

IN THE SUPREME COURT OF FLORIDA

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SID J. WHITE

OCT 26 1998

CLERK, SUPREME COURT

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WADE E. CARTER
Petitioner/Appellant,

CASE NO: 92-501

V.
State of FLORIDA,
Respondent/Appellee

PETITIONER'S ANSWER BRIEF TO RESPONDENT'S
REPLY ON "DISCRETIONARY REVIEW"

Petitioner/Appellant, pro se:

WADE E. CARTER, DC # 068325

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STATEMENT OF THE CASE AND FACTS

In 1986, petitioner was tried, convicted and received a departure sentence as an habitual offender, for 2nd degree murder, 40 yrs, attempted 2nd degree murder, 30 yrs., battery, 1 yr. Counts 2 and 3 to run concurrent with 40 yrs. in count one. Petitioner appealed, Carter v. State, 510 So. 2d 930 (Fl. 5th DCA), review denied, 519 So. 2d 986 (Fl. 1987). Post conviction proceedings entail a 3.800(a) motion, denied, 551 So. 2d 475 (Fl. 5th 1989); a 3.850 denied and affirmed in Carter v. State, 559 So. 2d 1151 (Fl. 5th 1990); and a habeas corpus petition, denied, Carter v. State, case no. 90-608 (Fl. 5th 6-4-1990),

On May 19, 1997, petitioner filed a 3.800(a) motion to correct an illegal sentence, denied. An appeal to the 5th DCA followed, denied in Carter v. State, 23 FLW (D) 23 (Fl. 5th 12-19-1997) An opinion was published affirming the denial. Petitioner then filed an All WRIT petition with this court which was accepted as a Notice to Invoke Discretionary Review. This court has accepted jurisdiction in an order dated September 9, 1998. Petitioner filed an Initial brief, respondents have replied. Petitioner now files his answer to respondent's reply.

SUMMARY OF ARGUMENT

Petitioner was sentenced as an habitual offender, (under statute 775.084) to an enhanced sentence, 40 yrs. This was a 1st degree felony enhanced to a life felony for the use of a weapon. A sentence is illegal under State v. Callaway, 658 So. 2d 983 (Fl. 1995) and Davis v. State, 661 So. 2d 1193 (Fl. 1995) when it is a habitual sentence to a life felony contrary to Lamont v. State, 610 So. 2d 435 (Fl. 1992). Even though it is within the 40 yr. statutory maximum of 775.082 (3) (a) (2), its enhanced punishment is not authorized by 775.084, Fl. Statute. Respondent's contention that petitioner does not have an habitual sentence is not supported by the record in this case.

ARGUMENT

"One convicted of a life felony is not subject to enhanced punishment as an habitual offender under section 775.084"; Lamont v. State, 610 So.2d 435, at 438 (Fl. 1992). Since section 775.084 authorized no extended term of imprisonment for life felonies such sentence is illegal irrespective of its length."

Every district and this court acknowledge enhancement of life felonies under 775.084 is illegal and exceeds penalties statutorily authorized. Washington v. State, 653 So.2d 362, 367 (Fl. 1994); Partridge v. State, 680 So.2d 543, 544 (Fl. 1st 1996); Blotz v. State, 640 So.2d 1240, 1241 (Fl. 2nd 1994); Thomas v. State, 638 So.2d 627 (Fl. 3rd 1994); Core v. State, 639 So.2d 185, 186 (Fl. 4th 1994); Johnson v. State, 664 So.2d 36, 37 (Fl. 5th 1995).

An illegal sentence which can be corrected by rule 3.800(a) is a sentence which exceeds the maximum allowed by law, King v. State, 681 So.2d 1193 (Fl. 1995); State v. Callaway, 658 So.2d 983 (Fl. 1995); Davis v. State, 661 So.2d 1193 (Fl. 1995).

CONCLUSION

(775.084 (1)(a): "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, it finds that): 775.084 (3)(a), (b), (c), (d), (e) and (4)(a) gives the procedure (criteria) to be followed to enhance an habitual felony offender to an extended term of imprisonment. It is obvious from the sentencing record that this was the procedure followed in sentencing the petitioner. It is the petitioners contention that the statute, 775.084 was illegal in its entirety concerning petitioners 40 yr sentence in court one. In Nathan v State, supra, subscript (4), 775.084: Effective October 1, 1995, the legislature has overruled Lamont by providing that life felonies are subject to habitual offender sentencing. On re-sentencing Nathan the trial court was given instructions. Nathan had multiple sentences but on re-sentence the state was instructed to give a guideline sentence on the burglary offense but could depart from the guidelines on the remaining offenses.

Petitioner has an illegal 40 yr. habitual sentence under statute 775.084. The habitual itself exceeds the statutory

maximum which makes it cognizable under rule 3.800(a). Petitioner is not an attorney but can only try to use common sense. Petitioner prays this court grants meaningful relief in accordance with Nathan v. State.

Respectfully Submitted,
Wade E. Carter

DECLARATION/CERTIFICATE OF SERVICE

Having read the forgoing statements of this petition, I swear under penalties all to be true and correct based upon personal knowledge and hereby certify that a true and correct copy has been furnished by U.S. mail to:

Roberta J. Tylke

Asst. Atty. Gen.

444 Seabreeze Blvd. 5th floor

Daytona Beach, Fl. 32118

this 23 day of October, 1998.

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