IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JEREMIAH BEAZLEY,

Appellant,

v.

CASE NO. 1D09-0697

STATE OF FLORIDA,

Appellee.

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Opinion filed September 10, 2009.

An appeal from the Circuit Court for Bay County.
Don T. Sirmons, Judge.

Jeremiah Beazley, pro se, Appellant.

Bill McCollum, Attorney General, and Bryan Jordan, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

The appellant challenges the denial of his motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). For the reasons discussed below, we reverse and remand.

The appellant was convicted of numerous crimes and sentenced to thirty years' imprisonment as an habitual felony offender on some of the charges. The

trial court relied on three prior convictions, in case numbers 96-2538, 96-2410 and 95-2276, to deem the appellant an HFO. The appellant filed the instant motion to correct illegal sentence alleging that his HFO sentences are illegal because he does not have two qualifying predicate convictions. Specifically, he alleges that his conviction in case 95-2276 could not be used to habitualize him because in that case adjudication was withheld and he was on community control at the time he committed the offenses for which he was habitualized. Further, he alleges that cases 96-2538 and 96-2410 cannot be used to habitualize him because he was convicted of both on the same day, and therefore, the convictions are not sequential.

The appellant asserts that case 95-2276 was not a qualifying predicate felony for purposes of the HFO statute. Section two of the 1997 version[1] HFO statute states:

> For purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which the person is to be sentenced was committed during such probationary period.[2]

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[1] The 1997 version applies because the crimes for which the appellant was sentenced as an HFO were committed on September 30, 1997.

[2] This section was amended in 1998 to read: "For purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which the person is to be sentenced was committed during such period of probation or

§ 775.084(2), Fla. Stat. (1997). In Overstreet v. State, 629 So. 2d 125 (Fla. 1993), the trial court withheld adjudication on multiple felony offenses and sentenced the defendant as a youthful offender to four years in a boot camp to be followed by a two-year probationary period. Id. The defendant then committed an offense while he was in boot camp. Id. The trial court treated the felony offenses for which adjudication had been withheld as qualifying predicate convictions and sentenced the defendant to a five-year term of imprisonment as a habitual offender. Id. The Florida Supreme Court held that the plain language of section 775.084(2) meant that prior offenses for which adjudication was withheld cannot be treated as prior convictions for the purpose of habitual felony offender sentencing if the offender was incarcerated at the time, because the defendant was not yet on probation. Id. at 126. In doing so, the supreme court rejected the contention that the legislature meant for section 775.084(2) to include prior felonies for which a defendant was incarcerated, on probation, or on community control. In Benton v. State, 829 So. 2d 388 (Fla. 3d DCA 2002), the Third District specifically held that pursuant to Overstreet, when adjudication of guilt is withheld and a defendant is placed on community control, the conviction cannot be treated as a prior conviction pursuant to section 775.084(2), Florida Statutes (1995).

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community control." See Ch. 98-204 § 11, at 1968, Laws of Fla.

In this case, the record reflects that in case 95-2276, the appellant was placed on community control and adjudication had been withheld at the time he committed the instant offenses. Thus, case 95-2276 does not qualify as a predicate felony offense under the relevant HFO statute. See Benton, 829 So. 2d at 389.

Additionally, the appellant alleges that the other two crimes used to support his HFO sentences (96-2538 and 96-2410) were not sequential because he was sentenced for both crimes on the same day. According to section 775.084(5), Florida Statutes (1997): "In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony." The trial court did not attach any documentation indicating that cases 96-2538 and 96-2410 were in fact sequential convictions. See Phillips v. State, 972 So. 2d 297 (Fla. 1st DCA 2008) (reversing and remanding denial of rule 3.800(a) motion where trial court did not attach records indicating the predicate felonies were sequential). Thus, it is not clear whether cases 96-2538 and 96-2410 alone could support appellant's HFO sentences.

Accordingly, we REVERSE and REMAND for the trial court to attach documentation demonstrating that appellant qualified as an HFO or to grant relief.

PADOVANO, J., CONCURS. WOLF, J., CONCURS WITH OPINION. THOMAS, J., DISSENTS WITH OPINION.

WOLF, J., Concurring.

There is no valid reason for subjecting a person on probation, who commits a new offense, to a more severe sentencing structure than a person who is on community control for the original offense. I believe, however, we are bound by Overstreet v. State, 629 So. 2d 125 (Fla. 1993). If the statute had not been amended in 1998 to address community control, I would have certified the question to the Florida Supreme Court as being one of great public importance.

THOMAS, J., DISSENTING.

I respectfully dissent. I would affirm because I think the trial court properly concluded that Appellant's primary offense did qualify him for sentencing as an habitual felony offender.

I would not extend Overstreet v. State to the facts of this case, and I disagree with the holding of the Third District in Benton, which concluded otherwise. I acknowledge that in Overstreet, the State argued that section 775.084(2), Florida Statutes, applied to defendants who committed subsequent crimes while on community control; however, the defendant in Overstreet was incarcerated and not on community control. Thus, the language in Overstreet addressed a broader argument and was not necessary to the resolution of the case; as such, it was *obiter dicta*. See Hilkmeyer v. Latin Am. Air Cargo Expediters, 94 So. 2d 821, 825 (Fla. 1957) (concluding that language in cited case was "not necessary to the determination of the cause and was therefore *obiter dicta*.").

In the present case, it is especially significant that Appellant was originally sentenced to probation in the relevant qualifying offense. It is reasonable to assume that he violated that probation within months, as his sentence was then converted to community control. (It would be unreasonable to assume that he simply volunteered for a more stringent supervision than probation.) After his

sentence was changed from probation and he was sentenced to community control, Appellant then committed a new offense while still on community control.

To allow Appellant to now escape his habitual felony offender status ten years later, based on the argument that the 1997 statute's literal language does not include community control but only "probation," truly produces an absurd result, in my view. While the Supreme Court did state in Overstreet that it was bound to follow that literal language where a defendant was incarcerated, I think that situation is quite different.

I note that the legislature never amended section 775.084(2), Florida Statutes, to include offenses committed while incarcerated, but the legislature did amend the statute to apply to offenses committed while community control. Ch. 98-204, § 12, Laws of Florida. In my view, the 1998 amendment demonstrates legislative intent that the decision in Overstreet was incorrect to the extent it could be read to include cases such as this, because community control is another, more punitive form of probation. See, e.g., Lowry v. Parole & Probation Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985) (noting that where the legislature amends statute recently after Supreme Court decision interpreting original act, later amendment can constitute evidence of legislative intent of original act). Although the legislature did not act "soon" after the Overstreet decision, it did act before any

court extended Overstreet, as the majority does here and the Third District did in Benton. Thus, I think it is reasonable to read the 1997 statute to include crimes committed while under the sanction of community control, under the rubric of "probation." More importantly, in my view, I find that probation and community control are so similar as to be indistinguishable in terms of supervised release, thus making the majority's opinion here and the Third District Court's decision in Benton unsound. Under both the Criminal Punishment Code and the Sentencing Guidelines, probation and community control are scored equally as "Supervised Release" status. In 1997, when Appellant committed the new crime while under the sanction of community control, section 921.0011(6), Florida Statutes, defined community sanction to "include: (a) Probation; (b) C*ommunity control;* (c) Pretrial intervention or diversion." (emphasis added). Thus, under the controlling law, the legislature classified Appellant's status as "community sanction" no differently than probation.

In my view, Appellant's offenses committed while under the status of community control did meet the relevant criteria of section 775.084(2), Florida Statutes, for sentencing under the Habitual Offender Act. While Justice McDonald's dissent did not carry the day in Overstreet, that opinion has far more persuasive force here, where Appellant was serving community control rather than

incarceration. I would affirm.