IN THE
SUPREME COURT OF FLORIDA

JIMMY LEE McFADDEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 94,235

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CAROL ANN TURNER
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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I. PRELIMINARY STATEMENT

The Petitioner, JIMMY LEE McFADDEN, was the appellant below, and the defendant in the trial court of Escambia County, Florida. He will be referred to as "Petitioner" or by his proper name, "McFadden." The State of Florida, prosecuting below, will be referred to as "respondent" or "state."

The three volumes comprising the record on appeal will be referred to as follows: the volume containing court documents and the sentencing transcript will be referred to by Roman numeral "I;" the two volumes containing the trial transcript will be referred to chronologically and respectively as "II" and "III," all followed by the applicable page number.

Pursuant to an Administrative Order of the Florida Supreme Court dated July 13, 1998, counsel certifies this brief is printed in Courier New Regular (12 pt) Western, an evenly spaced computer-generated font.

II. STATEMENT OF THE CASE AND FACTS

McFadden tried to shoplift some tools from an AutoZone store in Pensacola. Store personnel stopped him, and he swung at one of them with a utility knife, cutting his shirt. The employee was not aware until after the event that McFadden had a knife.

McFadden was charged by information with attempted armed robbery with a deadly weapon, and aggravated assault (I 1). After a trial by jury, he was convicted of the lesser included offenses of attempted robbery with a weapon and simple assault (I 5).

The state requested habitual felony offender sentencing, having filed a notice of its intent to do so prior to trial (I 3). At sentencing, the defense argued that habitual treatment was inappropriate because the only offense falling within the stipulated time period was the offense of felony petit theft for which judgment was entered January 27, 1993, and that felony petit theft was not a crime the legislature had intended to punish by habitual sentencing treatment, thereby preserving this issue for appellate review (I 13).

The court found that the state had established by a preponderance of the evidence that McFadden met the qualifications for treatment as an habitual felony offender (I 15), and sentenced him to 15 years incarceration on the charge of attempted robbery; and time served on the simple assault (I 21-22; I 56-61).

On October 15, 1998, the First District Court of Appeal rendered a decision affirming the trial court's sentence, but certifying as a question of great public importance: WHETHER A PRIOR CONVICTION FOR FELONY PETIT THEFT CAN BE USED AS A QUALIFYING OFFENSE UNDER SECTION 775.084, FLORIDA STATUTES. A copy of this decision is attached hereto as an Appendix.

On November 1, 1998, appellant filed with this court a Notice to Invoke Discretionary Jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v) and Art. V, section (3)(b)(4), Fla.Const. On November 4, 1998, this court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule. This brief is filed pursuant thereto.

III. SUMMARY OF ARGUMENT

By removing the enhanced sentencing penalty statute from the sentencing options of section 812.014(2)(d), Florida Statutes (1993), the Florida Legislature precluded its use in any manner to fashion a habitual felony offender enhanced sentence for shoplifters. Therefore, an habitual felony offender sentence which utilizes a felony petit theft as a predicate offense is not allowed under the law.

IV. ARGUMENT

ISSUE: WHETHER A PRIOR CONVICTION FOR FELONY PETIT THEFT CAN BE USED AS A QUALIFYING OFFENSE UNDER SECTION 775.084, FLORIDA STATUTES

The chapter of the Florida Statutes which permits enhanced sentencing because of a defendant's status as an habitual felony offender is entitled "Definitions; General Penalties; Registration of Criminals." [Chapter 775, Florida Statutes (1995)]. Within that chapter is section 775.084(1)(a)1, which allows enhanced sentencing where a defendant "has previously been convicted of any combination of two or more felonies in this state or other qualified offenses." Section 775.084(1)(a)2.b provides that the prior offenses are to have occurred within five years of the date of the defendant's last prior felony or release from a prison sentence.

Chapter 775 itself contains one exception to the general requirement of "any combination of two or more felonies," and that is an exception related to purchasing or possessing a controlled substance. That exception, designed to limit the number of drug abusers taking up prison beds as habitual felony offenders, provides:

> The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.

Section 775.084(1)(a)3. This exception does not totally exclude

drug abusers from treatment as habitual felony offenders: it simply limits the classification to convicted drug offenders who thereafter commit other felonies.

A year prior to this drug user exception amendment, the legislature had changed the punishment provision of the felony petit theft statute to remove any reference whatsoever to punishment as an habitual felony offender. A person convicted under the felony petit theft statute may be imprisoned for up to five years under the provisions of s. 775.082, Florida Statutes (1995), or may be fined under the provisions of s. 775.083, Florida Statutes (1995), but may not be treated as an habitual felony offender. Section 812.014(2)(d), Florida Statutes.

Petitioner contends that, when the Florida Legislature removed section 775.084, Florida Statutes from the sentencing options of the felony petit theft statute, it intended that felony petit theft not be used in any fashion to enhance a sentence. The First District Court of Appeal has disagreed with petitioner, and presented this court with the question to be resolved.

The problematical language is that of the sentencing statute which states that predicate offenses are "any combination of two or more felonies." This court has said that felony petit theft is a separate, substantive crime. *State v. Harris*, 356 So. 2d 315 (Fla. 1978). Therefore, it would appear on first reading

that felony petit theft could be counted as a qualifying offense.

And, a later decision of this court would seem to support that interpretation. In *Gayman v. State*, 616 So. 2d 17 (Fla. 1993), this court said that, in a factual situation where defendants were charged with a fourth petit theft, to find them guilty of felony petit theft *and* to enhance their sentence was not a violation of the constitutional principles forbidding double jeopardy. *Id.* at 18.

Gayman, however, was decided February 11, 1993, some three and a half months *after* the effective date of the amendment to the petit theft statute. No mention was made in the opinion of the new law, but Justice Barkett noted in her dissent that the "Florida Legislature has not specifically indicated whether the two statutes [petit theft and habitual sentencing] were supposed to work in tandem." With all respect to the dissenting justice, petitioner believes that the Florida Legislature-by removing felony offender punishment from the felony petit theft statute--had specifically indicated its intent.

Had the legislature intended the two statutes to work in tandem, it could have carved out an exception as it did one year later with the drug user exception. It did not do so. The prohibition against using enhanced sentencing is absolute.

Similarly, had the legislature intended to allow habitual sentencing treatment for convicted felony petit thieves who

subsequently commit other crimes, it would have used the method it had already employed with drug possession: an exception within the sentencing statute. As it is, though, the only penalty sections of Chapter 775 which apply to felony petit theft are sections 775.082 and 775.083.

The lack of enhancement language within the petit theft statute leads to only one logical conclusion: the legislature didn't intend for enhanced sentencing of petit theives, whether or not a subsequent offense was for a different crime. This issue was directly addressed by the Third District Court of Appeal in *Berch v. State*, 691 So. 2d 1148 (Fla. 2d DCA 1997).

The facts of *Berch* are similar to those here: Berch was charged with robbery arising from a 1995 shoplifting incident. Here, McFadden was convicted of attempted armed robbery arising from a shoplifting incident. The Third District found that the trial court erred in sentencing Berch as an habitual felony offender.

As this decision clearly sets forth the position the petitioner is urging on this court, extensive quotation is considered appropriate:

> In 1992, the Florida legislature amended the felony petit theft statute to provide that a person 'who commits petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.' s 812.014(2)(d), Fla. Stat. (1993) . . . Under the pre-1992 statute, a

> person who was convicted of petit theft 'upon a third or subsequent conviction for petit theft' was 'guilty of a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084.' s. 812.014(2)(d) (1991) . . . The 1992 amendment deleted any reference to section 775.084, the habitual offender statute. The Committee Notes on the 1992 amendment provide that 'The changes in the committee substitute provide the person who is prosecuted on an enhanced penalty for petit theft is not subject to habitual offender penalties.' Staff of Fla. Comm. On Crim. Just., HB 421 (1992) Staff Analysis 6 . . . . Where the legislature amended the petit theft statute and excluded a prior reference to the habitual offender section, the trial court erred in interpreting the statute to allow a habitual offender sentence.
>
> The omission of a word in the amendment of a statute will be assumed to have been intentional. And, where it is apparent that substantial portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive and not merely clerical and unconsequential [sic]. *Gunite Works, Inc., v. Lovett*, 392 So. 2d 910, 911 (Fla. 1st DCA 1980), (quoting *Carlile v. Games & Fresh Water Fish Comm's,*, 354 So. 2d 362, 364-65 (Fla. 1978)). *Cf. Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) where legislature 'will not imply it where it has been excluded').

Id., at 1149.

The reasoning of the *Berch* opinion was applied in *Ridley v. State*, 702 So. 2d 559 (Fla. 2d DCA 1997), even though the substantive crime was petit theft, not robbery as in *Berch* and the instant case. With respect to statutory interpretation, the

Second District Court added these words:

> When the legislature amends a statute by omitting words, or, in this instance, reference to a statute, the general rule of construction is to presume that the legislature intended the statute to have a different meaning from that accorded it before the amendment. *See Aetna Casualty and Surety Co. v. Buck*, 594 So. 2d 280, 283 (Fla. 1992).

Interestingly enough, both *Berch and Ridley* were cited with approval by the First District Court of Appeal in *Nelson v. State*, 23 Fla. L. Weekly D2241e (Fla. 1st DCA No. 97-3435, Oct. 1, 1998), a case decided *before McFadden*. In *Nelson*, however, the defendant was convicted of felony petit theft and sentenced as an habitual felony offender, rather than convicted of a crime other than petit theft, as here.

Section 775.021(1), Florida Statutes (1995) provides that statutes shall be strictly construed, and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Justice Barkett emphasized that point in her dissent in *Gayman, supra*, saying:

> As we stated in *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991), 'one of the fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter.' . . . .
>
> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

> In simple terms, this rule means that courts must decline to impose a punishment that has not plainly and unmistakably been authorized by the legislature. *Smith*, 547 So. 2d at 621 (Barkett, J., concurring in part, dissenting in part). This rule lies at the very heart of due process and the guarantee against double jeopardy.

Gayman, at 20.

In summary, if there is any doubt that the legislature intended to place petit thieves in a separate category from other offenders, the doubt should be resolved in favor of the petitioner. This matter should be reversed and remanded, with directions to sentence the petitioner within the Uniform Sentencing Guidelines.

IV. CONCLUSION

Based on the facts of this case, statutory law, statutory interpretation, constitutional principles and legal argument presented, this matter should be reversed and remanded with directions to sentence the petitioner within the Uniform Sentencing Guidelines.

Respectfully submitted,

NANCY A. DANIELS
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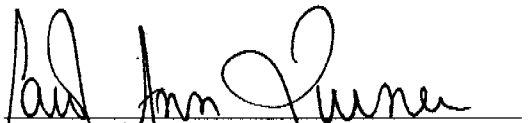

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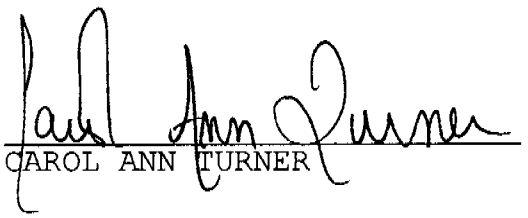
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida; and a copy has been mailed to petitioner on this 14th day of December, 1998.



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