

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,145

JOHN WESLEY LINDER,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

FILED

✓ SID J. WHITE

AUG 17 1990

CLERK, SUPREME COURT

By Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

THE GORT ACT VIOLENT CAREER CRIMINAL PROVISIONS OF §775.087(4)(c) ARE UNCONSTITUTIONAL BECAUSE THE SESSION LAW THAT CREATED IT, CHAPTER 95-187, VIOLATED THE SINGLE SUBJECT PROVISIONS OF THE FLORIDA CONSTITUTION, AND CONSEQUENTLY, THE DECISION OF THE THIRD DISTRICT MUST BE QUASHED AND THE DEFENDANT'S 40 YEAR SENTENCE PURSUANT TO THE GORT ACT REVERSED FOR RESENTENCING.

CONCLUSION 9

CERTIFICATE OF SERVICE 9

TABLE OF CITATIONS

CASES	PAGES
Higgs v. State 695 So. 2d 872 (Fla. 3d DCA 1997)	4,7
State v. Thompson Case No: 92,831	5,6
Thompson v. State 708 So. 2d 315 (Fla. 2d DCA 1998)	4,6

OTHER AUTHORITIES

STATUTES	PAGES
§775.084 (4) (c)	2,5,6
§776.08	2
§784.045 (1) (a) 2	1

INTRODUCTION

This is the initial brief on the merits of petitioner/defendant John Linder on conflict jurisdiction from the Third District Court of Appeal.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Transcript of Proceedings

(A) - Appendix with Third District's decision

STATEMENT OF THE CASE AND FACTS

The petitioner/defendant was charged by information on January 19, 1996, with aggravated battery in violation of §784.045(1)(a)2, Florida Statutes (1995). (R: 1)¹

Jury trial commenced on November 18, 1996. (T: 1) The victim, Rebecca Denham, testified at trial that she and the defendant lived together in a car and that on the day of the incident, she was on crack cocaine. (T: 140-145) According to Rebecca, the defendant beat her with a stick in a laundry room at the Pine Tree Villas apartment complex, then beat her in the parking lot and then in the car. (T: 145-151) She sustained broken facial bones and bruises. (T: 157) The police found crack

¹He was also charged with kidnapping, but the jury acquitted him of that charge. (R: 17; T: 417)

cocaine in Rebecca's car. (T: 222-229) The defendant testified they lived together in the car and that on the day of the incident, they were partying with drugs and beer. (T: 311-316) They went their separate ways and the defendant began working on a car. (T: 318) Rebecca came home, beaten up and injured by a man named Fred. (T: 322) The defendant denied beating up Rebecca. (T: 321-323) The jury found the defendant guilty of the aggravated battery. (R: 16; T: 417)

The sentencing hearing took place on January 16, 1997. (R: 33) The state sought to have the defendant sentenced under the violent career criminal statute, the "Gort" statute, §775.084(4)(c). (R: 35) The defendant acknowledged receiving written notice of this intention to seek this enhanced sentencing and stipulated to the certified copy of the prior convictions. (R: 35) The state said it had to prove the defendant had previously been convicted as an adult three or more times of a forcible felony as defined in §776.08 and presented certified copies of convictions in four prior cases as qualifying offenses. (R: 36) The first was case no: 87-37475 filed on February 8, 1988, for burglary of a dwelling and aggravated assault. (R: 36) The second conviction was case no: 77-2577 filed on January 23, 1979, for robbery. (R: 37) The third conviction was case no: 77-2123, filed on January 23, 1979, for robbery. (R: 37) The fourth conviction was case no:

88-35360 filed on June 6, 1989, for burglary of an occupied conveyance. (R: 37) Thus, the underlying qualifying felonies the state used were a burglary conviction in 1989, burglary and aggravated assault convictions in 1988, and two separate robbery convictions in 1979. (R: 38)

The prosecutor also presented an affidavit from the Department of Corrections showing the defendant had been previously incarcerated in state prison and was last released from such incarceration on January 31, 1992. (R: 38)

The state further pointed out that the offense for which the defendant was being sentenced was committed on December 30, 1995, which was after the effective date of October 1, 1995, for the Gort Act sentencing, and that the date of this crime December 30, 1995, was within 5 years after the defendant was last released from prison, which was on January 31, 1992. (R: 39) The state presented an affidavit showing the defendant never had any convictions set aside. (R: 39)

The judge found the state complied with the requirements and procedures necessary for a finding of violent career criminal. (R: 40) The judge found there is "no basis for not implementing the provisions of violent career criminal act, and accordingly, the defendant is sentenced to 40 years with a minimum mandatory of 30 years." (R: 41) The judge adjudicated the defendant guilty of the

aggravated battery, which was a second degree felony, and sentenced him as a violent career criminal to 40 years in prison with a 30 year mandatory minimum before release. (R: 18-26)

The defendant appealed his conviction and sentence and on June 10, 1998, the Third District Court of Appeal affirmed his conviction but certified direct conflict with the Second District Court of Appeal on the violent career criminal sentencing issue. (A: 1) Specifically, the Third District noted that in Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998), the Second District held that chapter 95-182, Laws of Florida, which enacted the enhanced violent career criminal sentencing provisions, was unconstitutional for crimes that were committed between October 1, 1995, and May 24, 1997, because it violated the single subject requirement. (A: 1) Since the defendant's crime was committed during that window period on December 30, 1995, he could not be sentenced as a violent career criminal under the Gort Act and his sentence was illegal. (A: 1) The Third District acknowledged that in its earlier case of Higgs v. State, 695 So.2d 872 (Fla. 3d DCA 1997), it rejected the same argument presented in Thompson and held the Gort Act did not violate the single subject requirement. The court thereupon certified conflict with Thompson. (A: 1)

SUMMARY OF ARGUMENT

The Gort Act violent career criminal provisions of §775.084(4)(c), Fla. Stats. (1995), are unconstitutional because the session law that created it, chapter 95-182, Laws of Florida, violates the single subject provisions of the Florida Constitution because it addresses two distinct subjects: career criminal sentencing and civil remedies for victims of domestic violence. Since these two subjects are not reasonably related, chapter 95-182 addresses more than one subject and is therefore invalid.

Consequently, defendants whose offenses were committed between the date the Gort Act took effect on October 1, 1995, and May 24, 1997, when the legislature reenacted the Gort Act, are entitled to relief from such violent career criminal sentencing. Since the defendant in the present case committed the crime on December 30, 1995, during this window period, he is entitled to relief from his violent career criminal sentence. The decision of the Third District must be quashed, the defendant's sentence must be reversed, and this case remanded to the trial court for a resentencing.

This precise issue is presently pending in this Court in State v. Thompson, Case No: 92,831, and the defendant fully adopts the defense brief filed in this Court in Thompson for the initial brief in this case.

ARGUMENT

THE GORT ACT VIOLENT CAREER CRIMINAL PROVISIONS OF §775.087(4)(c) ARE UNCONSTITUTIONAL BECAUSE THE SESSION LAW THAT CREATED IT, CHAPTER 95-187, VIOLATED THE SINGLE SUBJECT PROVISIONS OF THE FLORIDA CONSTITUTION, AND CONSEQUENTLY, THE DECISION OF THE THIRD DISTRICT MUST BE QUASHED AND THE DEFENDANT'S 40 YEAR SENTENCE PURSUANT TO THE GORT ACT REVERSED FOR RESENTENCING.

The issue before this Court is whether the Gort Act, creating the violent career criminal sentencing enhancement in §775.084(4)(c), Florida Statutes (1995), is unconstitutional on the ground that the session law that enacted it, chapter 95-182, Laws of Florida, violated the single subject provision of the state constitution, so that the defendant's sentence as a violent career criminal pursuant to that act is illegal.

This precise issue is presently pending before this Court in State v. Thompson, Case No: 92,831. In Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998), the Second District Court of Appeal held that chapter 95-182 was unconstitutional for violation of the single subject requirement of article III, section 6, of the Florida Constitution, and invalidated a violent career criminal sentence under the Gort Act on that basis. The effect of that ruling is to invalidate a violent career criminal disposition for crimes committed between the time the Gort Act was enacted on

October 1, 1995, to the legislative reenactment of the Gort Act on May 24, 1997. As noted, the Thompson case is now pending before this Court on this issue.

In the present case, the defendant committed the crime on December 30, 1995, and thus he came within the window period during which the Gort Act was found unconstitutional in Thompson. The defendant was found to be a violent career criminal and was sentenced pursuant to the Gort Act to an enhanced sentence of 40 years in prison with a 30 year mandatory minimum before release. (R: 18-26, 41) The Third District acknowledged the defendant would be entitled to sentencing relief on this issue if his case were proceeding in the Second District. The Third District also acknowledged that it had previously rejected this identical single subject challenge to chapter 95-182 in Higgs v. State, 695 So.2d 872 (Fla. 3d DCA 1997). (A: 1) However, in view of the Second District's later contrary decision in Thompson, the Third District certified conflict to this Court in this case on this issue.

The defendant has reviewed the arguments made by the defense in the Thompson case and has determined they are fully applicable to this case. In the interest of judicial economy, the defendant therefore fully adopts the arguments made in the defense answer brief filed in this Court in State v. Thompson for the initial brief in this case.

In conclusion, chapter 95-182 creating the Gort Act violates the single subject provision of the Florida Constitution. Since the crime the defendant committed in this case occurred during the window period during which the Gort Act was unconstitutional, the defendant's sentencing as a violent career criminal under the Gort Act was illegal and his enhanced violent career criminal sentence of 40 years in prison must be reversed.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court quash the decision of the Third District and reverse his violent career criminal sentence with directions to remand the case to the lower court for a new sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this 14th day of August, 1998.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

Contracts—Construction—Arbitration—Ambiguities in contract documents as to which issues are intended to be subject to arbitration

LOYOLA DEVELOPMENT LIMITED COMPANY, etc., Appellant, vs. M.J. ANDERSON CONSTRUCTION CORPORATION, Appellee. 3rd District. Case No. 98-689. L.T. Case No. 97-17173. Opinion filed June 10, 1998. An appeal of a non-final order from the Circuit Court of Dade County, Eleanor Schockett, Judge. Counsel: Gonzalo R. Dorta, for appellant. Gunster, Yoakley, Valdes-Fauli & Stewart and Janet E. Ritenbaugh and Michael P. Peterson, for appellee.

(Before NESBITT and FLETCHER, JJ. and McDONALD, Senior Judge.)

(FLETCHER, Judge.) Loyola Development Limited Company [Loyola] seeks review of orders compelling arbitration in an action against a general contractor, M. J. Anderson Construction Corporation [Anderson]. We reverse the orders and remand the cause with instructions to the trial court.

Loyola and Anderson entered into a letter agreement for Anderson to act as a general contractor for the construction in Key Biscayne of a luxury development known as Grand Bay Resort. The letter agreement called for the parties to enter into a standard form owner/contractor agreement which would be subject to the conditions of the letter agreement providing for any inconsistency, conflict, or discrepancy among the contract documents to be controlled by the letter agreement. Two owner/contractor agreements were entered into, both of which contained a paragraph requiring that all claims and disputes relating to them be decided by arbitration. On the other hand, there was no mention of arbitration in the letter agreement. Supplemental conditions attached to each owner/contractor agreement provided that if either party "is forced to submit a dispute to a court of law, or is forced to seek the assistance of a court of law to enforce its rights hereunder, then the prevailing party in such litigation" may recover costs and attorney's fees. Venue for any such litigation was established in Dade County. A second supplemental condition provided for the *supplemental conditions* (and not the letter agreement) to govern any conflicts with the terms and conditions of the other contract documents.

After several months on the job, Loyola and Anderson ran into difficulties over alleged overruns and other financial matters. In an effort to resolve the difficulties, a new letter agreement was entered into, the meaning of which has been disputed. Loyola claims it is a severance agreement that terminated Anderson's services while Anderson claims that the new letter agreement was intended solely to bring payments up to date. Anderson refused to vacate the construction site and Loyola responded by filing suit for breach of oral agreement, declaratory relief, trespass, fraudulent lien, accounting, misappropriation of funds, and fraud. Anderson countered with motions to compel arbitration and to stay the proceedings. The trial court granted both motions and this appeal resulted.

Loyola contends that the original letter agreement and the owner/contractor agreements, with the supplements, contain conflicting provisions as to the settlement of disputes (whether by litigation or arbitration) and that the provisions relating to litigation govern over those relating to arbitration, thus there is no right to arbitration and the trial court's orders are in error. Anderson contends, in support of the trial court's orders, that these documents when read together unambiguously call for arbitration of all the issues.

Our review of the contract documents leads us to the conclusion that the cobbled-together documents are hopelessly ambiguous. It would appear that some issues are intended to be subject to arbitration, although not all issues. Which issues were intended to be arbitrated needs to be sorted out. However, in order to arrive at the intention of the parties, an appropriate evidentiary hearing on that issue is required as was ordered in *Gannon Construction & Design Co. v. McKeon*, 697 So. 2d 224 (Fla. 3d DCA 1997). Accordingly the orders under review are reversed and the

cause remanded for further proceedings.

* * *

Criminal law—Sentencing—Violent career criminal—Statute constitutional—Conflict certified

JOHN WESLEY LINDER, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 97-597. L.T. Case No. 95-39971. Opinion filed June 10, 1998. An appeal from the Circuit Court for Dade County, Ronald Dresnick, Judge. Counsel: Bennett H. Brummer, Public Defender, and Lillian Valdespino, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, for appellee.

On Motion for Rehearing

(Before JORGENSON, COPE, and SORONDO, JJ.)

(COPE, J.) John Wesley Linder was convicted of aggravated battery and was sentenced as a violent career criminal pursuant to section 775.084(4)(c), Florida Statutes (1995).

The statute creating the classification of violent career criminals and creating enhanced penalties for those who qualify, was enacted by chapter 95-182, Laws of Florida. By motion for rehearing, defendant-appellant Linder points out that the Second District Court of Appeal has recently held chapter 95-182 unconstitutional for violation of the single subject requirement of article III, section 6, of the Florida Constitution, and invalidated a violent career criminal sentence on that basis. *See Thompson v. State*, 708 So. 2d 315 (Fla. 2d DCA 1998). In the Second District, the effect of that ruling is to rule out a violent career criminal disposition for crimes committed between October 1, 1995 and May 24, 1997. *See id.* at 317 n.1. Defendant committed the crime on December 30, 1995, and thus he would fall into the class entitled to relief if this case were proceeding in the Second District.

Defendant acknowledges that this court has already rejected the identical single subject challenge to chapter 95-182, Laws of Florida. *See Higgs v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997). Accordingly we reject defendant's challenge to his sentence as a violent career criminal, but certify direct conflict with *Thompson v. State*.

Rehearing denied.*

*Although appointed appellate counsel was previously allowed to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), we reappoint counsel for further proceedings on the certified conflict.

* * *

Torts—Contractors—Action against construction company which acted as qualifying agent for company which contracted to build swimming pool by property owner who was injured when she fell into trench which was dug in order to change electrical panel and to reroute underground utilities—Defendant was not directly liable for plaintiff's injuries where defendant did not dig the trench in question—Defendant was not vicariously liable for plaintiff's injuries where electrical work and digging of trench were outside scope of contract for construction of swimming pool and where defendant had no knowledge of the digging of the trench—Because defendant did not obtain permit for electrical work, it is not responsible for injuries sustained in connection with electrical work—Error to deny defendant's motion for directed verdict

ABD CONSTRUCTION CO., Appellant, v. IRMA DIAZ, Appellee. 3rd District. Case No. 97-2859. L.T. Case No. 93-7724. Opinion filed June 10, 1998. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Bambi G. Blum; Ross & Burger, for appellant. Kutner, Rubinoff, Bush & Lerner and Susan L. Lerner, for appellee.

(Before SCHWARTZ, C.J., and GODERICH and SHEVIN, JJ.)

(GODERICH, Judge.) The defendant below, ABD Construction Co. [ABD], appeals from a non-final order entered pursuant to the jury's finding that it is liable for the injuries sustained by the plaintiff, Irma Diaz. We reverse and remand for entry of final judgment in favor of ABD.