

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

McMillan v. State

516 So. 2d 1064 (Fla. 4th DCA 1987) · No. No. 87-1933 · Decided December 16, 1987

SUMMARY

The Florida Fourth District Court of Appeal affirmed Larry McMillan’s conviction and ten-year habitual-offender sentence for grand theft. The court held that the habitual offender statute could support a sentence exceeding both the statutory maximum and the presumptive sentencing-guidelines range when valid grounds for departure were stated. It certified a question of great public importance concerning whether *Whitehead v. State* precludes such a sentence.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fourth District
WRITING FOR THE COURT	STONE; GLICKSTEIN; DELL
JURISDICTION	Florida
DECIDED	December 16, 1987
DOCKET	No. 87-1933
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a judgment of conviction for grand theft and a habitual-offender sentence exceeding both the statutory maximum for the offense and the presumptive sentencing-guidelines sentence.
STANDARD OF REVIEW	Appellate review of the legality of a criminal sentence and the trial court's grounds for departure from the sentencing guidelines.
PRECEDENTIAL VALUE	Published Florida district court of appeal decision; certified a question of great public importance.
PARTIES	Larry McMillan v. State of Florida

TOPICS

- sentencing
- sentencing guidelines
- criminal procedure
- appellate procedure
- statutory interpretation

PRACTICE AREAS

- criminal law
- sentencing
- appellate practice

QUESTIONS PRESENTED

1. Whether *Whitehead v. State* precluded use of the habitual-offender statute to impose a sentence exceeding both the statutory maximum and the sentencing-guidelines sentence when the trial court articulated valid departure grounds other than those disapproved in *Whitehead*.
2. Whether the remaining issues raised by the appellant required reversal of the judgment or sentence.

HOLDINGS

1. *Whitehead v. State* did not preclude application of the habitual-offender statute to impose a sentence exceeding the offense's statutory maximum and the presumptive guidelines sentence when the trial court stated valid grounds for departure other than the grounds disapproved in *Whitehead*.

KEY QUOTATIONS

“We agree with the conclusions in these cases and affirm the judgment and sentence.” (516 So. 2d at 1066)

FACTUAL BACKGROUND

McMillan was convicted of grand theft, a third-degree felony carrying a five-year maximum statutory penalty. He was sentenced as a habitual offender under section 775.084(4)(a)3 to ten years' imprisonment, while the guidelines scoresheet provided for a maximum sentence of thirty months. The trial court relied on a continuing and persistent pattern of criminal activity demonstrating the futility of rehabilitation and the commission of the offenses shortly after McMillan's release from prison; his recent criminal history included sexual battery and two burglary convictions involving attempted sexual battery.

PROCEDURAL HISTORY

The trial court convicted McMillan of grand theft and sentenced him as a habitual offender to ten years' imprisonment. The sentence exceeded the five-year statutory maximum for the third-degree felony and the thirty-month guidelines maximum. McMillan appealed, arguing that *Whitehead v. State* invalidated the sentence; the Fourth District affirmed and certified a question of great public importance.

DISPOSITION

affirmed

CASES CITED

- *Williams v. State*, 504 So. 2d 392 (Fla. 1987)
- *Brockington v. State*, 506 So. 2d 495 (Fla. 5th DCA 1987)
- *Shelton v. State*, 510 So. 2d 1068 (Fla. 2d DCA 1987)
- *Harmon v. State*, 506 So. 2d 500 (Fla. 1st DCA 1987)
- *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986)
- *Condiles v. State*, 512 So. 2d 331 (Fla. 3d DCA 1987)
- *King v. State*, 511 So. 2d 1131 (Fla. 4th DCA 1987)

- Hoefert v. State, 509 So. 2d 1090 (Fla. 2d DCA 1987)
- Smith v. Wainwright, 508 So. 2d 768 (Fla. 2d DCA 1987)
- Winters v. State, 500 So. 2d 303 (Fla. 1st DCA 1986)
- Hall v. State, 511 So. 2d 1038 (Fla. 1st DCA 1987)
- Holmes v. State, 502 So. 2d 1302 (Fla. 1st DCA 1987)
- Hester v. State, 503 So. 2d 1342 (Fla. 1st DCA 1987)

OPINION

PER CURIAM.

516 So. 2d 1064 (1987) Larry McMILLAN, Appellant, v. STATE of Florida, Appellee. No. 87-1933. District Court of Appeal of Florida, Fourth District. December 16, 1987. *1065 Richard L. Jorandby, Public Defender, and Jeffrey L. Anderson, Asst. Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Jr., Atty. Gen., Tallahassee, and Deborah Guller, Asst.

Atty. Gen., West Palm Beach, for appellee. STONE, Judge. The defendant was convicted of grand theft. The maximum statutory penalty for this third degree felony is five years. § 775.082(3)(d), Fla. Stat. He was sentenced as a habitual offender under section 775.084(4)(a)3, Florida Statutes, to ten years incarceration, the maximum period permitted under that statute.

The guidelines scoresheet provided for a maximum sentence of thirty months. The trial court aggravated the defendant's sentence based on two grounds: (1) a continuing and persistent pattern of criminal activity demonstrating the futility of rehabilitation, and (2) the perpetration of the offenses shortly after the defendant's release from prison. These reasons are a valid basis for departure.

See Williams v. State, 504 So. 2d 392 (Fla. 1987); Brockington v. State, 506 So. 2d 495 (Fla.5th DCA 1987); Shelton v. State, 510 So. 2d 1068 (Fla.2d DCA 1987); Harmon v. State, 506 So. 2d 500 (Fla.1st DCA 1987). The crime in this instance occurred shortly after the defendant's release from his latest commitment to prison. His most recent conviction was for sexual battery.

He twice previously has been convicted of burglary of a dwelling involving an attempted sexual battery. Appellant contends that his sentence is invalid under Whitehead v. State, 498 So. 2d 863 (Fla. 1986). With the exception of the Fifth District, the appellate courts in this state have held that it is proper for the trial court to resort to the habitual offender statute to enhance a defendant's sentence beyond the statutory maximum, where the sentence does not exceed the recommended guidelines range.

See Condiles v. State, 512 So. 2d 331 (Fla.3d DCA 1987); King v. State, 511 So. 2d 1131 (Fla.4th DCA 1987); Hoefert v. State, 509 So. 2d 1090 (Fla.2d DCA 1987); Smith v. Wainwright, 508 So. 2d 768 (Fla.2d DCA 1987); Winters v. State, 500 So. 2d 303 (Fla.1st DCA 1986).

Here the sentence imposed exceeds both the statutory maximum penalty and the presumptive guidelines sentence. The validity of such a sentence was recognized in *Hall v. State*, 511 So. 2d 1038 *1066 (Fla.1st DCA 1987), and *Holmes v. State*, 502 So. 2d 1302 (Fla.1st DCA 1987).

In *Hester v. State*, 503 So. 2d 1342 (Fla.1st DCA 1987), a similar sentence was affirmed. We agree with the conclusions in these cases and affirm the judgment and sentence. The other issues raised by appellant are also affirmed.

We certify the following question as one of great public importance: DOES WHITEHEAD V. STATE PRECLUDE APPLICATION OF THE HABITUAL OFFENDER STATUTE TO A SENTENCE IN EXCESS OF THE SENTENCING GUIDELINES WHERE THE TRIAL COURT STATES VALID GROUNDS FOR DEPARTURE OTHER THAN THE GROUNDS DISAPPROVED IN WHITEHEAD? GLICKSTEIN and DELL, JJ., concur.