IN THE SUPREME COURT OF THE STATE OF FLORIDA

RICKY BRADLEY,

Petitioner,

v. S. Ct. Case No.SC08-196

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0259918
444 SEABREEZE BLVD. # 210
DAYTONA BEACH, FLORIDA 32118
(386) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with one count of attempted felony murder and one count of robbery with a firearm. The information alleged that in the course of committing the robbery, petitioner "was in possession of and carried a firearm" and cited Section 775.087 (2), Florida Statutes (2002). Petitioner subsequently entered a plea of no contest to the offenses pursuant to a plea agreement calling for a sentence of twenty years in prison with a twenty year minimum mandatory term resulting from the discharge of a firearm during the robbery. At the time of entering his plea, petitioner's counsel stated:

> the agreement is pursuant to the 10/20/life bill he is still exposed, because the firearm was discharged, to 20 years mandatory. He will be sentenced to 20 years in the state prison with the expectations [sic] he will have to serve 20 years day for day with credit for time served. I've explained to him the only way he'll get out in less than 20 years is if some how the laws change and it applies to it. But as it stands now [,] he's got to do 20 years.

Petitioner was then sentenced to the mandatory twenty years under the 10/20/life statutes. No direct appeal was taken from the judgment and sentence but subsequently petitioner filed a motion to correct the sentence arguing that the twenty year minimum mandatory was illegal because the information filed by the State alleged the possession of a firearm, and not a discharge of a firearm. The trial court denied the motion and an appeal was taken to the Fifth District Court of Appeal. The Fifth District affirmed the denial of relief finding that the plea colloquy supplied the missing allegations of discharge and constituted an implicit amendment to the information. In doing so, the Fifth District acknowledged that on identical facts the Fourth District reached the opposite conclusion on ***Jackson v. State,*** 852 So. 2d 941 (Fla. 4th DCA 2003) review denied 869 So. 2d 540 (Fla. 2004). The Fifth District certified express and direct conflict with ***Jackson. Bradley v. State,*** 971 So. 2d 957 (Fla. 5th DCA2007).

Petitioner filed a timely notice to invoke this Court's discretionary jurisdiction on January 25, 2008. On March 26, 2008, this Court issued an order accepting jurisdiction.

SUMMARY OF THE ARGUMENT

Where an information fails to allege that a defendant discharged a firearm, it is improper to impose the mandatory sentencing provision of the 10/20/Life statute for discharging a firearm. The failure to allege the essential facts necessary to support imposition of the mandatory sentence renders such a sentence illegal. The illegality cannot be transformed to legal simply because the defendant does not contest it. Nothing in the law permits the "implicit" amendment of a charging document.

ARGUMENT

WHERE AN INFORMATION FAILS TO ALLEGE THAT A DEFENDANT DISCHARGED A FIREARM, IT IS IMPROPER TO IMPOSE THE MANDATORY SENTENCING PROVISION OF THE 10/20/LIFE STATUTE FOR DISCHARGING A FIREARM.

Petitioner was charged with attempted felony murder and robbery with a firearm. The information specifically alleged that during the course of the robbery petitioner " was in possession of and carried a firearm." (R 71) Petitioner plead guilty as charged to both offenses. At the plea hearing, all parties discussed the fact that a twenty year mandatory minimum would be imposed because petitioner discharged a firearm. (R 102-112) Thereafter, petitioner filed a motion to correct his sentence based on the decision of ***Jackson v. State***, 852 So. 2d 941 (Fla. 4th DCA 2003), which held that in order to reclassify a crime under the 10/20/Life statute, the grounds for enhancement must be specifically charged in an information. Thus, where the information charged only that in the course of committing a robbery the defendant "carried a firearm" it was improper to sentence the defendant to a mandatory twenty-five years to life under the 10/20/Life statute

for discharge of a firearm causing great bodily injury. The Court further held that illegality of the sentence could not be transformed even where the evidence presented at the plea hearing established that the defendant had discharged a firearm resulting in great bodily harm and all parties were under the impression that the defendant was pleading to an offense that carried a mandatory minimum twenty-five to life. The trial court refused to follow ***Jackson*** and petitioner appealed to the Fifth District Court of Appeal. In refusing to follow ***Jackson***, the Fifth District Court of Appeal noted that although petitioner was only charged with possession or carrying a firearm, the record demonstrates that petitioner was specifically advised that he was pleading to crimes under the 10/20/Life statute, and that he was exposing himself to a twenty year minimum mandatory for discharge of a firearm. Therefore, the Fifth District held that petitioner's plea constituted his consent to the implicit amendment of the information to include the discharge of a firearm element. Petitioner contends that the decision below must be quashed.

If the State wishes to seek the reclassification of a crime under the 10/20/Life law, it must allege the necessary factual predicate in the information, as such facts are treated as "essential terms." ***Koch v. State***, 874 So. 2d 606 (Fla. 5th

DCA 2004); ***Jackson v. State***, 852 So. 2d 941 (Fla. 4th DCA 2003); ***Davis v. State***, 884 So. 2d 1058 (Fla. 2nd DCA 2004); ***Mobley v. State***, 939 So.2d 213 (Fla. 1st DCA 2006) The imposition of a mandatory minimum sentence where the information did not contain the grounds for enhancement renders the sentence illegal. ***Whitehead v. State***, 884 So. 2d 139 (Fla. 2nd DCA 2004) Even if a defendant agrees to a mandatory minimum sentence, if the charging document did not allege sufficient grounds for enhancement, the sentence is still illegal since a defendant can not agree to an illegal sentence. ***Mobley, supra***; ***Leavitt v. State***, 810 So. 2d 1032 (Fla. 1st DCA 2002)

The Fifth District below approved the rather novel concept of implicit amendment of the charging document. This practice should not be permitted. It is the State's prerogative to charge a person with a crime. Due process requires that any charging document must contain the essential elements of the offense charged. This is not a novel idea. The State could have amended the information below to specifically comply with due process. While the Fifth District held that the Rules of Criminal Procedure are not intended to furnish a procedural device to escape justice, neither should the State be allowed to simply ignore the rules of criminal procedure and the basic tenets of due process. A criminal defendant should not

have to supply the missing elements for the State. The Fourth District Court of Appeal in ***Inmon v. State***, 932 So. 2d 518 (Fla. 4th DCA 2006) reviewed the provisions of section 775.087 in detail and explained the necessity for the State to plead specifically the basis for a requested enhancement under that statute. It is axiomatic that one cannot be convicted of a crime not charged in the information. So,too a defendant should not be sentenced to an enhanced penalty that is not specifically pled in the information. Other Courts except for the Fifth District have so held. In ***Rogers v. State***, 875 So.2d 769 (Fla. 2nd DCA 2004) the Court reversed a enhanced sentence for discharge of a firearm that resulted in serious bodily harm because the information simply alleged that the defendant "did use" a firearm during the battery. The fact that at the bench trial the trial court made a specific finding that the defendant discharged the firearm and the information included the statute number for discharge did not cure the defect in the information. In ***Mobley v. State,*** 939 So.2d 213 (Fla. 1st DCA 2006) the Court held that a sentence for armed robbery based on possession of a firearm could not be enhanced for discharge of a firearm where the count did not allege discharge. The fact that a second count in the same information alleged that the defendant discharged a firearm could not be used to support enhancement of the other count. In ***Jackson v. State***, 852 So. 2d 941 (Fla. 4th DCA 2003) the defendant pled no

contest to a charge and was sentenced to a mandatory term for discharge of a firearm. The Fourth District reversed the mandatory sentence holding that it was illegal since the information merely charged that Jackson had "carried" a firearm. The Court refused to find waiver even though the facts that had been discussed at the plea hearing supported the discharge of the firearm and Jackson and his counsel were under the mistaken belief that he was pleading to a charge that carried a twenty-five to life mandatory minimum. As the Court noted the State could have moved to amend the information to add the missing essential elements but it never did so. Therefore, the Court reasoned that the State could not complain. The decision below stands due process on its head. It must be quashed.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and remand the cause with instructions remove the mandatory minimum sentence.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER FOR:
Fla. Bar No.: 0267082

REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0259918
444 Seabreeze Blvd. # 210
Daytona Beach, Florida 32118
(386) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Bill McCollum., 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Ricky Bradley, DC# 167298, Columbia C. I., 216 S E Corrections Way, Lake City, FL 32025 on this 21st day of April, 2008.

MICHAEL S. BECKER FOR:
REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

MICHAEL S. BECKER
REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER