morales, 678 So. 2d 510 (Fla. 3d DCA 1996);, Hill v. State: 652 So. 2d 904 (Fia. 4th DCA 1995).

PETERSON, C.J., GOSHORN and ANTOON, JJ.. concur