OA 4.7.92

FILED
SID J. WHITE
FEB 18 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

BOBBY ROSS,

Petitioner,

v. CASE NO. 78,179

STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LYNN A. WILLIAMS #195484
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

BOBBY ROSS, :

Petitioner, :

vs. : Case No. 78,179

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

ARGUMENT

ISSUE I

SECTION 775.084, FLORIDA STATUTES (1988) IS IMPERMISSIBLY INEQUITABLE, IRRATIONAL, AND VAGUE, IN VIOLATION OF STATE AND FEDERAL CONSTITUTIONAL GUARANTEES.

Petitioner notes that the state has divided their response to this issue into two issues, one dealing with whether or not the constitutionality of a sentencing statute may be raised for the first time on appeal and a second dealing with the constitutionality of the habitual violent felony offender statute.

As to the state's first point, petitioner notes that in point of fact, the issue of the constitutionality of the habitual violent felony offender statute was raised by petitioner before the trial court by a lengthy written motion. The motion was denied by written order (R 47-R 52; R 56).

Further, as conceded the the state, the issue was also addressed in the First District Court of Appeal and expressly ruled on.

In support of its second point, the state argues that petitioner cannot "complain simply because he received commensurate imprisonment". (State's AB, page 14) It should be noted that due to the application of the habitual violent felony offender statute petitioner received a sentence which was double the maximum sentence which can normally be imposed for escape, a second degree felony. See Section 775.082, Florida Statutes (1987); Section 944.40, Florida Statutes (1987). The application of the habitual violent felony offender statute adversely affected petitioner not only by doubling the maximum sentence but also providing for a ten year minimum mandatory. If the statute is unconstitutional, petitioner received an excessive and illegal sentence.

The state also posits, relying on Sowell v. State, 342 So.2d 969 (Fla. 1977) that a sentence established by the legislature is immune from attack on grounds of due process, equal protection, or separation of power theories. In Sowell this Court was considering only whether the minimum mandatory three year provision under Section 784.04, Florida Statutes, in an aggravated assault case, was constitutional. There is no discussion or mention in the opinion that the law had a rational basis, it apparently was presumed that present offenses committed with a firearm could be punished more severely than offenses committed without a firearm. Nor was there any

indication in that case that the classifications made within that statute did not have a rational basis. The language can only be considered dicta within the parameters of the facts involved in that case. Moreover, a rule which per se precludes review of legislative action surely violates any reasonable interpretation of the due process clauses of the state and federal constitutions. See State v. Saiez, 489 So.2d 1125 (Fla. 1986).

An equal protection analysis is applicable to state criminal statutes.

The equal protection violation in this case is that the statute in effect at the time petitioner allegedly committed his escape did not include aggravated battery, although it did include arson, sexual battery, robbery, kidnapping, aggravated child abuse, murder, manslaughter, unlawful throwing, placing, or discharging of a destructive device or bomb, armed burglary, and aggravated assault.

There is no reasonable basis for the disparate classification.

In Mikell v. Henderson, 63 So.2d 508 (Fla. 1953) a statute prohibiting cruelty to animals was being applied to individuals who bred and trained game cocks but not to individuals who shipped poultry on steamboats or other crafts. This Court premised that roosters were going to fight whether they were penned together on land or on a boat. In finding the criminal statute denied equal protection of the law, this Court found no reasonable basis for the separate classifications for cock

fighting on a steamboat or other craft, and cock fighting on land or in the back yard.

In Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) this Court held, inter alia, that a provision of the automobile reparations reform act permitting recovery for pain and suffering if the injury involved consisted in whole or in part of a fracture to a weight-bearing bone, without regard to the medical payments threshold or whether the injury resulted in death or permanent injury, denied equal protection. This Court reasoned:

> Although this alternative "threshold" test was undoubtedly well intended, it unfortunately constitutes a denial of equal protection of the laws by discriminating among members of the class of persons injured in automobile accidents who have survived such accident with less than $1000 in medical expenses and no permanent injury. ... One who suffers a soft tissue injury may not seek recompense for pain and suffering unless it can be proved that the injury is permanent; yet these have been shown to be among the most serious of bodily injuries.

Id. at 20.

In Rollins v. State, 354 So.2d 61 (Fla. 1978) this Court considered a criminal statute which prohibited an owner or employee from allowing persons under age 21 to frequent a billiard parlor. The statute specifically excepted from its coverage people playing billiards in a bowling alley. In examining the constitutionality of the statute, this Court looked at the classifications made within the statute in determining that the statute violated the state and federal equal

protection guarantees. In so ruling, this Court stated that in examining the statute:

> we must inquire whether the classification made by the legislature in that statute is reasonable. Gammon v. Cobb, supra. [335 So.2d 261 (Fla. 1976). For a statutory classification to satisfy the equal protection clauses found in our organic documents, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed (citations omitted).
>
> In the case sub judice, we find no such reasonable relation. There are no practical differences between billiards played in a billiard parlor and billiards played in a bowling alley sufficient to warrant a special classification, subjecting only appellant to arrest, fine or imprisonment for allowing minors to play billiards.
>
> ...
>
> Assuming, arguendo, that billiard establishments do attract undesirable characters, thereby providing a deleterious atmosphere for minors, these undesirables are just as likely to frequent a bowling alley offering billiards as they are a billiard parlor, particularly where the bowling alley serves alcoholic beverages and the billiard parlor does not.

Id. at 63.

Similarly, in the case at bar, all offenders with a previous violent record are not treated alike, and the treatment they receive does not rest on some difference that bears a just and reasonable relation to the perceived goal of the habitual violent felony offender statute. If petitioner's prior enumerated violent felony had been more severe, i.e., aggravated battery, the maximum allowable sentence in his case for the present offense of escape would have been fifteen years. Because petitioner's prior felony was less severe, he

received a thirty year sentence with a ten year minimum mandatory.[1]

In footnote six of its brief the state concedes that the law applicable to petitioner did not included aggravated battery as an enumerated felony. Petitioner submits the later amendment of the statute is irrelevant. This Court cannot rewrite the statute to include aggravated battery. Smith v. State, 567 So.2d 55 (Fla. 2d DCA 1990), cited in footnote 6 of the state's brief, does not provide any authority for the propositions stated in the footnote.

Based on the foregoing, and the argument presented in petitioner's initial brief, petitioner submits the habitual violent felony offender statute, under which petitioner was sentenced, should be declared unconstitutional.

---

[1]The state continually refers to other portions of petitioner's prior record. However, the trial court relied on petitioner's previous aggravated assault conviction to find that petitioner was a habitual violent felony offender. Therefore, the other portions of petitioner's record are irrelevant and the state made no showing below that they would have otherwise qualified petitioner as an habitual violent felony offender.

ISSUE II

THE TRIAL JUDGE IMPROPERLY OVERRULED PETITIONER'S OBJECTION TO THE MANNER IN WHICH THE PROSECUTOR IMPEACHED PETITIONER WITH HIS PRIOR CRIMINAL RECORD AND FURTHER ERRED IN ALLOWING THE PROSECUTOR TO QUESTION PETITIONER ABOUT HIS PRIOR RECORD BASED ON A "RAP SHEET".

In a bootstrap argument, the state asserts that petitioner opened the door to the prosecutor's subsequent grossly improper impeachment when he initially responded that he did not know how many felony convictions he had.

This ignores the fact that the prosecutor virtually assured the petitioner would have to answer this way by refusing to show petitioner or his attorney any copies of certified convictions in her possession, asserting that the correct answer to the question was twenty even though it became evident both during and after the trial that the prosecutor was unprepared to substantiate this number, and finally, threatening a perjury prosecution if petitioner answered incorrectly. This is illustrated by the following colloquy:

> Mr. Radloff: She told me she was going to refresh his recollection off the arrest and booking report, Judge.
>
> The Court: Don't you have the arrest and booking reports available?
>
> Mr. Radloff: Yes, Judge, but as I told you those are not one hundred percent accurate. My client cannot give an accurate answer on the stand. I cannot fully prepare him for that question because Mrs. Peek either doesn't have them or may have them now but just is not going to provide them to me.
>
> The Court: Well, of course the best -- I suppose that may be one way of finding out

how many convictions he has. He is probably in the best position to know how many convictions he has, perhaps he's had so many that he's forgotten.

Mr. Radloff: Well, that's probably the case here, Judge.

The Court: Yes, Mrs. Peek, can you state how many to the defense how many convictions you think you have evidence of?

Mrs. Peek: Well, Judge, I think I've got 11 or 12 here, I need a moment to count them but as I explained to Mr. Radloff it's two different issues. Him refreshing his client's memory from his six out of state convictions is one issue and what I can prove up is another issue. And I thought I said, sir, take what I've got, try to refresh your client's memory before I do it. He's got from Chicago, Tennessee, Atlanta, and California.

Now, him telling his client to say 12 is not responsive to the question and that's perjury. And I told him I was concerned about that. I have -- I need to count them either 11 or 12 right here, plus I have the F.B.I. rap sheet that his client needs to refresh his memory from if he is having some trouble remembering all those encounters in these other jurisdictions, whether or not I will be able to prove it up is one thing but suborning perjury is another. (T 56-57).

The result of this cat and mouse game by the prosecutor, appellant's inability on the stand to state, with any confidence, the number of his prior convictions, cannot consistent with fairness operate to open the door to further improper conduct by the prosecutor.

The egregiousness of the error is compounded by the fact that throughout the trial the prosecutor intimated the correct answer to the question (for which petitioner could escape a perjury prosecution) was twenty prior felony convictions. How-

ever, even at sentencing the prosecutor was not able to prove up that number of convictions. In fact, the trial court made a finding of fact that petitioner had eighteen prior felony convictions and it could not be determined from petitioner's "rap sheet" if an additional five convictions were felonies or misdemeanors (R 149; R 158).

The result was to deny petitioner due process of law and a fair trial in contravention of Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution.

The state argues that this Court should limit its discretion by declining to entertain issues which are not the basis for the court's acceptance of jurisdiction.

Of course, this Court has the discretion to review all issues because it has jurisdiction of the case. If this Court determined that it would never look beyond the certified question in a case, this Court would also in effect be unnecessarily limiting its jurisdiction. One obvious effect of this would be that this Court would be placing its imprimatur, sub silentio, on decisions which this Court might not only disagree with but find to be fundamentally unfair and a deprivation of due process. This is nonsensical given this Court's jurisdiction of the entire cause.

Petitioner submits the error presented in this issue is a good example of a case presented to this court where petitioner's fundamental due process right to a fair trial was violated, albeit by an issue not certified.

Petitioner's conviction should be reversed and the case remanded for a new trial.

CONCLUSION

Based on the foregoing argument and citation of authority, and the argument presented in petitioner's initial brief as to all issues, petitioner submits his conviction should be reversed and the case remanded for a new trial. If this relief is denied, petitioner's sentence should be reversed and remanded for a guideline sentence.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LYNN A. WILLIAMS #195484
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, on this 18th day of February, 1992.

LYNN A. WILLIAMS #195484
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER