IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES TERRY,

Petitioner,

v.

CASE NO. SC01-383
LOWER TRIBUNAL CASE NO. 5D00-794

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

Respondent accepts Terry's statement of the case and facts as far as it goes and adds the following additional facts in support of the ruling of the trial judge. Some facts are repeated for the sake of continuity.

1. Terry was advised both in the plea agreement and at the plea hearing that the maximum sentence he could receive on the aggravated battery was 30 years as a habitual offender. (R 55; 2SR 7-8). Terry understood that pursuant to the plea agreement he could be sentenced as a habitual offender, but that the sentence he would receive would be the mid-range of the guidelines. (R 55; SR 167).

2. Although it was indicated at the plea hearing that an objection would be made to any habitual offender finding, Terry did not object to the imposition of the sentence in any respect. (SR 160, 161; 2SR 198-209). While Terry objected to the use of his prior convictions to establish he was a habitual offender, he agreed that he "would just barely qualify." (2SR 195, 196).

3. At the original sentencing hearing, the prosecutor requested that Terry be sentenced as a habitual felony offender "so if he came back here on a violation of probation then the guidelines would not be applicable and that would be something hanging over his head . . ." (2SR 191, 192). In sentencing Terry, the trial judge stated that Terry had "special incentive not to violate his probation because if he violates his probation that guidelines are not involved in this case, he could be looking at up to 30 years in prison . . ." (2SR 202). The trial judge felt that was a good approach and a fair resolution of the case. (2SR 202). Terry neither objected to the statements made by the trial judge and the prosecutor nor moved to withdraw his plea. (2SR 198-209).

4. Terry did not at any time move to withdraw his plea. (2SR 198-209).

5. While Terry did file a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800 following the imposition of sentence after his probation was revoked, Terry argued only that he did not receive all the credit for time served to which he was entitled. (R 129).

6. On February 9, 2001, the Fifth District Court of Appeal affirmed Terry's sentence. *Terry v. State*, 778 So. 2d 435 (Fla. 5th DCA 2001). The court found the following facts:

> Pursuant to a plea agreement with the State, Terry pled guilty to aggravated battery and was sentenced as an habitual offender to fifty-four (54) months in prison followed by a term of probation. Terry's plea agreement contemplated that the court could, at its discretion, sentence him as an habitual offender. Following his release from prison, Terry violated his probation and, after admitting his violation, was sentenced as an habitual offender to fifteen (15) years in prison followed by an additional term of probation.

Terry, at 436. In affirming his sentence, the court found:

> . . . In *King*[*v. State*, 681 So. 2d 1136 (Fla. 1996)], the defendant was convicted by a jury and subsequently sentenced as an habitual offender. There was no plea agreement that contemplated habitual offender treatment. Significantly, Terry's original plea did allow for habitual offender sentencing. In *King*, the defendant qualified as an habitual offender but at the time of his original sentencing, the judge elected not to treat him as such (unlike Terry, who was habitualized at his original sentencing). Later, after he violated probation, the judge sought to impose an habitual offender sentence for the first time. The supreme court held that to be improper and said:
>
> > [S]entences imposed after revocation of probation or community control must be in accordance with the guidelines if the defendant was not originally sentenced as an habitual offender.
>
> *King*, 681 So.2d at 1141.
>
> But the supreme court also recognized that a defendant could, by agreement, agree to the very type of sentence that Terry received when it said:
>
> > [W]e distinguish those instances where a defendant agrees to such a sentence as part of an otherwise valid plea agreement and the negotiated sentence does not exceed the statutory maximum for the particular offense involved.
>
> *King*, 681 So.2d at 1139.
>
> *King* allows a trial judge the discretion to place an habitual offender on probation. *See King*, 681 So.2d at 1139 n. 8. If an habitual offender sentence of probation is permissible, then logically a sentence by agreement within the

> guidelines as an habitual offender would be permissible as well. This is, in our view, consistent with the supreme court's later holding in *Walker v. State*, 682 So.2d 555 (Fla.1996) wherein the court upheld the validity of Walker's plea agreement that he would be sentenced to prison as a non-habitual offender followed by probation with the condition that he would be treated as an habitual offender if he violated probation.

Terry, at 436-437 (footnote omitted). The Fifth District went on to certify conflict with *Yashus v. State*, 745 So. 2d 504 (Fla. 2nd DCA 1999), and *McFadden v. State*, 773 So. 2d 1237 (Fla. 4th DCA 2000). *Terry*, at 437.

SUMMARY OF ARGUMENT

This issue has not been preserved for appellate review. No objection was made at the time the sentence was originally imposed in 1996. Also, Terry never moved to withdraw his plea. Furthermore, at the sentencing in 2000 upon the revocation of Terry's probation, Terry made no objection to the imposition of the sentence and did not raise the issue he raises on appeal in a rule 3.800(b) motion. If preserved, the sentenced imposed after his probation was revoked was contemplated by the parties and the plea agreement. The Fifth District properly found that Terry's habitual offender sentence which was imposed after he violated his probation was in accord with this Court's decisions in *King*, *infra*, and *Walker*, *infra*. The decision of the Fifth District should be affirmed.

ARGUMENT
POINT ON APPEAL

THIS ISSUE HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW; IF PRESERVED, THE SENTENCE IMPOSED IS PROPER. PURSUANT TO THE PLEA AGREEMENT, TERRY WAS SENTENCED TO A GUIDELINES SENTENCE AS A HABITUAL FELONY OFFENDER. THE FIFTH DISTRICT PROPERLY FOUND THAT TERRY'S HABITUAL OFFENDER SENTENCE WHICH WAS IMPOSED AFTER HE VIOLATED HIS PROBATION WAS IN ACCORD WITH THIS COURT'S DECISIONS IN *KING*, *INFRA*, AND *WALKER*, *INFRA*. THE DECISION OF THE FIFTH DISTRICT SHOULD BE AFFIRMED.

This issue has not been preserved for appellate review. At the time Terry was

originally sentenced he was found to be a habitual felony offender and sentenced to 54 months incarceration followed by 60 months probation. (R 57-58, 82-91; 2SR 203). Although it was indicated at the plea hearing that an objection would be made to any habitual offender finding, Terry did not object to the imposition of the sentence in any respect. (SR 160, 161; 2SR 198-209).[1] Terry did not at any time move to withdraw his plea. (2SR 198-209). It does not appear that Terry appealed from the original imposition of sentence.

Respondent asserts that by failing to object or in any way challenge the original sentence Terry has waived this issue for appeal. Terry accepted the benefit of the plea bargain and may not now complain, after having violated his probation, that he could not be habitualized upon revocation of his probation. *See State v. Jordan*, 630 So. 2d 1171, 1172 (Fla. 5th DCA 1993) ("A defendant who knowingly accepts the benefit of a plea bargain cannot thereafter disavow that bargain, . . ."); *State v. Wheeler*, 756 So. 2d 230 (Fla. 3rd DCA 2000) (defendant cannot be heard to complain about sentence after receiving the benefit of the bargain); *Powell v. State*, 657 So. 2d 37, 38 (Fla. 5th DCA 1995) (defendant received benefit of the bargain, as defendant could have received much more severe sentence as a habitual felony offender).

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[1]While Terry objected to the use of his prior convictions to establish he was a habitual offender, he agreed that he "would just barely qualify." (2SR 195, 196).

Furthermore, Respondent asserts that this issue was not only waived in 1996 when Terry was originally sentenced, but in 2000 when he was sentenced after the revocation of his probation. At the time Terry was sentenced, Terry made no objection. (R 37). While Terry did file a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800 following the imposition of sentence after his probation was revoked, the argument made in the motion is not the argument made on appeal. Rather, Terry argued that he did not receive all the credit for time served to which he was entitled. (R 129). Respondent asserts that because Terry failed to object and to raise this issue in his rule 3.800(b) motion this issue has been waived.

Terry's probation was revoked and he was sentenced to 15 years incarceration followed by 10 years probation in March of 2000, after the effective date of the amended rule 3.800(b). "Under *Maddox*[*v. State*, 760 So. 2d 89 (Fla. 2000)], sentencing errors occurring after the effective date of amended rule 3.800(b), even fundamental ones, are barred if not raised at trial or in post-trial proceedings pursuant to rule 3.800." *Capre v. State*, 773 So. 2d 92 (Fla. 5th DCA 2000); *see also Mancha v. State*, 768 So. 2d 1178 n.1 (Fla. 2nd DCA 2000) ("In the future, those defendants who have available the procedural mechanism of the recently amended rule 3.800(b), *see Amendments to Florida Rules of Criminal Procedure 3.111(c) and 3.800 and Rules of Appellate Procedure 9.010(h), 9.140, and 9.600*, 761 So. 2d 1015

(Fla.1999), must first raise the single subject rule challenge in the trial court."). Terry did not raise his sentencing issue in the trial court. This issue has been waived. *Capre*, *supra*.

Should this court determine that this issue has not been waived, Respondent asserts that the Fifth District correctly affirmed Terry's sentence. Respondent asserts that this Court's decisions in *Walker v. State*, 682 So. 2d 555 (Fla. 1996), and *Dunham v. State*, 686 So. 2d 1356 (Fla. 1997), are controlling. In *Walker*, at 555, Walker "pled guilty to the crime charged, with the understanding that he would be sentenced to five and one-half years' incarceration to be followed by nine and one-half years' probation and that he would be treated as an habitual offender if he violated probation." In affirming Walker's sentence, this Court stated:

> We quashed the district court's decision in *King* because we determined that an habitual offender sentence may not be imposed upon revocation of probation where the trial judge, in imposing the original sentence, made a finding that the defendant was an habitual felony offender but imposed sentence under the guidelines. *King v. State*, 681 So. 2d 1136 (Fla.1996). In reaching that decision, we also noted that while such a hybrid split sentence is not authorized by statute or rule it is not an "illegal" sentence. *King*, at 1140. Thus, *where a defendant agrees to such a sentence as part of an otherwise valid plea agreement and the negotiated sentence does not exceed the statutory maximum for the particular offense involved, the court may impose incarceration under the guidelines followed by probation as an habitual offender*. *Id*. at 1140-41.

Walker, at 556 (emphasis added).

In *Dunham*, the defendant was determined to be a habitual felony offender, but was sentenced well below the guidelines with the understanding that

if he violated his probation he could be sentenced as a habitual felony offender. Upon violating his probation, Dunham was sentenced as a habitual felony offender to a total sentence of life. *Dunham v. State*, 683 So. 2d 507 (Fla. 4th DCA 1996). In approving the affirmance of Dunham's sentence, this Court stated "[i]n *Walker*, we relied upon our prior decision in *King v. State*, 681 So.2d 1136 (Fla.1996), in which we approved such a hybrid sentencing arrangement if the defendant had agreed to it at the time of his original sentencing."

Terry was advised both in the plea agreement and at the plea hearing that the maximum sentence he could receive on the aggravated battery was 30 years as a habitual offender. (R 55; 2SR 7-8). Terry understood that pursuant to the plea agreement he could be sentenced as a habitual offender, but that the sentence he would receive would be the mid-range of the guidelines. (R 55; SR 167).

At the original sentencing hearing, the prosecutor requested that Terry be sentenced as a habitual felony offender "so if he came back here on a violation of probation then the guidelines would not be applicable and that would be something hanging over his head . . ." (2SR 191, 192). In sentencing Terry, the trial judge stated that Terry had "special incentive not to violate his probation because if he violates

his probation that guidelines are not involved in this case, he could be looking at up to 30 years in prison . . ." (2SR 202). The trial judge felt that was a good approach and a fair resolution of the case. (2SR 202). Terry neither objected to the statements made by the trial judge and the prosecutor nor moved to withdraw his plea. (2SR 198-209).

Terry was advised that if found to be a habitual felony offender the maximum sentenced he faced with thirty years. Terry had notice at the time he entered his plea that if he violated his probation he could be sentenced to any sentence which the trial judge could have originally imposed pursuant to section 948.06(1), Fla. Stat. (1995). Terry understood that he could be so sentenced and made no objection. Terry agreed the trial judge could find him to be a habitual felony offender, as he "would just barely qualify." The fact that the sentence Terry received as a habitual felony offender was within the guidelines does not change the fact that Terry was sentenced as a habitual felony offender. The sentence imposed was done pursuant to the plea agreement. Thus, upon revocation of his probation, an enhanced sentence pursuant to the habitual offender statute was properly imposed.

Furthermore, Terry's sentence is proper pursuant to *King v. State*, 681 So. 2d

1136, 1140 (Fla. 1996).[2] In *King*, at 1140, this Court found that a hybrid sentence of incarceration under the guidelines followed by probation as a habitual offender was neither an illegal sentence nor authorized by statute. While this court reversed King's habitual offender sentence imposed after he violated his probation, it did so because King's sentence was imposed after having been found guilty at trial, not pursuant to a valid plea agreement. This court went on to state that

> [W]e distinguish those instances where a defendant agrees to such a sentence as part of an otherwise valid plea agreement and the negotiated sentence does not exceed the statutory maximum for the particular offense involved.

King, at 1140.

Here, pursuant to a plea agreement, Terry was sentenced to a guidelines sentence of 54 months followed by 10 years probation. Terry was specifically found to be a habitual felony offender by the trial judge. Respondent asserts that "[i]f a habitual offender sentence is permissible in the case of a probation disposition, then logically it would be permissible in the case of a guidelines disposition as well." *Rodriguez v. State*, 766 So. 2d 1147, 1148 n.3 (Fla. 3rd DCA 2000); *see also Terry*, at 437 ("If an habitual offender sentence of probation is permissible, then

[2]Unlike in *King*, Terry's sentence was imposed pursuant to a plea agreement.

logically a sentence by agreement within the guidelines as an habitual offender would be permissible as well.").

Furthermore, in originally sentencing Terry, it was contemplated by all of the parties that Terry was originally found to be a habitual offender not only because he qualified for such, but also as incentive for Terry not to violate his probation. For if such violation occurred, Terry would be facing a much lengthier sentence under the habitual offender statute. By finding Terry to be a habitual offender at the original sentencing, the trial judge also provided himself, or his predecessor, greater sentencing authority should Terry violate his probation. "The advantage of the habitual offender sentence in the context of probation or a split sentence is that in the event of violation, the trial court has greater sentencing authority." *Rodriguez*, at 1148 n.3. Terry's sentence imposed upon revocation of his probation to an extended period of both incarceration and probation was contemplated by the plea agreement and parties at the time Terry entered his plea. Thus, Respondent asserts that pursuant to *Walker*, *Dunham* and *King*, the sentence imposed after the revocation of probation was proper and the Fifth District properly affirmed.

The Fifth District certified conflict with *Yashus* and *McFadden*. Terry argues in

his merits brief that his case is identical to *Yashus*. Respondent asserts that the decision in *Yashus* does not conflict with the decision in *Terry*. There is nothing in the majority opinion to indicate whether Yashus entered a plea or was found guilty after a trial. Such facts are found only in the dissent. "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Reaves v. State*, 485 So. 2d 829 (Fla. 1986).

Furthermore, it is clear from the opinions in both *Yashus* and *McFadden*, that both the Fourth District and the Second District wholly ignored this Court's decisions in *Walker* and *Dunham*, as well as the portion of this Court's decision in *King* upon which the decisions in *Walker* and *Dunham* were based. It is interesting to note that *Dunham* originated out of the Fourth District almost four years before the Fourth District issued its decision in *McFadden*, yet the court completely ignored both its prior decision and its affirmance by this court. It is also interesting to note that it appears in *Key v. State*, 2001 WL 332045 (Fla. 2nd DCA April 6, 2001), that the Second District reversed Key's sentence only because it determined it was bound by their prior

decision in *Yashus*. The Second District acknowledged the dissent in *Yashus* and certified conflict with this case. Again, the Second District wholly ignored this court's decisions in *Walker* and *Dunham*, as well as the portion of this Court's decision in *King* upon which the decisions in *Walker* and *Dunham* were based. Contrary to Terry's assertion on page 7 of his initial brief, the Second and Fourth Districts did not correctly apply this Court's decision in *King*. Rather, as stated above, they ignored *King* and other precedent from this Court which was directly on point. This Court should approve the decision in *Terry* and disapprove the decisions in *Yashus* and *McFadden*.

Finally, should this Court determine both that this issue has been preserved and that Terry was improperly sentenced, on remand the state is entitled to a correct scoresheet which should include points for Terry's prior convictions, as well as his violation of probation. *Mathis v. State*, 719 So. 2d 348 (Fla. 5th DCA 1998); *Roberts v. State*, 644 So. 2d 81 (Fla. 1994); *Holmes v. State*, 722 So. 2d 240 (Fla. 5th DCA 1998).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent requests this Court approve the decision in *Terry* and disapprove the decisions in *Yashus* and *McFadden*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by delivery to the Public Defender's in-basket at the Fifth District Court of Appeal to Nancy Ryan, Assistant Public Defender, 125 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this ____ day of May, 2001.

_____
Bonnie Jean Parrish
Of Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is 14-point, Times New Roman.

_____
Bonnie Jean Parrish