IN THE FLORIDA SUPREME COURT

THE STATE OF FLORIDA,

Petitioner,

v.

CLIFFORD TALMADGE SMITH,

Respondent.

CASE NO. 65,157

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the appellant below, but the parties will be referred to as they appear before this Court. The brief of petitioner will be referred to as "PB", followed by the appropriate page number in parentheses. Attached hereto as an appendix, which contains the decision below, reported as Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's recitation of the history of his case.

III ARGUMENT

ISSUE

THE RECLASSIFICATION PROVISIONS OF SECTION 775.087(1), FLORIDA STATUTES, DO NOT APPLY WHERE THE DEFENDANT IS NOT CONVICTED OF THE OFFENSE EXPRESSLY CHARGED IN THE INFORMATION OR INDICTMENT BUT, INSTEAD IS CONVICTED OF A LESSER INCLUDED OFFENSE.

The First District, in the instant case, held that Section 775.087(1), Florida Statutes is not applicable to one who is convicted of a lesser offense because of the plain language of the statute:

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attmepts to use any weapon or firearm, or during the commission of any such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified. . . . (Empahsis added)

The First District followed its prior opinion in Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982) and disagreed with the Fourth District's decision in Miller v. State, 438 So.2d 83 (Fla. 4th DCA 1983), discretionary review pending, case number 64,505, oral argument set September 7, 1984. The First District's decisions in Carroll and the instant case are correct because they are based upon several well-settled rules of statutory construction.

First, the Legislature, when enacting the statute

in 1974, also codified the following rules of statutory construction:

> The general purpose of the provisions of the code are: . . .(2) to give fair warning to the people of the state in understandable language of the nature of the conduct prescribed and of the sentences authorized upon conviction.
>
> * * *
>
> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of different constructions, it shall be construed most favorbly to the accused.

Sections 775.012(2) and 775.021(1), Florida Statutes.

Second, it has always been the law that penal statutes are to be strictly construed. Whitehurst v. State, 105 Fla. 574, 141 So. 878 (1932); Fiske v. State, 336 So.2d 423 (Fla. 1978); Fourteen Fla. Jur. 2d Crim. Law §14 at 79.

Third, the Legislature, when enacting the statute in 1974, also created subsection (2) thereof, which provides for a three mandatory minimum sentence for the use of a firearm. Compare Section 775.087(2), Florida Statutes which imploys the language that the defendant be convicted of the crime, with Section 775.087(1), Florida Statutes, which does not use the word "convicted", but rather uses the word "charged". Thus, it is clear that the Legislature had two different things in mind when drafting the statute. Petitioner's claim for relief, if any is due, must be addressed to the Legislature, not to this Court.

Fourth, this Court in Palmer v. State, 438 So.2d 1 (1983) strictly construed subsection (2) to prohibit multiple three year mandatory minimums resulting from the same criminal episode. The language in Palmer is fully applicable to the instant case:

> We rely in part upon a fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed. Ferguson v. State, 377 So.2d 709 (Fla. 1979). We have held that " nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms. " State v. Wershow, 343 So.2d 605, 608 (Fla. 1977), quoting Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927). This rule of construction has, in fact, been codified as part of the various statute on which the state relies.[2] Nowhere in the language of section 775.087 do we find express authority by which a trial court man deny, under subsection 775.087(2), a defendant eligibilty for parole for a period greater than three calendar years.
>
> * * *
>
> 2/ §775.021(1), Fla. Stat. (1981).

Id. at 3. Likewise, nowhere in subsection (1) is there expressed authority to allow reclassification of a lesser offense.

Fifth, this Court in State v. Perez, __So.2d__ (Fla. Supreme Court Case No. 63,787, opinion filed April 26, 1984)

again strictly construed subsection (2) to apply only to felony convictions.

Petitioner has urged this Court to adopt the Fourth District's Miller view (PB 5). That court criticized the First District as being too "hyper-technical" (438 So.2d at 84) in construcing subsection (1). Respondent urges just the opposite--that strict construction is exactly the role of the courts in passing upon criminal statutes.

Even if the Court agrees with Miller and overrules Carroll, the decision in the instant case need not be reversed because it rests upon a separate ground not attacked by petitioner. In the First District, Respondent argued two points:that the reclassification was illegal because he was not convicted as charged, and also that it was illegal because the jury did not specifically find in its manslaughter verdict that a firearm was used. The First District reversed on this point:

> On the second point, the defendant asserts that the trial judge was not at liberty to reclassify the offense absent the jury's express finding that the defendant used a firearm, the verdict reflecting no such finding. We agree with the defendant's position and adopt the reasoning of the court in Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982). Accord Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983). We, therefore, reverse on this point as well.

Smith v. State, 445 So.2d ad 1051. Petitioner has not sought review of the second issue, but has limited its Notice of

Discretionary Review only to the certified question. Petitioner has casually argued that this Court should reverse on the second issue (PB 5-6), but it is not properly before this Court.

Therefore, even if this Court disagrees with the First District's construction of the reclassification statute, there is no reason to accept this case and reverse it, wherein an independent ground for sustaining it has not been properly presented for review.

IV CONCLUSION

Based upon the foregoing argument, reasoning and citation of authorities, Respondent urges this Court to decline to accept jurisdiction. If accepted, the certified question should be answered in the negative, and this Court should decline to reach the second issue which is not properly before it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Gregory Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to respondent, Clifford Talmadge Smith, #014751, 3950 Tiger Bay Road, Daytona Beach, Florida 32014 on this 14 day of May, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER