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w/app

FILED

SID J. WHITE

MAY 26 1992

CLERK SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

REGINALD MILLER, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :

Case No. 79,729

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

[Handwritten initials]

11

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Petitioner, REGINALD MILLER, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal which was utilized on the District Court level will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State filed an information charging Mr. Miller with felony petit theft (R3-4). The State filed a notice of intent to have Mr. Miller sentenced as a habitual felony offender on the same day he entered a plea of guilty to the charge (R15, 41-42). At the sentencing hearing the State presented certified copies of prior convictions. The prior convictions presented were **also** felony petit thefts (R47). Mr. Miller was sentenced as a habitual felony offender (R19-22, 47, 53).

On Appeal Mr. Miller argued that sentencing him as a habitual felony where the charged offense was felony petit theft violated his double jeopardy rights. The Second District Court of Appeals rejected this argument agreeing with the case of Gayman v. State, 584 So.2d 632 (Fla. 1st DCA 1991). The Court then certified the following question, the same question certified in Gayman, as one of great public importance:

WHETHER THE DOUBLE JEOPARDY CLAUSES
OF THE UNITED STATES AND FLORIDA
CONSTITUTIONS WERE VIOLATED BY THE
TRIAL COURT'S RECLASSIFYING APPELLANT'S
OFFENSE AS FELONY PETIT THEFT
THEN USING THAT FELONY CLASSIFICATION
TO ENHANCE APPELLANT'S SENTENCE
TO THE HABITUAL VIOLENT FELONY OFFENDER
STATUTE.

SUMMARY OF THE ARGUMENT

The double jeopardy protections afforded through the United States and Florida Constitutions were violated when Mr. Miller was sentenced as a habitual felony pursuant to section 775.084, Florida Statutes (1989) for the previously enhanced offense of felony petit theft.

ARGUMENT

ISSUE I

WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE TO THE HABITUAL FELONY OFFENDER STATUTE .

The double jeopardy clauses of both the United States and the Florida Constitutions protect a defendant from the imposition of multiple punishments for the same offense. U.S.C.A. Const. Amend. 5; West's F.S.A., Const. Art. 1, § 9. ~~State v. Heestrom~~, 401 So.2d 1343 (Fla. 1981); ~~North Carolina v. Pearce~~ 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) . The habitualization of a defendant pursuant to section 775.084, Florida Statutes (1989) following his conviction for the offense of felony petit theft runs afoul of these provisions.

Florida's theft statute, section 812.014(1)(d), Florida Statutes (1989), enhances the classification of a petit theft from a misdemeanor to a third-degree felony where a person has been convicted of two prior petit thefts. The state creates the substantive offense of felony petit theft. ~~State v. Harris~~, 356 So.2d 315 (Fla. 1978). The habitual offender statute provides for the enhancement of a defendant's sentence where he has been convicted of two or more prior felony offenses within the required time periods. § 775.084, Fla. Stat. (1989). The true purpose of

both of these statutes **is** to increase the punishment for the offense.

The reclassification of an offense because of the use of a firearm and the subsequent imposition of a minimum mandatory sentence for the **use** of the same firearm was upheld in Williams v. State, 517 So.2d 681 (Fla. 1988). See also, ~~State v. Whitehead~~, 472 So.2d 730 (Fla. 1985). In these cases, this **Court** noted that the enhancement of an offense because of the use of a firearm and the imposition of a minimum mandatory sentence were independent provisions. The reclassification of the offense increased the possible penalty whereas a minimum mandatory sentence **assured** only that at least a minimum period of the sentence would be served. Williams v. State, 517 So.2d 681, 683 (Fla. 1988).

Unlike the approved application of both the enhanced offense and the use of the minimum mandatory sentence, the **use** of the habitual offender statute in conjunction with the enhancement of a petit theft to a felony petit theft is not acceptable. Although felony petit theft is a substantive offense, **this** fact alone should not preclude this court from determining that a person convicted of this offense is not subject to habitualization under section 775.084, Florida Statutes (1989). **Clearly**, the purpose of provision section 812.014(2)(d), Florida Statutes (1989), establishing that felony petit theft may be charged where a defendant has been convicted of two prior felony convictions, is the enhance the potential sentence where a defendant appears to be a habitual

thief. The only way the sentence could be increased was to create a felony offense thereby creating a possible five year sentence.

The habitual offender statute itself is designed solely to enhance the sentence a defendant may serve where he has been convicted of two prior **felonies** as described in the statute. § 775.084, Fla. Stat. (1989).

Thus, the enhancement of an offense from a petit theft to a felony petit theft and the habitual offender statute **both** serve the same purpose. **They** each serve only to increase the sentence that may **be** served by the defendant. In addition, they each rely on the defendant's propensity to commit **crime** to support the enhancement. A defendant subjected to these sentencing provisions is twice placed in jeopardy, as his sentence may be enhanced twice. In fact, but for the **existence** of the offense of felony petit theft, a misdemeanor **defendant** is no longer subject to possible habitualization. Prior to the substantial 1988 revision of the habitual offender **statute**, first-degree misdemeanors could be used to support the finding that a defendant was a habitual felony offender. § 775.084(1)(a)(1)(b), Fla. Stat. (1977). The statute **also** had a provision for "habitual misdemeanants". **Under this section a defendant faced an enhanced sentence where he had twice previously been convicted of the same offense after his eighteenth birthday the last within two years of the new offense.** § 775.084-(1)(b), Fla. Stat. (1977).

The current habitual offender statute eliminated the **use** of misdemeanors to support the finding that a defendant qualified

as a habitual felony offender. The "habitual misdemeanor" was also eliminated in the 1988 revision of the statute. § 775.084, Fla. Stat. (Supp. 1988). Thus, it is only with the enhancement of the offense to a felony petit theft that the sentence could be further enhanced. This fact could not be more clear than in this case where Mr. Miller was convicted of felony petit theft, and the three convictions used to support the finding that he qualified as a habitual felony offender were also for felony petit theft.

Mr. Miller's double jeopardy protections against multiple punishment for the same offense were undoubtedly violated when he was sentenced as a habitual felony offender to five years incarceration for the offense of felony petit theft. The decision of the Second District Court of Appeal affirming this sentence must be reversed and Mr. Miller resentenced without the application of the habitual offender statute.

CONCLUSION

In light of **the** foregoing reasons, arguments, and authorities, Appellant respectfully **asks this** Honorable Court to reverse the decision of the lower court.

APPENDIX

PAGE NO.

1. Second District Court of Appeal Opinion
filed April 3, 1992.

A1

WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT, THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE PURSUANT TO THE HABITUAL VIOLENT FELONY OFFENDER STATUTE.

CAMPBELL, A.C.J., LEHAN and HALL, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ron Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21 day of May, 1992.

Respectfully submitted,

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