IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, **CASE NO. SC04-174**

Petitioner, **LT Case No. 4D02-4985**

v.

ERICK RICHARDSON,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the prosecution in the trial court and Appellee the Fourth District Court of Appeal. Petitioner will be referred to herein as “the Petitioner” or the “State”. Respondent, Erick Richardson, was the defendant in the trial court and Appellant in the Fourth District Court of Appeal. Respondent will be referred to as “the Respondent” or “Richardson”.

STATEMENT OF THE CASE AND FACTS

The facts of the case, as recited in the opinion of the Fourth District Court of Appeal ("Fourth District"), are as follows:

> . . . Richardson was convicted of robbery and sentenced as a habitual offender to twenty years in prison. Richardson claimed that the predicate convictions used to declare him a habitual offender were not sequential. To establish Richardson as a habitual felony offender, the State relied on prior convictions in case numbers 93-4322, for possession of cocaine, and 93-15462, for grand theft. The record shows that although a conviction in the possession case was entered on April 14, 1993, Richardson was placed on probation. Richardson was convicted on the grand theft charge on September 23, 1993. On the same day, September 23, the court found Richardson in violation of probation on the possession case and sentences were entered on both charges.

Erick Richardson v. State of Florida, 29 Fla. L. Weekly D215 (Fla. 4th DCA Jan. 14, 2004), *On Motion for Rehearing*. In its original opinion, the Fourth District reversed the trial court's summary denial of Richardson's motion for post-conviction relief on the claim that the predicate convictions used to declare him a habitual felony offender were not sequential. Erick Richardson v. State of Florida, 28 Fla. L. Weekly D1716 (Fla. 4th DCA July 23, 2003). Citing section 775.084(5), Florida Statutes (2002), the Fourth District found that the prior convictions did not

meet the separate sentencing requirement of that section: "The sequential conviction requirement found in the habitual offender statute requires that prior felonies must have 'resulted in a conviction sentenced separately prior to the current offense and *sentenced separately from any other felony conviction that is to be counted as a prior felony*.'" Id. at D1717 (emphasis in opinion).

The Fourth District held that the separate sentence requirement was not met since Richardson was not actually sentenced on the possession charge until he was found in violation of probation on September 23, 1993, which was the same day he was sentenced on the grand theft charge. Id. Rejecting the State's contention that he was originally sentenced (for purposes of the habitual offender statute) on the possession charge when he was convicted and placed on probation on April 14, 1993, the Fourth District held that:

> A sentence and probation are distinct concepts . . . When a defendant is placed on probation, the court *must stay and withhold the imposition of a sentence* regardless of whether adjudication of guilt is withheld . . . Richardson was sentenced on the possession charge for the first time after the finding of violation of probation . . . Thus, the sentences for the predicate convictions were entered on the same day.

Id. (emphasis in opinion)(internal citations omitted). Citing

this Court's opinion in Bover v. State, 797 So. 2d 1246 (Fla. 2001)[1], the Fourth District held that the record in the instant case failed to demonstrate that the sentence entered on the violation of probation and the sentence entered on the grand theft charge, which were entered on the same day (September 23, 1993), took place at separate proceedings. Richardson, 28 Fla. L. Weekly at D1717.

Thereafter, the State filed a motion for rehearing which was granted in part by the Fourth District and a supplement to the original opinion was issued. Erick Richardson v. State of Florida, 29 Fla. L. Weekly D215 (Fla. 4th DCA Jan. 14, 2004). In this supplemental opinion, the Fourth District addressed section 775.084(2), Florida Statutes (2002), which provides that:

> For the purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.

The Fourth District rejected the State's argument that this section provides that the date of sentencing of Richardson's first prior (the possession charge), for purposes of separate sentencing requirement, was the date he was placed on probation

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[1] Bover held that under section 775.084(5), which requires separate sentencing for the two prior offenses, may be satisfied when the sentences take place on the same day as long as there are separate sentencing proceedings.

for this charge. Richardson, 29 Fla. L. Weekly at D216. The Fourth District also rejected the State's argument that its holding deprived section 775.084(2) of any effect and would lead to absurd results. Id. The Court concluded that subsections (2) and (5), when read together, were "ambiguous", but "not inconsistent." Id.

The Fourth District stated that subsection (5) modifies subsection (2), and read the subsections together as follows:

> Subsection two addresses the "prior-ness" of the adjudication of guilt upon revocation of probation. The initial offense is considered "prior" although adjudication may occur contemporaneously or even subsequent to the conviction on the new offense. Subsection five provides the independent requirement that sentencing on the VOP occur in a separate proceeding prior to sentencing on the felony "to be sentenced" and separate from any other felony conviction that is to be counted as a prior felony.

29 Fla. L. Weekly at D216. However, the Fourth District noted that the Court in McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003), reached an opposite conclusion and held that "the imposition of probation was a 'sentence' for purposes of the sequential sentencing proceeding requirement in the habitual felony offender statute", and quoted the holding of McCall that:

> When it enacted the habitual felony offender statute, the legislature intended that once a defendant had twice been

> convicted with sanctions the third conviction would be enhanced. We find that a sentence, as referred to in section 775.084, includes the sanction of probation.

29 Fla. L. Weekly at D216. Recognizing that the McCall Court certified conflict with its initial opinion in the instant case, the Fourth District then certified conflict with McCall. 29 Fla. L. Weekly at D216.

SUMMARY ARGUMENT

The Fourth District erroneously interpreted subsections (2) and (5) of section 775.084, Florida Statutes. Subsection (2) clearly provides that the placing of a defendant on probation or community control, even without an adjudication of guilt, shall be treated as a prior conviction for purposes of habitual felony offender sentencing. However, the Fourth District's interpretation of this subsection renders it essentially meaningless and frustrates the clear intent of the Legislature.

Contrary decisions have been reached by the Second District. Certified conflict should be resolved in favor of the Second

District’s decision in McCall.

ARGUMENT

THE FOURTH DISTRICT ERRONEOUSLY INTERPRETED PROVISIONS OF THE HABITUAL OFFENDER STATUTE; THE DECISION OF THE FOURTH DISTRICT IS CONTRARY TO LEGISLATIVE INTENT AND GIVES SECTION 775.084(2), FLORIDA STATUTES, NO EFFECT; CERTIFIED CONFLICT SHOULD BE RESOLVED IN FAVOR OF MCCALL

"Habitual felony offender" is defined in section 775.084 (1)(a), Florida Statutes (2002). In the instant case, it is without question that the Respondent qualifies as a habitual felony offender under that section. The issue in the instant case is whether the separate sentence requirement of section 775.084(5) was satisfied by the Respondent being placed on probation for conviction for possession of cocaine. It is the Petitioner's position that this section was satisfied and that the Fourth District erroneously interpreted provisions of the habitual offender statute. The Petitioner respectfully submits that the Fourth District's interpretation of the habitual felony offender statute was contrary to legislative intent. Review of this issue is *de novo:*

> . . . This question of statutory interpretation is subject to *de novo* review . . . Our purpose in construing a statute is to give effect to the Legislature's intent . . . When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent .

> . . Instead, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent . . .

State v. Burris, 875 So. 2d 408, 410 (Fla. 2004)(internal citations omitted). The Fourth District's interpretation of subsections (2) and (5) of section 775.084 are contrary to the plain language of those subsections. Accordingly, that decision should be reversed by this Court.

In order to qualify as a habitual felony offender, a defendant must have "previously been convicted of any combination of two or more felonies in this state or other qualified offenses." Section 775.084(1)(a)1, Florida Statutes (2002). A separate sentencing requirement applies to the prior felonies:

> In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

Section 775.084(5), Florida Statutes (2002)[2]. The Fourth District has concluded that the prior felonies in this case do not meet the requirements of this section - which the Court

[2] This subsection was added to the habitual offender statute by the Legislature in 1993. See, Chapter 93-406, section 2, Laws of Florida (1993)(effective date June 17, 1993).

refers to as the "sequential conviction requirement" - since the record does not reflect that the Respondent was sentenced on the prior convictions at separate sentencing proceedings; in reaching this conclusion, the Court has concluded that the Respondent was sentenced on the prior convictions on the same day, namely September 23, 1993. Richardson, 28 Fla. L. Weekly at D1717. The Petitioner respectfully disagrees with this conclusion.

The record reflects that the Respondent was convicted for possession of cocaine, case # 93-4322, on April 14, 1993, and was placed on probation. Richardson, 29 Fla. L. Weekly at D215. (The Petitioner will refer to this as the "first prior".) Thereafter, the Respondent was convicted for grand theft, case # 93-15462, on September 23, 1993 ("second prior"); on that date he was also found to be in violation of probation on the cocaine charge, and was sentenced on both the violation of probation ("VOP") and the grand theft conviction. Id.

In its original opinion, the Fourth District concluded that the separate sentencing requirement was not met since the Respondent was not actually sentenced on the first prior conviction until he was found to be in violation of probation, which was on the same day that he was sentenced on the second prior conviction. Id. Since the record did not reflect separate

sentencing proceedings on that day, the Fourth District reversed the trial court's order denying the Respondent's post-conviction motion and remanded the matter for further proceedings. Id.

The basis of this holding was the Fourth District's conclusion that "[a] sentence and probation are distinct concepts . . . [w]hen a defendant is placed on probation, the court *must stay and withhold the imposition of sentence* regardless of whether adjudication of guilt is withheld." Id. (emphasis in opinion). In support, the Fourth District cited section 948.01(2), Florida Statutes and Rule 3.790(a), Fla. R. Crim. P.

On rehearing, the Fourth District considered section 775.084(2), Florida Statutes, which provides that "the placing of a person on probation for community control without an adjudication of guilt shall be treated a prior conviction" for habitual offender sentencing, and held that this section was not rendered meaningless in its original opinion. Richardson, 29 Fla. L. Weekly at D216. Again, the State disagrees with this conclusion and respectfully submits that the Fourth District's interpretation of subsections (2) and (5) of the habitual offender statute is contrary to legislative intent and is clearly erroneous.

It is the clear intent of the Legislature that the placing

of a defendant on probation or community control constitutes a "prior conviction" for purposes of habitual offender sentencing:

> For purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.

Section 775.084(2), Florida Statutes (2002)[3]. Since the Respondent was placed on probation (and actually convicted) for the first prior on April 14, 1993, then a consistent reading of section 775.084(2) and section 775.084(5) must mean that he was sentenced on the first prior on that date. Since he was sentenced on the second prior on September 23, 1993, the separate sentencing requirement has been satisfied and he was therefore properly sentenced as a habitual felony offender.

This reading is in accordance with decisions of the Second District Court of Appeal ("Second District"). In McCall v. State, 862 So. 2d 807 (Fla. 2d DCA 2003), the defendant challenged his habitual felony sentence on the grounds that he lacked the necessary predicate offenses. Id. at 807-808. In

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[3] This section previously ended with the language: ". . . if the subsequent offense for which for which the person is to be sentenced was committed during such period of probation or community control." This language was removed by the Legislature in 1999. See, Chapter 99-188, section 3, Laws of Florida (1999). The Respondent's first prior would also qualify under this previous version of 775.084(2) since there is no question that he committed the second prior while he was on probation for the first prior.

that case, McCall was originally placed on probation for his first offense on September 16, 1991; thereafter, on May 6, 1992, he was convicted for two additional offenses and, on the same day, he was found to be in violation of probation on the first offense. Id. at 808. The Second District specifically rejected McCall's argument that he was sentenced for the first time on the first offense when he was found in violation of probation and that his sentences on all the offenses were therefore entered on the same day. Id. The Second District also rejected his argument that probation was not a sentence for purposes of habitual offender sentencing. Id.

> When it enacted the habitual felony offender statute, the legislature intended that once a defendant had twice been convicted with sanctions the third conviction would be enhanced. We find that a sentence, as referred to in section 775.084, includes the sanction of probation.

Id. Conflict with the original opinion in the instant case was certified. Id.

Likewise, in Teal v. State, 862 So. 2d 871 (Fla. 2d DCA 2003), the Second District rejected the defendant's argument that the sanction of community control did not qualify as a predicate offense for habitual felony offender sentencing. Id. at 872. In that case, Teal was adjudicated guilty of robbery in 1992 and placed on community control for two years followed by

two years of probation. Id. He later violated community control and received a prison term. Id. Teal was sentenced as a habitual offender in 1997 with the predicate convictions being the robbery offense, upon which he was originally placed on community control, and a 1991 kidnapping conviction. Id. The Second District rejected Teal's argument that he was not sentenced on the robbery case until he actually received a prison term upon violation of community control:

> In his motion, Teal claimed that it was improper to use the conviction in case number 91-20507[4] as a predicate conviction because the trial court originally placed him on community control. He contended that placement on community control was not a sentence; instead, he asserted that he received a sentence in case number 91-20507 only after the trial court found him guilty of violating his community control and imposed the sentence of 5.5 years in prison. Teal further argued that because the prison sentence in case number 91-20507 was imposed on the same day that he was convicted and habitualized in the present case, the conviction in case number 91-20507 was not a proper predicate for habitualization pursuant to section 775.084(5), Florida Statutes (2002). We disagree.

Id. This is a clear rejection of the Fourth District's holding that placing a defendant on probation cannot qualify as sentence for purposes for habitual felony offender sentencing. Accordingly, the Teal Court certified conflict with the original

[4] The robbery case. Id.

opinion in the instant case. Id. at 873[5].

The Second District's decisions in McCall and Teal correctly reflect the Legislature's intent that the placing of a defendant on probation or community control qualifies as a prior conviction for purposes of habitual felony offender sentencing. However, based upon the instant decision, a probation offense will qualify as a prior conviction only if the defendant actually violates probation and is given a prison term. The Petitioner respectfully submits that this is contrary to the plain language of section 775.084(2) and actually gives that section no effect whatsoever. "It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole . . . Where possible, courts must give effect to *all* statutory provisions and construe statutory provisions in harmony with one another." T.R. v. State, 677 So. 2d 270, 271

[5] Since Teal, the Second District has certified conflict with Richardson in at least ten other opinions: Scott v. State, 29 Fla. L. Weekly D1018 (Fla. 2d DCA April 23, 2004); Pruitte v. State, 29 Fla. L. Weekly D1018 (Fla. 2d DCA April 23, 2004); McClellan v. State, 873 So. 2d 546 (Fla. 2d DCA 2004); Sheridan v. State, 873 So. 2d 617 (Fla. 2d DCA 2004); Stevens v. State, 880 So. 2d 784 (Fla. 2d DCA 2004); Hannah v. State, 29 Fla. L. Weekly D1713 (Fla. 2d DCA July 23, 2004); Stokes v. State, 29 Fla. L. Weekly D1786 (Fla. 2d DCA August 6, 2004); McDonald v. State, 29 Fla. L. Weekly D2022 (Fla. 2d DCA September 3, 2004); Ely v. State, 29 Fla. L. Weekly D2055 (Fla. 2d DCA September 10, 2004); Stanford v. State, 29 Fla. L. Weekly D2156 (Fla. 2d DCA September 24, 2004).

(Fla. 1996)(internal citations omitted)(emphasis in original). "Courts should construe statutes to give effect to all provisions, and not to render any part meaningless." Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1273, 1286 (Fla. 2000). See also, Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996). The instant decision renders section 775.084(2) essentially meaningless. The Legislature has provided that the placing of a person on probation shall be treated as a prior conviction for habitual felony sentencing; however, the Fourth District has held that a probation case only qualifies once the defendant violates probation and is sentenced to a prison term on the VOP. This is contrary to Legislative intent. The Legislature has determined that **the placing** of a defendant on probation shall be treated as a prior conviction, not **the violation** of that probation. Therefore, the Legislature has determined that probation, or community control, is a prior conviction for habitual sentencing whether or not there is a violation of probation or community control.

The Fourth District, in its supplemental opinion, maintains that subsection (5), the separate sentencing requirement, "modifies" subsection (2). Richardson, 29 Fla. L. Weekly at D216. However, under the Fourth District's interpretation, subsection (5) "modifies" subsection (2) to the extent of

voiding it completely. Under Richardson, the actual placing of a defendant on probation, without a VOP, would never qualify as a prior conviction for habitual offender sentencing. The Fourth District attempts to show how subsection (2) remains viable after Richardson; however, the Court's example is unconvincing since it presupposes - indeed, **requires** - a violation of probation in order to give effect to this subsection. 29 Fla. L. Weekly at D216. Consequently, the **placing** of a defendant on probation has no effect; this is contrary to legislative intent as evidenced by the plain language of the subsection. Therefore, the Fourth District's interpretation is clearly erroneous and should be reversed by this Court.

The primary reason for the Fourth District's interpretation of subsections (2) and (5) would appear to originate from that Court's conclusion that the placing of a person on probation could not serve as a "sentencing" under section 775.084. Richardson, 29 Fla. L. Weekly at D216. The Court cites some authority to support its limited use of the term "sentencing"; however, it fails to recognize that "sentence" means the pronouncement of a penalty, not necessarily the imposition of term of imprisonment.

"The term sentence means the pronouncement by the court of the penalty imposed on a defendant for the offense of which the

defendant has been adjudicated guilty." Rule 3.700, Fla. R. Crim. P. The penalty, of course, may be probation or community control, or other sanction. This Court has stated that: "Probation is a sentence in Florida." Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1996)[6].

In the instant opinion, the Fourth District states that to consider the placing of a defendant on probation as a sentence for purposes of section 775.084 "would contradict the plain language of the probation statute and a plethora of precedent." Richardson, 29 Fla. L. Weekly at D216, FN 1. Although probation and the "imposition of a sentence" are indeed treated as distinct concepts in subsection 948.01(2), Florida Statutes, that distinction should not be utilized to frustrate the clear intention of the Legislature that the placing of a defendant on probation or community control qualifies as a prior conviction for habitual offender sentencing pursuant to section 775.084(2). See, Burris, 875 So. 2d at 410.

In addition to the cited decisions of the Second District, the Petitioner submits that the instant opinion is also in conflict with decisions of the Third and Fifth District Courts

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[6] "Sentence" is defined in Black's Law Dictionary, Sixth Edition, as: "The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, imprisonment, or probation."

of Appeal. In Render v. State, 742 So. 2d 503 (Fla. 3d DCA 1999)[7], the Court rejected the defendant's argument that his prior conviction for grand theft could not be used to habitualize him because he was placed on probation for that offense and completed probation by the time he committed the current offense. Id. at 504. The Court concluded that the grand theft could be used a predicate offense for habitual sentencing. Id. However, under Richardson, this grand theft would not be treated as a prior conviction without a VOP.

Likewise, in Odom v. State, 859 So. 2d 569 (Fla. 5th DCA 2003), the Court rejected the defendant's argument that he had not been "sentenced" on a prior offense (for purposes of habitual felony offender sentencing) because although he was convicted of the offense, he was placed on probation. Id. Both Render and Odom correctly reflect the Legislature's intent that the placing of a defendant on probation constitutes a prior conviction for purposes of habitual offender sentencing. The instant opinion does not.

Since the decision of the Fourth District is contrary to clearly expressed Legislative intent, that decision should be reversed by this Court. Certified conflict should be resolved

[7] Render analyzed the prior version of section 775.084(2), Florida Statutes; however its holding remains in conflict with Richardson. Odom also analyzed the prior version.

in favor of McCall.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable Court reverse the decision of the Fourth District Court of Appeal and resolve the certified conflict in favor of McCall.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to Joseph Hagedorn Lang, Jr., Carlton Fields, P.A., P.O. Box 3239, Tampa, FL 33601-3239, and Christine R. Dean, Charlton Fields, P.A., P.O. Box 190, Tallahassee, FL 32302-0190, Counsel for Respondent, on October 28, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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