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IN THE

SUPREME COURT OF FLORIDA

DONALD MCCALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,536

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Donald McCall, was the Appellant and Respondent, State of Florida, was the Appellee in the Fourth District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE

Petitioner was charged by information with Count I - possession of cocaine and Count II - carrying a concealed weapon for an incident that occurred on May 27, 1990 (R 173).

The case was brought to trial on November 15, 1990. The motions for judgment of acquittal and renewed judgment of acquittal were denied (R 89, 95-96). The jury returned a verdict as charged on Count I and not guilty on Count 11 (R 161-162, 177-178).

Petitioner was sentenced on December 13, 1990 as a habitual offender to eight years with credit for 208 days (R 171,181).

Notice of Appeal was timely filed on January 8, 1991 (R 186). This appeal follows.

STATEMENT OF THE FACTS

Officer Penny testified that he was working the evening shift when he came in contact with Petitioner (R 15). Penny was working with Officer Bollinger (R 15). They saw Petitioner standing on the corner of N.W. 8th and 2nd Avenue (R 15, 62-63). He was suspicious because he was alone standing on the corner (R 16, 36, 39). The officers were one and one-half to two blocks away (R 17, 64). It was in the evening and the lighting was good (R 18).

Penny saw Petitioner looking around. As a car would drive up to the stop sign, Petitioner attempted to flag them (R 19, 64-65). Penny was using binoculars to get a closer view of the activity (R 20-21). According to Penny if the car stopped Petitioner would run over and Petitioner engage the occupants in conversation, reached into his pocket, get a piece of paper and displayed it (R 21-22, 41). He could not tell what the object was (R 45). The officers watched for a few minutes and then approached Petitioner (R 22, 65). Penny did not keep the binoculars on Petitioner as they approached (R 46).

Petitioner was asked to remove his hands from his pocket (R 23, 66). As Petitioner did, he removed a twenty dollar bill in his left hand (R 23). As Petitioner released the money, four pebble-like substances fell to the ground (R 23, 49-50).

Then Petitioner tried to reach his back with his right hand (R 23, 50). He was ordered to stop (R 50). Whereupon he was patted down and searched (R 23, 66). The search revealed an open knife (R 23, 68). Penny retrieved the money and four objects (R

28, 68).

Petitioner was arrested and left with the money (R 32, 52). Petitioner said the objects were "Perp" - fake cocaine while he was in the police car (R 55). However that comment was not mentioned in the police report (R 58-59).

Officer Bollinger testified as Officer Penny did except that Petitioner made his statement as soon as the rocks were being confiscated from the ground not at station or on way to station (R 70, 74). Bollinger also stated it was not normal for a person who had dropped drugs to then reach for a weapon (R 72). Bollinger admitted that he talked with Penny about this case before he testified (R 77-78).

Sandra Lamar testified as forensic chemist that she analyzed one object of the four objects and the results were positive for cocaine or mixture containing cocaine (R 79-83, 86).

SUMMARY OF THE ARGUMENT

POINT I

The trial court erred in not granting a mistrial when officer Penny testified Petitioner was trying to sell cocaine. Any evidence introducedto show bad character or propensity for selling drugs is error. Additionally such evidence has no relevance to a possession charge. The evidence only created a danger that jury would consider alleged bad character of defendant in determining Petitioner was guilty of the crime charged which is error.

POINT II

The trial court erred in declaring Petitioner a habitual offender by not complying with requirements of the statutes. The trial court did not make a specific finding that Petitioner's present charge was committed within five years of his last conviction as required.

POINT III

The trial court erred in sentencing Petitioner as a habitual offender where the statute violates the one subject rule and is therefore unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL.

Officer Penny testified that Petitioner was attempting to flag cars down to see if they were interested in what he has to sell (R 19). Defense counsel objected (R 19). The court struck the answer (R 19). Defense counsel made a motion for mistrial based on the inference was already placed in the jury's mind and that Petitioner was not charged with selling (R 19-20). The court stated the objection stating "[W]e can testify as to that fine and allowed the question to be rephrased (R 20). Shortly thereafter he admonished the jury to disregard the stricken answer (R 20-21).

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Section 90.403 Florida Statutes (1990).

The evidence that Petitioner was attempting to sell drugs and was not relevant as to whether he possessed a cocaine rock. Rather, such evidence was merely introduced to show Petitioner's bad character and propensity for selling drugs. This court has specifically held that it is error to introduce evidence implying that the defendant was a drug dealer: Hargrave v. State, 431 So.2d 732, 733 (Fla. 4th DCA 1983) (the "implications to be drawn from fact that drug dealers use phrase "stuff" and fact that defendant used phrase "I don't mess with the stuff" are obvious, irrelevant and error); see also Griffin v. State, 334 So.2d 288, 289 (Fla. 4th DCA 1976) (defendant on trial for possession of heroin, fact that

defendant advised several days prior to stop "selling dopa" irrelevant and reversible error); Smith v. State, 539 So.2d 556, 557 (Fla. 4th DCA 1989) (reversed due to mention of defendant's drug dealing). Clearly, the admission of evidence of drug dealing was error. Id.

Where the sole purpose of introducing evidence of criminal activity not charged is to show propensity to commit a crime, the evidence is irrelevant and its admission is presumed harmful because of the danger that the jury will take this harmful error as evidence of guilt of the crime charged. Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied 102 S.Ct. 556, 454 U.S. 1022, 70 L.Ed.2d 418, rehearing denied 102 S.Ct. 1043, 454 U.S. 1165, 71 L.Ed.2d 323, stay denied 491 So.2d 281 (1986). This type of testimony is improper because it fails to shed any light on a material issue in the case. Williams v. State, 110 So.2d 654 (Fla.) cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Florida Statutes Section 90.404 (1990). The probative value of testimony is clearly outweighed by the prejudicial effect placed on character of the defendant. Giddens v. State, 404 So.2d 163 (Fla. 2d DCA 1981).

Here the testimony was a reference to the fact Petitioner was trying to sell cocaine - an uncharged bad act and crime. The testimony had no relevance and would not prove that he possessed the cocaine rock found on the ground. The testimony just linked him to more serious criminal activity. The evidence only served to convey to the jury Petitioner is involved in other criminal

activity. Therefore it was error. Straight, Griffin, Smith, supra.

In addition, assuming arguendo that the collateral evidence has some probative value, such probative value was substantially outweighed by the danger of unfair prejudice. Section 90.403, Florida Statutes (1987); Whitfield v. State, 479 So.2d 208 (Fla. 4th DCA 1985). The collateral evidence should not have been admitted.

The error of producing evidence that Petitioner was a drug dealer cannot be deemed harmless. The focus of the harmless error test is the potential influence of the improper evidence on the trier of fact. State v. Lee, 531 So.2d 133, 137 (Fla. 1988). For the error to be harmless it must be shown beyond a reasonable doubt the improper evidence could not have influenced the jury. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986).

As noted in Clark v. State, 337 So.2d 858 (Fla. 2d DCA 1976), evidence that a defendant is a drug dealer is so prejudicial that it cannot be ignored by a jury:

> Understandably, those involved in the trafficking of heroin are held in the highest disrepute by law-abiding members of the community. It is too much to ask a juror to put this out of his mind while he is deliberating over the defendant's guilt of another crime.

337 So.2d at 858 (emphasis added).[1] Likewise, in this case,

[1] In Clark, supra, this evidence was deemed so prejudicial that reversal was warranted even though the jury was instructed to disregard such evidence and the jurors individually indicated that they could place the reference to other drug deals out of their mind. 337 So.2d at 859. Obviously, if reversal was warranted under those conditions where there was an attempt to sanitize the prejudicial evidence, reversal would be warranted in the case where

evidence that Petitioner trying to sell drugs would be prejudicial to Petitioner's case. Certainly, it cannot be said beyond a reasonable doubt that such evidence could not influence the jury.[2] The error was not harmless. Petitioner's conviction and sentence must be reversed and this cause remanded for a new trial without the evidence of collateral drug activity.

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not only was there not attempt to sanitize the prejudicial evidence,

[2] Although the harmless error test is not an overwhelming evidence test as noted in DiGuilio, supra, at 1139, even under this test the error would not be harmless. The case turned on the credibility of the police officers who accused Appellant of being a drug dealer. The officers were impeached about their recollection of when Appellant made his statement and about the fact they talked to each other about the case before they came in to testify.

POINT II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A HABITUAL OFFENDER.

The trial court declared Petitioner a habitual offender (R 171, 181). The trial court did nat make the findings required by Florida Statutes Section 775.084.

Section 775.084(1)(a) Florida Statutes (1990) requires the court to make certain factual findings before the court classifies a person as a habitual offender. The Court must find the defendant has a combination of two or more felonies, the felony for which the defendant is to be sentenced was committed within 5 years of the last felony conviction or his release from prison or other commitment, and the defendant has not been pardoned for any felony or has a conviction that is set aside or in post-conviction proceeding necessary for operation of this section. Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990); Johnson v. State, 564 So.2d 1174 (Fla. 4th DCA 1990). If the trial court fails to follow the statutory procedure and make necessary findings, the sentence must be reversed and the cause remanded for re-sentencing. Mitchell v. State, 547 So.2d 311 (Fla. 4th DCA 1989).

Given the penal ramifications of such a determination, it is a well-settled principle that the requirements of habitual offender statutes must be strictly followed. Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962). The findings need not be in writing, but if they are nat, they must be made in a reported judicial proceeding. Parker v. State, 546 So.2d 727 (Fla. 1989) citing Eutsey v. State, 383 So.2d 219 (Fla. 1980). Mere conclusory statements that

statutorily required findings have been made are not sufficient. Puqh v. State, 547 So.2d 289 (Fla. 1st DCA 1989); Raymond v. State, 489 So.2d 1185 (Fla. 1st DCA 1986); Power, supra; Johnson, supra. The trial court must make "specific findings of fact to justify an enhanced sentence under 775.084." Roy v. State, 547 So.2d 1292 (Fla. 2d DCA 1989); Eutsev, at 226. Merely reiterating the words of the statute to justify sentencing as a habitual offender is insufficient. Avery v. State, 505 So.2d 596 (Fla. 1st DCA 1987).

At bar, there are no specific findings that the felony for which defendant is to be sentenced was committed within five years of the date of the previous felony conviction. The court merely stated that he had the requisite number to qualify and refers to the convictions by case number and date (R 169). There is no finding the convictions were committed within five years of the previous felony conviction. The failure to make the requisite findings is reversible error. See Eutsey at 226, Avery at 597.

Therefore, because the trial court sentenced Petitioner without following statutory procedure and making the requisite findings, Petitioner's sentence must be reversed and remanded for re-sentencing within the guidelines. Mitchell, supra.

POINT III

SECTION 775.084, FLORIDA STATUTES (1989), CHAPTER *89-280*, LAWS OF FLORIDA, VIOLATES THE ONE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

Petitioner's offense date was May 27, 1990, which was after the October 1, 1989, effective date of Section 775.084, Florida Statutes (1989), Ch. 89-280, Laws of Florida. Petitioner was sentenced to eight years in the Department of Corrections pursuant to this statute. Petitioner contends that Section 775.084, Florida Statutes (1989), Ch. 89-280, Laws of Florida violates the one subject rule of Article III, Section 6 of the Florida Constitution which provides:

> Every law shall embrace but one subject and matter properly connected therewith and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise *ox* amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida."

Chapter 89-280 embraces two subjects: habitual felony offenders and the repossession of motor vehicles. The first three sections of Chapter 89-280 amended Sections 775.084 (habitual offender statute), 775.0842 (career criminal statute), and 775.0843 (policies for career criminals), Florida Statutes. Section four of Chapter 89-280 created section 493.30(16), Florida Statutes, defining "repossession."[3] Section five amended section 493.306(6),

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[3] Section 493.30(16) states:

> "Repossession" is the legal recovery of a motor vehicle or motorboat as authorized by

adding **license** requirements for repossessor. Section six created section 493.317(7) and (8), prohibiting repossessor from failing to remit money or deliver negotiable instruments. Section seven created section **493.3175,** regarding the sale of property **by** repossessor. Section eight amended section **493.318(2),** requiring repossessor to prepare and maintain inventory. Section nine **amended** section **493.321,** providing penalties. Section ten created section **493.3176,** requiring information **be** displayed on vehicles **used by** repossessers.

In Johnson v. State, 16 F.L.W. D2876 (Fla. 3rd DCA November **15, 1991),** the third **DCA** decided that Chapter 89-280, Laws of Florida, which amended the habitual offender provision, violated the one subject rule. The title of the act at issue designates it as an act relating to criminal law and procedure In State v. Burch, 558 So.2d **1** (Fla. **1990),** the Florida Supreme Court quoted the fallowing from State v. Thompson, 120 Fla. 860, **163 So. 270 (1935):**

> Where duplicity of subject-matter is contended for as violative of Section **16** of Article III of the constitution relating to and requiring but one subject to be embraced in a single legislative bill, the test of duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects

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the legal owner, lienholder, or lessor to recover, or ta collect money payment in lieu of recovery of, that which has been sold or leased under a security agreement that contains a repossession clause. A repossession is complete when a licensed repossessor is in control, custody, and possession of such motor vehicle or motorboat.

of legislative effort.

Burch, supra, at 2.

The Burch Court also quoted from Chenowith v. Kemp, 396 So.2d 1122 (Fla. 1981):

> [T]he subject of an act "may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection."

Burch, supra, at 2.

Petitioner submits that there is no "natural or logical connection" between recidivists and repossessor of cars and boats. Sections one through three of Chapter 89-280 addresses the prosecution of career criminals, while sections four through eleven addresses Chapter 493 provisions governing private investigation and patrol services, specifically, repossession of motor vehicles and motor boats. It is therefore clear that the law is "designed to accomplish separate and disassociated objects of legislative effort."

In Burch the Florida Supreme Court upheld chapter 87-243. In doing so, however, the Burch Court distinguished Bunnell v. State, 453 So.2d 808 (Fla.1984):

> In Bunnell this Court addressed chapter 82-150, Laws of Florida, which contained two separate topics: the creation of a statute prohibiting the obstruction of justice by false information and the reduction in the membership of the Florida Criminal Justice Council. The relationship between these two subjects was so tenuous that this court concluded that the single-subject provision of the constitution had been violated. Unlike Bunnell, chapter 87-243 is a comprehensive law in which all of its parts are directed toward meeting the crisis of increased crime.

Burch, supra, at 3.

Like Bunnell, chapter 89-280 is a two-subject law; it is not a comprehensive one. The relationship between recidivists and repossessor of cars and boats is even more tenuous than the relationship between the obstruction of justice by providing false information and reduction in the membership of the Florida Criminal Justice Council. Accordingly, the inescapable conclusion is that Chapter 89-280 violates the one subject rule and is unconstitutional.

Petitioner's sentence must be reversed and remanded for re-sentencing under the guidelines.

CONCLUSION

Based upon the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Court to reverse and remand for new trial with directions that this court deems to be appropriate.

Respectfully submitted,

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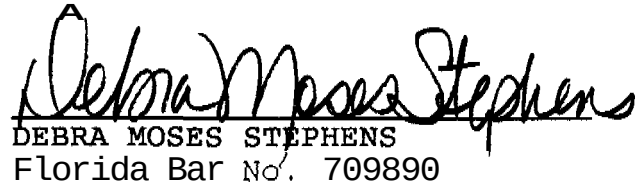

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Georgina Jimenez-Orosa, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 19th day of March, 1992.

Of Counsel