

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA
Petitioner,

vs.

Case No. SC01-1596
LOWER TRIBUNAL CASE NO. 4D99-4339;
4D99-4340;
4D99-4341

GREGORY BYRON ORR,

Respondent.

-----/

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, GREGORY BYRON ORR, was the defendant in the trial court below and will be referred to herein as "Respondent." Petitioner, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." The following symbols will be used:

Ra = Record on Appeal for lower case number 99-3201CF10A

Rb = Record on Appeal for lower case number 99-1763CF10A

SR = Supplemental Record on Appeal for Defendant's 3.800(a) motion

Ta = Transcripts from July 31, 1995

Tb = Transcripts from August 4, 1995

Tc = Transcripts from July 20, 1999

Td = Transcripts from December 13, 1999

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of the case and facts presented in its Initial Brief on the Merits and as presented in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

The trial court properly sentenced Respondent to imprisonment as an habitual felony offender upon revoking Respondent's probation. The record shows that Respondent entered a valid plea agreement that provided for a guidelines term of probation as an habitual offender, and Respondent agreed that if he violated the terms of his probation, he could be sentenced to prison time as an habitual felony offender. The district court's opinion, which relied on its own previous decision of McFadden v. State, 773 So. 2d 1237 (Fla. 2000), must be reversed because this Court recently, in Terry v. State, 27 Fla. L. Weekly S89 (Fla. January 24, 2002), confronted the exact same issue, specifically disapproved of McFadden, and held that a trial court may sentence a defendant to probation as an habitual offender as part of a valid plea agreement, and upon revocation of probation, sentence the defendant to imprisonment as an habitual felony offender.

While Respondent acknowledges that this Court's Terry opinion indeed requires reversal of the decision below, Respondent nevertheless asks this Court to revisit the issue and adopt the result reached by the Fourth District in McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000). However, the State would point out that Respondent's request is illogical and is not supported by any valid reason.

ARGUMENT

THE TRIAL COURT PROPERLY SENTENCED RESPONDENT TO IMPRISONMENT AS AN HABITUAL FELONY OFFENDER UPON REVOKING RESPONDENT'S PROBATION, WHERE RESPONDENT VOLUNTARILY ENTERED A PLEA TO PROBATION AS AN HABITUAL FELONY OFFENDER, AND CLEARLY ACKNOWLEDGED THAT UPON A SUBSEQUENT VIOLATION OF PROBATION, THE COURT COULD SENTENCE HIM TO IMPRISONMENT AS AN HABITUAL FELONY OFFENDER; THE DISTRICT COURT'S OPINION MUST BE REVERSED IN LIGHT OF THIS COURT'S OPINION IN TERRY V. STATE, 27 Fla. L. Weekly S89 (Fla. January 24, 2002).

In his Answer Brief, Respondent properly concedes that as a result of this Court's opinion in Terry v. State, 27 Fla. L. Weekly S89 (Fla. January 24, 2002), this Court must reverse the decision of the Fourth District Court of Appeal in the case at bar. However, Respondent asks this Court to adopt the result and reasoning of the Fourth District in McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000).

First, the State would note that in making such a request, Respondent completely fails to give this Court any reason why it should adopt the result of McFadden, 773 So. 2d 1237. Rather, Respondent merely asks this Court to ignore this Court's precedent, without even attempting to explain why. Second, Respondent apparently overlooked the fact that in Terry, this Court **specifically disapproved** of McFadden. See, Terry, 27 Fla. L. Weekly S89. Third and finally, as aptly noted by Judge Klein in the Orr decision below, McFadden involved a **plea**, just as in

the instant case. See, Orr v. State, 793 So. 2d 48, 50 (Fla. 4th DCA 2001) (special concurrence of Judge Klein, on the granting of the State's Motion to Recall and Stay Mandate Pending Review in the Florida Supreme Court). Thus, the State notes that the result of McFadden is actually **inconsistent** with this Court's opinion of King v. State, 681 So. 2d 1136 (Fla. 1996), because, as argued in Petitioner's Initial Brief on the Merits, King specifically approves of the type of hybrid split sentence at issue in the case at bar, as well as in McFadden. Therefore, this Court must reverse the decision of the district court below.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to REVERSE the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by United States Mail to: Ellen Griffin, Esq.,

Assistant Public Defender, The Criminal Justice Building, 421
Third Street, 6th Floor, West Palm Beach, Florida 33401 on this
25th day of March, 2002.

CELIA A. TERENCE
Assistant Attorney General
Bureau Chief

DONNA L. ENG
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

In accordance with the Administrative Order of this Court
dated July 13, 1998, the undersigned hereby certifies that the
instant brief has been prepared with 12 point Courier New type,
a font that is not spaced proportionately.

CELIA A. TERENCE
Assistant Attorney General
Bureau Chief

DONNA L. ENG
Assistant Attorney General

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APPENDIX

Orr v. State, 793 So. 2d 48 (Fla. 4th DCA 2001) 4

Terry v. State, 27 Fla. L. Weekly S89 (Fla. January 24, 2002) 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appendix" has been furnished by United States Mail to: Ellen Griffin, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach,

Florida 33401 on this 25th day of March, 2002.

CELIA A. TERENCE
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DONNA L. ENG
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CERTIFICATE OF COMPLIANCE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant appendix has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

CELIA A. TERENCE
Assistant Attorney General
Bureau Chief

DONNA L. ENG
Assistant Attorney General

