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IN THE SUPREME COURT OF FLORIDA

GREGORY MCKNICHT,

Petitioner,

v. Case No. 79,689

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On November 7, 1989, the State Attorney for the Thirteenth Judicial Circuit filed a two count information charging appellant with burglary of a structure and third degree grand theft. (R. 4,5) On January 25, 1990, the trial court gave appellant notice that he would be treated as a subsequent felony offender. (R. 11) On January 29, 1990 the state offered a cap of probation if appellant would agree to a non jury trial. (R. 54) Appellant agreed to this. (R. 54) Following a non jury trial spread over two days, the c urt found appellant guilty as charged. (R. 39) As appellant had absconded for the second day of this trial, R. 33, sentencing did not take place until August 28, 1990. (R. 41) The court found that it was necessary for the protection of the public that appellant be place on probation as a habitual offender. (R. 44) The court then placed appellant on probation for five years on each offense and made the probations to sun concurrently. (R. 44)

The evidence revealed that there had been a fire at a residence owned by Zeno Franks' sister. (R. 57) As Franks had been living these at on point he had his washer and dryer, stove and dishwasher there. (R. 57, 58) He went over to retrieve them after the fire and found that they were gone. (R. 58) He learned that appellant had taken them. (R. 58) Franks contacted appellant several times and appellant told him that he had taken the appliances. (R. 59, 66) Appellant had not had permission to take them. (R. 73) Nor, did appellant have permission to live in

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the house when he took the appliances. (R. 34) Appellant told Franks that he was keeping them at his father's and brother's. (R. 61) Franks tried to retrieve the items on several occasions but appellant always made excuses. (R. 61, 68) At the close of the state's case the appellant's counsel made a motion for judgment of acquittal stating, "Well, Judge, I move for a JOA far the record."

Appellant presented the testimony of one Arthur Heath. (R. 36) He stated that he knew Franks by the name of Ernest Edmunds. (R. 36) He testified that Edmunds approached him about moving appliances out af the house. (R. 38) The state objected to this testimony and the court sustained the objection. (R. 38) Appellant then renewed his motion for judgment of acquittal. (R. 38-39)

SUMMARY OF THE ARGUMENT

As to Issue I: This court should find that appellant claim that the evidence was insufficient on a lack of proof of consent theory is procedurally barred because it was not presented to the trial court. And, even if the court could reach the merits of the claim it would have to find it to be without merit. The state presented the only evidence on consent and it was that appellant did not have consent. Here there was evidence of a burglary and theft and a confession by the appellant.

As to Issue 11: Appellant has procedurally defaulted the claim that what he wanted to introduce was not hearsay because he did not make that claim in the trial court. Davis v. Alaska is not applicable here. In this case, the declarant testified and could have been asked the question. In any event, the appellant elicited the substance of what he wanted.

As to Issue 111: Appellant was aware that he was subject to "habitulization" before he made his agreement for a bench trial in exchange for a cap of probation. Accordingly, there was no breach of his agreement when he received "habitualized" probation following the bench trial. The case on which appellant rests his argument for reversal is readily distinguishable because "habitulization" was not contemplated by the parties at the time of the agreement of a probation cap in exchange for a bench trial.

Probation is within a trial court's discretion in sentencing a defendant who qualifies as a habitual felony offender. This

court's decision in Burrell indicates as much. And, the second district's decision in King explains why this is the case in detail. This court should adopt the portion of King finding that probation is a permissible sentencing choice for a habitual felony offender.

ARGUMENT

ISSUE 1

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGEMENT OF ACQUITTAL?

(As restated by respondent)

Appellant argues that the evidence was insufficient to rule aut the reasonable hypothesis of innocence that he had **consent** to enter the house and remove the appliances for safe keeping. The record is to the contrary.

The only testimony on consent was from the state's witness, Franks. Mr. Franks testified that he was the lawful custodian and did not give appellant permission to live in the house. (R. 34) And, he testified that appellant did not have permission to take the appliances. (R. 73)

Appellant's theory of **consent** was never presented to the trial court. He wasn't even present to claim that he acted with consent. Because he did not make this **claim,** it is was not properly before the district court and it is not properly before this court. Two of this court's decision show why this is the case. The cases are Tillman v. State, 471 So.2d 32 (Fla. 1985) and G.E.G. v. State, 417 So.2d 978 (Fla. 1982). In Tillman this court rejected an attack on the sufficiency of the evidence because it had not been presented to the trial court. The claim in the trial court had been that there was no such crime as attempted manslaughter. The claim raised in this court was that there should be a remand because it was not clear whether the jury had based its verdict on act or procurement on the one hand

or culpable negligence on the other. This court refused to hear the argument because it had not been presented to the trial court. In **G.E.G.** this court ruled that objections to sufficiency of the evidence based on chain of custody and proof of identity of substance were insufficient to preserve a claim of insufficiency predicated on a lack of introduction of the evidence.

Appellant's reference to the special rule for evaluating the sufficiency of the evidence in circumstantial evidence cases is in apposite. This was not a circumstantial evidence case. This case involved direct proof that a burglary occurred and a confession by the person who did the burglary.

ISSUE II

WHETHER APPELLANT HAS PROCEDURALLY DEFAULTED HIS CLAIM WITH RESPECT TO THE HEARSAY HE SAYS HE SHOULD HAVE BEEN ALLOWED TO INTRODUCE?

(As restated by respondent)

The trial court precluded appellant from offering hearsay during his case in chief. Appellant now claims that the evidence he wanted to offer was not hearsay. Appellant's claim comes too late. He gave the trial court no indication that the evidence he wanted to elicit was not for the truth of the matter asserted.

It is a well settled principle that a litigant can not change grounds on appeal. This court's decision in Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) sets out the principle. As Steinhorst states, " . . . [I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection, exception, or motion below." 412 So.2d at 338. Appellant made no claim to the trial court that the evidence he wanted to offer was not hearsay because it was not offered for the truth of the matter asserted.

Appellant's appeal to Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 30 L.Ed.2d 347 (1974) is misplaced for two reasons. First and foremost the appellant gave the trial court no indication that he though the evidence he wanted to elicit was admissible on this ground. Next, Davis is simply not applicable. In Davis, the Supreme Court held that a trial court should not have precluded a criminal defendant from cross-examining a witness about his possible bias stemming from his probationary status as a juvenile delinquent. Davis is a right to

confrontation case. It does not purport to authorize a criminal defendant to introduce hearsay especially where the declarant is available and has testified. The witness had testified that he knew Ernest Edmunds as Zeno Franks. (R. 36) It was Franks who made a reference to a Ernest Edmonds. (R. 58) And, of course, Franks had testified. Moreover there was noting inconsistent with his testimony and his having approached Heath to get the appliances. He had testified that he wanted to get the appliances after the fire. (R. 58)

In any event it seems that appellant got the substance of what he wanted into evidence. He did establish that Franks, a man also known to him as Edmunds, had approached him about taking the appliances out of the house. (R. 37) The only thing he was not allowed to establish was what Edmunds had told him. (R. 37)

ISSUE III

WHETHER THE TRIAL COURT ERRED IN PLACING APPELLANT ON PROBATION AS A HABITUAL OFFENDER?

(As restated by respondent)

Appellant first contends that his being placed on probation as a habitual offender was a violation of his agreement to a non jury trial. Appellee can not agree. Appellee was on notice that he would be treated as a habitual felony offender at sentencing before he agreed to a non jury trial in exchange for a sentence af probation. The absence of any objection to his being treated as a habitual felony offender at the time the court placed him on probation is evidence that the person in the best position to know, trial counsel, did not believe that the agreement was being breached.

This case is readily distinguishable from Wright v. State, 599 So.2d 767 (Fla. 2d DCA 1992), the case that appellant relies on for this prong of this issue. In Wright there was an objection at the time of the imposition of the "habitualized probation" that it was in violation of the agreement for the bench trial. There was no objection in this case. Respondent submits that this is because "habitulization" was contemplated from before the time petitioner agreed to the bench trial in exchange for probation. Once the notice had been filed it became a ministerial act on the part of the trial judge to find that appellant was a habitual felony offender. King v. State, 597 So.2d 309, 313-314 (Fla. 2d DCA 1992)(en banc). Further, unlike the record in Wright there is not indication that both counsel, the prosecutor and the defense counsel, thought that petitioner

could not be "habitualized" under the agreement for the bench trial.

Appellant next contends that probation is not an authorized sanction for a habitual felony offender. The second district's well reasoned en banc decision in King explains why this is the case. As mentioned above, when the legislature changed section 775.084 in section 6 of Chapter 88-131, Laws of Florida it made the determination of an offender's status **as** a habitual felony offender a ministerial act. Nevertheless, it granted trial court's discretion in determining what sanction to impose in two ways. First, pursuant to section 775.084(4)(c) a trial judge can decide not to sentence an offender as a habitual felony offender. Second, a trial judge is given discretion to sentence up to a maximum term of years as provided in sections 775.084(4)(a) 1, 2, and **3.** Although section 775.084(a) specifies that a court "shall sentence,'' this court has recently held in Burdick **v.** State, **594** So.2d 267 (Fla. 1992) that a court retains discretion to sentence to less than term of years specified in the statute. **As** this court said in another context in **Burdick,** ". . . sentencing under the habitual offender statute is entirely discretionary , . . ." **594** So.2d at 269. Third, Chapter 88-131, section 5(2)(d) contemplates that a trial judge must be persuaded to impose the most sever sanction available on a habitual felony offender. Accordingly, it follows that a trial judge may also be persuaded to be lenient. For all these reasons, it is clear that a trial judge may select probation after a finding that a defendant is a habitual felony offender.

CONCLUSION

WHEREFORE Respondent **asks** the court to decline **to** accept jurisdiction on the basis of the above and foregoing reasons, arguments and authorities.

Respectfully Submitted,

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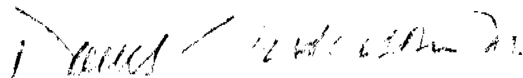

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondent on Jurisdiction has been furnished to, John S. Lynch, Assistant Public Defender, Public Defenders Office, **Polk** County Courthouse, P.O. Drawer 9000--Drawer PD, Bartow, Florida **33830,** Attorney for **Petitioner,** by United States Mail, postage prepaid, this 21 day of October, 1992.

OF COUNSEL 'FOR RESPONDENT