

IN THE SUPREME COURT OF FLORIDA

PAUL MYERS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

F
JUL 27 1987
CLERK
By 017
Deputy Clerk

CASE NO. 76-017

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 3299-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii,iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
ISSUE I	
THE HABITUAL OFFENDER STATUTE IS NOT OPERATING FOR THE PURPOSE OF EXTENDING THE PERMISSIBLE MAXIMUM PENALTY	4
ISSUE II	
THE TRIAL COURT DID NOT ERR IN SENTENCING PETITIONER AS A HABITUAL OFFENDER BASED ON SPECIFIC FACTUAL FINDINGS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE EXTENDED SENTENCE WAS NECESSARY	9
CONCLUSION	12
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979)	10
Corbin v. State, 445 So.2d 1138, 1139 (Fla. 2nd DCA 1984)	10
Eutsey v. State, 383 So.2d 219 (Fla. 1980)	10
Grimmett v. State, 357 So.2d 461 (Fla. 2nd DCA 1978)	9
Hendrix v. State, 475 So.2d 1218 (Fla. 1985)	4
Hester v. State, 475 So.2d 1218 (Fla. 1985)	4
Hoefort v. State, 12 F.L.W. 1250 (Fla. 2nd DCA May 22, 1987)	7
Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1986)	4,7
Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986)	4,7
Scott v. State, 446 So.2d 261 (Fla. 1984)	11
Weston v. State, 452 So.2d 93, 96 (Fla. 1st DCA 1984)	10
Whitehead v. State, 598 So.2d 863 (Fla. 1986)	3,4,5,6,11
Winters v. State, 500 Sol2d 303 (Fla. 1st DCA 1986)	4,7
Wright v. State, 476 So.2d 325 (Fla. 2nd DCA 1985)	9
<u>OTHER:</u>	
In Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rule 3.701 and 3.988), 12 F.L.W. 162, 166 (Fla. April 2, 1987)	5

-(continued)-

<u>OTHER:</u>	<u>PAGE</u>
Rule 3.701(d)(10), Florida Rules of Criminal Procedure	5,7
Section 775.084, Florida Statutes	5,9

IN THE SUPREME COURT OF FLORIDA

PAUL MYERS,

Petitioner,

v.

CASE NO. 70,017

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the Appellant in the lower tribunal. The parties will be referred to as they appear before this Court. A one volume record on appeal, including transcripts, will be referred to as "R", followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent, State of Florida hereby adopts Petitioner's statement of the case and facts as being accurate to the extent stated.

SUMMARY OF ARGUMENT

In Issue I Respondent argues that this Court in Whitehead v. State, 498 So.2d 863 (Fla. 1986), did not eliminate the habitual offender statute as a viable method to enhance the statutory maximum penalty of an offense. Several district courts of appeal as well as public defenders have considered this issue and agreed with Respondent's position.

As to Issue II Respondent argues that the trial court's order sentencing Petitioner as a habitual offender was based on specific findings of fact based on uncontraverted evidence sufficient to justify its ruling.

ARGUMENT

ISSUE I (RESTATED)

THE HABITUAL OFFENDER STATUTE IS
OPERATIVE FOR THE PURPOSE OF EXTENDING
THE PERMISSIBLE MAXIMUM PENALTY

Petitioner argues that the Habitual Offender Statute is not operative for the purpose of extending the permissible maximum penalty based on this Courts ruling in Whitehead v. State, 498 So.2d 863 (Fla. 1986), contrary to the First District's opinions below in Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987) and contrary to other decisions from that court. See, Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); and Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987). In each of the aforementioned cases, the First District correctly limited Whitehead to the only issue that was before this Court, i.e., that a finding of habitual felony offender status pursuant to section 775.084 is no longer viable as a reason to depart from the sentencing guidelines in light of this Court's holding in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The First District continues to maintain that Whitehead did not repeal the Habitual Offender Act or claim that it had no legal operation within the Sentencing Guidelines Act.

The State submits the First District's interpretation of Whitehead is correct. Nothing in the majority opinion of Whitehead repealed the Habitual Offender Act. Only Justice Overton in his

dissent concluded that was the effect of the majority opinion. Furthermore, the Guidelines Act itself recognizes the interrelationship of the Habitual Offender Act in Rule 3.701(d)(10) and the Committee Note thereto which provides:

(d)(10) If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. If the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by the operation of that statute. If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

In this Court's most recent amendments to the sentencing guidelines rules, no changes were made to any portion of this Committee Note.

In Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rule 3.701 and 3.988) 12 F.L.W. 162, 166 (Fla. April 2, 1987).

If the Habitual Offender Act was judicially repealed by Whitehead surely this Court would have seen fit to delete from the sentencing guidelines rules any reference whatsoever to the habitual offender statute. By leaving in references to this Act, this Court has evidenced its intentions to limit Whitehead to its only holding: a defendant's habitual offender status cannot serve as a reason for departure.

In addition to this Court's recent indication that the Habitual Offender Act still exists, the Public Defender for the Fourth Judicial Circuit of Florida has also taken the position that the Act is still viable. In a letter written to Chief Justice McDonald, Louis Frost

stated the Public Defender's position on the ramifications of Whitehead.

We agree, for the most part, with the Florida Supreme Court's recent decision in Whitehead [citation omitted], with regard to its determination that the provision of the Habitual Offender Act cannot operate as an alternative to guidelines sentencing. The opinion is well reasoned on that point.

We do take issue, however, to the apparent dictum in Whitehead to the effect that there no longer is reason for the Habitual Offender Act to exist. We believe that the Habitual Offender Act is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds the total statutory maximums for the offenses charged. In such an instance, an extended term can be sought under the Act to impose a sentence within the presumptive guidelines range. Such an interpretation would be consistent with both the guidelines system and the Habitual Offender Act, since an individual whose guidelines range exceeds the statutory maximum would in most instances, almost certainly fall within anyone's interpretation of an individual for whom an extended term is necessary for protection of the public.

(Appendix at 1-3)

Based on this Court's recent refusal to delete from the sentencing guidelines references to the habitual offender statute, based on Public Defender Louis Frost's position in his letter to Chief Justice McDonald, the State submits the First District's limitation of Whitehead is correct. The Habitual Offender Act was not legislatively repealed by the enactment of the sentencing guidelines nor judicially repealed in Whitehead.

Having established that the Habitual Offender Statute still exists and should still exist, the question remains in what context

does the statute still exist. The State maintains it is still fully operable; however, one's habitual offender status cannot serve as a reason to impose a departure sentence. See Committee Note (d)(10). As evidenced by Louis Frost's letter to Justice McDonald, some public defenders at least agree that the Habitual Offender Act "is still viable (and should be utilized in those instances in which the presumptive guidelines range in a particular case exceeds that total statutory maximums for the offenses charged." Thus, it appears the public defenders are in agreement with the State and the First District's opinions in Myers, supra; Winters, supra; and Holmes, supra. While the facts sub judice are different from the Myers, Winters and Holmes scenario, the State still submits use of the Habitual Offender Statute was proper in this context.

In Hoefort v. State, 12 F.L.W. 1250 (Fla. 2nd DCA May 22, 1987) the court addressed this issue:

"In the habitual offender statute still an effective basis on which to exceed the statutory maximum as long as the sentence imposed does not exceed the guidelines recommendation?"

The court noted that this question had been answered in the affirmative by the First District Court of Appeal in Myers v. State, supra and certified to the supreme court in Winters v. State, supra. After analyzing the issue¹ the court concluded that the habitual offender statute remains a viable method to enhance the statutory

¹ See also respondent's brief on the merits in Holmes v. State, case no. 70-269, Supreme Court.

maximum penalty of an offense. Thus, both the First and Second Districts have concluded that Whitehead does not make inoperative the habitual offender statute as a viable method to enhance the statutory maximum penalty of an offense. Their reasoning is persuasive and should be followed in the instant case.

ISSUE II

THE TRIAL COURT DID NOT ERR IN SENTENCING PETITIONER AS A HABITUAL OFFENDER BASED ON SPECIFIC FACTUAL FINDINGS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE EXTENDED SENTENCE WAS NECESSARY

Petitioner contends that the State offered no evidence on which the court could make a specific finding that the protection of the public required that he be sentenced to an enhanced penalty pursuant to Section 775.084(3)(d). Petitioner concedes that the State's evidence at the sentencing hearing revealed that Petitioner had a prior record which was not contested by Petitioner and was properly before the trial court. Petitioner argues that his prior record is not sufficient evidence on which the trial court could base a specific finding. However it is clear that a defendant's prior record alone may be sufficient evidence on which to justify an enhanced sentence is necessary to protect the public. Wright v. State, 476 So.2d 325 (Fla. 2nd DCA 1985); Grimmett v. State, 357 So.2d 461 (Fla. 2nd DCA 1978).

Petitioner argues that the trial judge made no specific findings as to why he was imposing the enhanced sentence. Contrary to this assertion, immediately after stating that the sentence was necessary for the protection of the public, the trial judge went on to state:

4. The defendant is 26 years of age. Between 1973 and 1976 in Juvenile Court, he was adjudged delinquent in nine separate adjudications for commission of numerous criminal offenses, including burglary, grand larceny, shoplifting, assault, battery, trespassing and disorderly conduct.

In 1977 and 1978, he was charged with numerous criminal offenses, but was found incompetent and those cases were placed on an inactive docket and were later dismissed or were nolle prossed.

In 1979 he was adjudicated guilty of twelve counts of burglary, nine counts of grand theft and two counts of petit theft. He was sentenced on February 20, 1980, to two consecutive five-year prison terms. He was released from imprisonment on June 25, 1985.

5. The defendant committed the attempted burglary in this case on July 20, 1985, less than one month after his release from imprisonment. (p. 22-23, A.B.)

Clearly these underlying factors and circumstances concerning Petitioner's general pattern of prior criminal activity and the timing of such are sufficient on their face to have induced the trial judge to conclusively find that the enhanced sentence was required to protect the public. Weston v. State, 452 So.2d 93, 96 (Fla. 1st DCA 1984); Eutsey v. State, 383 So.2d 219 (Fla. 1980); Corbin v. State, 445 So.2d 1138, 1139 (Fla. 2nd DCA 1984).

Petitioner's reliance on the cases he cites in support of his contention that the sentencing order is insufficient is misplaced in that the court's finding in those cases do not come even close to the specific findings in the instant case. For instance, in Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) the court ruled that a finding that an extended sentence was necessary to protect the public was insufficient in that the underlying facts and circumstances were not apparent in the trial court's order and that an appellate court could not speculate on what facts from the PSI or otherwise were considered to justify the finding. In the instant

case no such speculation is necessary. The trial court's order is specific and concise. Similarly in Scott v. State, 446 So.2d 261 (Fla. 1984) the trial court merely stated that the defendant's prior record and facts of the case justified an enhanced sentence but no specific findings of facts were made and thus the case is clearly distinguishable from the instant case.

Petitioner complains that the burden of proof required for a guidelines departure and for an habitual offender finding are 'irreconcilably inconsistent' and without a rational basis for this distinction. Petitioner offers no analysis as to why this is so nor does he face the fact that a finding to enhance sentencing under habitual offender is not a departure from the guidelines. In addition this Court noted the different objectives between the habitual offender statute and the guidelines in Whitehead v. State, supra. The habitual offender statute was a scheme to impose an enhanced sanction upon those defendants who had committed other crimes in the past and posed a danger to society in the future thereby evidencing an increased need for a lengthier term of incarceration. The guidelines were intended to eliminate unwarranted variation in the sentencing process. Given the different purposes of the two schemes it is not remarkable that different burdens of proof exist and thus Petitioner's argument on this point is without merit.

CONCLUSION

Based upon the foregoing Respondent requests that this Court hold that the Habitual Offender Statute remains a viable method to enhance the statutory maximum penalty of an offense and that the trial court's findings were sufficient to sentence Petitioner as a habitual offender. Therefore Petitioner's sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

William A. Hatch

WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 29th day of July, 1987.

William A. Hatch

WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL