

IN THE SUPREME COURT OF FLORIDA

JAMES TERRY,

Petitioner,

v.

CASE NO. SC01-383

STATE OF FLORIDA,

Respondent.

_____)

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

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The petitioner, James Terry, was charged by the State with one count of aggravated battery in case no. 95-24130-CF. (R 40) On February 2, 1996, he entered a plea of guilty to that charge, pursuant to an agreement with the State that he would be sentenced to a term of months in prison determined by the mid-point of his sentencing guidelines range. (R 55-56, 160-61, 166-67) The agreement further provided that it would be discretionary with the court whether to impose sentence for that term of months pursuant to the habitual offender statute or pursuant to the guidelines, and that it would be discretionary with the court whether to add probation to that term of months. (R 55-56, 160-61, 166-67) On March 12, 1996, the judge who had accepted the plea imposed a sentence of 54 months in prison to be followed by ten years on probation. (R 82-901, 203) The judge announced orally that he was imposing that sentence pursuant to the habitual offender statute, and the court also issued written orders to that effect. (R 203, 57-58, 87)

At the March 12, 1996 sentencing hearing, the State argued that the agreed-on term of 54 months in prison should be imposed pursuant to the habitual offender statute "so if [the defendant] came back here on a violation of probation

then the guidelines would not be applicable and that would be something hanging over his head." (R 191) The judge stated that

by using the habitual offender treatment for the aggravated battery it does give the defendant a special incentive not to violate his probation because if he violates his probation he knows the guidelines are not involved in this case, he could be looking at up to 30 years in prison; if that doesn't do it, you know, I don't know what should in a case like this. So I think it's a good approach to it. I think it's a fair resolution of this case and therefore I'm going to go along with the plea bargain. I will declare Mr. Terry does qualify as a habitual felony offender as it relates to the aggravated battery count. I find he qualifies and therefore I will exercise my discretion and I will sentence him as such in this case.

(R 202-03)

In 1999, the Department of Corrections charged Mr. Terry with violating his probation. (R 95) He admitted he had violated those conditions of his probation which required him to report to his officer and remain at a known address. (R 4, 110, 88) Counsel argued on Petitioner's behalf that his post-violation sentence could not be enhanced under the habitual offender statute, because such an enhanced sentence cannot be imposed for the first time after a violation of probation and because the pre-violation, 1996 sentence imposed in this case did not have the legal effect of an enhanced sentence because

it fell within the guidelines range. (R 14-17) The State acknowledged that caselaw exists which might support that position in another case, but argued that in this case the parties' understanding that Mr. Terry could be sentenced as a habitual offender after a violation of probation controlled over the caselaw. (R 9) The successor judge agreed with the State, revoked probation, and imposed a sentence of fifteen years in prison, to followed by ten years on probation, pursuant to the habitual offender statute. (R 9, 13, 14-16, 37, 112-18)

Timely notice of appeal was filed and the Fifth District Court of Appeal, in its case no. 5D00-794, affirmed the sentence, certifying conflict with the decisions in Yashus v. State, 745 So. 2d 504 (Fla. 2d DCA 1999) and McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000). Terry v. State, 778 So. 2d 435 (Fla. 5th DCA 2001).

SUMMARY OF ARGUMENT

This court has held that where a trial court imposes a prison term within the sentencing guidelines to be followed by probation, that court can also rule that after any violation of probation the defendant will be treated as an habitual offender, *if* the defendant specifically agrees to that rider as part of his plea bargain. Here there was no such express agreement. The Second District Court of Appeal has correctly applied this court's precedents in a case indistinguishable from this case. The Fifth District Court's contrary decision in this case should be quashed, and this court should adopt the reasoning of the Second District Court and remand for imposition of a guidelines sentence.

ARGUMENT

THE TRIAL COURT DID NOT IMPOSE AN ENHANCED SENTENCE INITIALLY, AND ERRED BY IMPOSING ONE FOR THE FIRST TIME AFTER VIOLATION OF PROBATION. THE FIFTH DISTRICT COURT MISAPPLIED THIS COURT'S PRECEDENT, AND THIS COURT SHOULD REVERSE ITS DECISION AND ADOPT THE REASONING OF THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL.

This court held in October, 1996, after the original plea and sentencing hearings were held in this case, that a criminal defendant cannot be sentenced to an enhanced prison term under the habitual offender statute for the first time after he violates his probation. King v. State, 681 So. 2d 1136, 1141 (Fla. 1996). This court has held, since that time, that where a trial court imposes a prison term within the sentencing guidelines to be followed by probation, the court can rule in addition that after any violation of probation the defendant will be treated as an habitual offender, *if* the defendant specifically agrees to that rider as part of his plea bargain. Walker v. State, 682 So. 2d 555 (Fla. 1996); Dunham v. State, 686 So. 2d 1356 (Fla. 1997).

Applying those precedents, the Second District Court of Appeal has held that where, as here, a trial court imposes a prison sentence and announces that that sentence is imposed pursuant to the habitual offender statute, but where the term

imposed at that point is no longer than the term authorized by the sentencing guidelines, that defendant—regardless of the terms of his plea agreement—has not received an enhanced term under the habitual offender statute, and cannot later in the same case receive an enhanced term. Yashus v. State, 745 So. 2d 504 (Fla. 2d DCA 1999). McFadden v. State, 773 So. 2d 1237 (Fla. 4th DCA 2000), and Key v. State, 26 Fla. L. Weekly D699 (Fla. 2d DCA March 7, 2001) are similar; there the courts held that an enhanced sentence could not be imposed for the first time after a violation of probation where the defendants had initially been found to be habitual offenders but were respectively sentenced to probation, and to jail followed by probation. The Fifth District Court of Appeal acknowledged conflict with McFadden and Yashus when it approved the petitioner's newly enhanced sentence in this case.

Here, as in Yashus, the trial court when it accepted Petitioner's plea did not have the benefit of this court's King decision. Here, as in Yashus, the trial court did not impose an enhanced sentence when it imposed the original guidelines-length, 54-month prison term, and accordingly defense counsel correctly argued that an enhanced sentence could not later be imposed in this case, pursuant to King. Walker is distinguishable because there the defendant agreed

he *would* be treated as a habitual offender if he violated probation. Here the parties' plea agreement was to a prison term capped at the mid-guidelines level; the agreement left the decisions whether to habitualize, and whether to add a probation term, altogether up to the trial court. While at sentencing the State and court noted that a habitual offender sentence *could* be imposed after any violation of probation, there was no agreement that such a sentence later *would* be imposed. Cf. Walker.

This court should approve the decisions in Yashus, McFadden and Key, all of which correctly apply King, and should disapprove the Fifth District's conflicting decision in this case, reverse that decision, and remand for a sentence to be imposed within the guidelines.

CONCLUSION

The petitioner requests this court to reverse the decision and quash the opinion issued by the Fifth District Court in this case, to adopt in its place the decisions issued by the District Courts in Yashus and McFadden, supra, and to remand for imposition of a guidelines sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Assistant Attorney General Bonnie Jean Parrish, at 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, by way of the Attorney General's in-basket at the Fifth District Court of Appeal, this _____ day of April, 2001.

NANCY RYAN

CERTIFICATE OF COMPLIANCE

This brief is set in Courier New 12.

NANCY RYAN