IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 78,547

DORCY GAYMON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS continued:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Petitioner, Dorcy Gaymon, was the Appellant before the First District Court of Appeal and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee before the First District Court of Appeal and prosecuted Petitioner in the Circuit Court. References to the Record on Appeal below, which contains the pleadings and orders filed in this cause, will be "R." followed by the appropriate page number(s). References to the transcript of the proceedings, will be "T." followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal certified the following question, as a question of great public importance, to this Court:

> "WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT AND THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE PURSUANT TO THE HABITUAL VIOLENT FELONY OFFENDER STATUTE?"

The opinion by the First District accurately stated the relevant facts of this case (Appendix I):

Petitioner was charged by Information with Armed Robbery. The Respondent thereafter filed a Notice of Intent to Classify Petitioner as an Habitual Violent Felony Offender pursuant to Section 775.084, Florida Statutes (1989). The case proceeded to trial and the jury found Petitioner guilty of Petit Theft.

The case was then passed on for sentencing, just prior to which the Respondent filed a Notice of Intent to Seek Felony Petit Theft Sentencing or, in the Alternative, a First-Degree Misdemeanor Penalty. The Respondent next filed an Amended Notice of Intent to Classify Petitioner as an habitual Violent Felony Offender, seeking an enhanced sentence commensurate with a conviction for felony petit theft. At the hearing, the court first adjudicated Petitioner guilty of the offense of felony petit theft based upon two prior convictions for petit theft. It then found

Petitioner to be an habitual violent felony offender based upon the instant conviction for felony petit theft and a prior conviction of aggravated battery. Consequently, Petitioner was sentenced to five years as a result of the felony petit theft, with a five-year minimum mandatory provision pursuant to the Habitual Violent Felony Offender statute.

SUMMARY OF ARGUMENT

The facts of this cause present a unique situation to the Court: a double enhancement of a 60 day maximum penalty for petit theft first to 5 years for felony petit theft and then a 5 year minimum, mandatory term pursuant to the Habitual Violent Felony Offender statute, based upon Petitioner's prior felony record and the enhancement of the misdemeanor conviction for petit theft to a felony. No matter how one defines the problem, the fact remains that Petitioner's sentence was enhanced twice. The first District Court of Appeal below decided the double enhancement did not violate double jeopardy because the first enhancement was only the definition of a substantive offense, not a penalty and offense enhancement. By the use of this definition, the First District committed the logical fallacy of equivocation. Although felony petit theft is a substantive offense for some purposes, it still requires proof of a past record, In this cause, if petitioner's past record had not been used to elevate the petit theft to a felony petit theft, then the habitual offender classification would not have been possible.

The second enhancement of Petitioner's sentence from a felony petit theft sentence of 5 years to a habitual violent felony classification (5 year minimum, mandatory term) violated the double jeopardy clause of the Florida Constitution. In State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), this Court held that an individual could be punished only once for a single, legislatively-

defined offense. The single offense in this case was petit theft. Petitioner was first punished by the use of his prior misdemeanor record by the classification of felony petit theft (two or more prior petit theft convictions). Once the petit theft was elevated to a felony petit theft, Petitioner had a felony conviction which made him eligible for habitual violent felony offender classification. Petitioner's past felony record was then used to punish him again.

In Williams v. State, **517 So.2d 681** (Fla. 1988), this Court suggested that such reclassifications/enhancements were proper unless the separate reclassification provisions were dependent on each other. The habitual violent felony classification was dependent upon the felony petit theft classification - without the elevation of the misdemeanor petit theft to felony petit theft, Petitioner would not have been classified as a habitual violent felony offender.

ARGUMENT

ISSUE I

THE TRIAL COURT PUNISHED APPELLANT TWICE FOR THE SAME OFFENSE (PETIT THEFT, A SECOND DEGREE MISDEMEANOR) BY FIRST RECLASSIFYING THE OFFENSE AS FELONY PETIT THEFT AND THEN USING THAT FELONY CLASSIFICATION TO PUNISH APPELLANT AS A HABITUAL VIOLENT FELONY OFFENDER, PURSUANT TO Section 775.084, Florida Statutes, CONTRARY TO THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A. The issue in this cause: The fallacy of equivocation.

The opinion of the First District Court of Appeal below is a classic example of the fallacy of equivocation. See Barker, "The Elements of Logic," pages 179-185. (McGraw-Hill, Inc. 1965). The First District reasoned below that Petitioner was not punished twice (twice using his record to enhance his penalty) because although Petitioner's conviction for petit theft was enhanced up to felony petit theft, felony petit theft is a single substantive offense and a single substantive offense can then be further enhanced a second time as a habitual offender statute. Although this last statement can be true, it is a fallacy when applied to the facts of this case; the statement is false because it misidentifies and redefines a term to fit the following syllogism:

> Single-legislatively defined offenses may be enhanced to a habitual offender sentence and the enhancement **does** not result in double punishment under the double jeopardy clause of the constitution;
>
> felony petit theft is a single legislatively-defined offense;
>
> therefore, felony petit theft is a single legislatively-defined offense and it may be enhanced to a habitual offender sentence without resulting in double punishment.

The fallacy of equivocation occurs when syllogistic reasoning uses terms which are ambiguous, misdefined or contradictory. In "The Elements of Logic," supra, at 182-83, the following example is used to illustrate such a fallacy:

> "No designing persons are to be trusted; architects are people who make designs; therefore, architects are not to be trusted."

This argument is fallacious because the words designing/designs have several different meanings. The use of the word designing (one who hatches evil schemes) is different than the word designs (one who makes blueprints). The use of the phrase designing does not correspond to the use of the word designs. Consequently, the fallacy of equivocation occurs.

The same type of fallacy of equivocation occurred in the decision below. Although felony petit theft is a single substantive offense for some purposes, it is still defined by a reference to an individual's past record. Therefore, felony petit theft is unlike most other offenses where there is no need to define/ classify the offense by reference to a past record. Consequently, for double-jeopardy purposes, it was improper to lump felony petit

theft with all other offenses - like lumping the phrase no designing persons are to be trusted with architects are people who make designs. This equivocation caused the First District to overlook the fact that a felony petit theft enhanced to a habitual offender sentence used an individual's record twice to enhance/classify the offense, instead of the one reference to a prior record used with most other offenses classified under the Habitual Offender statute.

The First District committed the fallacy of equivocation because it failed to realize that although felony petit theft is a substantive offense, it is a unique offense unlike all other substantive offenses which can be enhanced to habitual offender. In State v. Harris, 356 So.2d 315 (Fla. 1978), this Court considered whether the felony petit theft statute violated due process. The Court construed the felony petit theft statute to make it constitutional.

This Court noted that felony petit theft was a substantive offense (defined by prior convictions for petit theft), as compared with the habitual offender statute. The Harris Court noted that because felony petit theft was a substantive offense, the prior convictions were essential elements which must be proved beyond a reasonable doubt to the trier of fact (unlike the prior record in a habitual offender proceeding - proof not beyond a seasonable doubt). To avoid a destruction of the presumption of innocence (proof of the prior record before the jury), this Court then mandated a bifurcated trial. Once the State proved petit theft, proof of the prior convictions would be before the judge in the proceeding used under Section 775.084 (Habitual Offender

Statute). (This Court had to construe the felony petit theft statute as a substantive offense because if it was merely a sentencing enhancement provision, a conviction in county court would then have to be transferred to circuit court for sentencing as a felony. This problem would have caused perhaps insurmountable constitutional and jurisdictional problems for county and circuit courts.)

Regardless of the label one gives to felony petit theft (substantive offense partially defined by past record or penalty enhancement based upon past record), the sentencing court unquestionably considers the past record of the convicted person. The consideratian of the past record can result in an increase of the maximum penalty from 60 days to 5 years. The question in this cause is whether a court can then again increase the sentence of a person convicted of felony petit theft by again considering past criminal record (thereby again increasing the maximum possible penalty to 10 years with a 5 year minimum, mandatory term).

B. The reclassification of the Petit Theft to a Felony Petit Theft, coupled with an enhancement of the Felony Petit Theft sentence to a Habitual Violent Felony Offender sentence, based upon that reclassification, punished Petitioner twice for a single offense, Petit Theft.

The Double Jeopardy clause of the United States Constitution prohibits, inter alia, multiple punishments for the same offense. Grady v. Corbin, ___ U.S. ___, 110 S.Ct. 2084 (1990);

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Florida courts have resolutely followed this principle. See Carawan v. State, 515 So.2d 161 (Fla. 1987); Spencer v. State, 438 So.2d 864 (Fla. 1st DCA 1983). See also Article I, Section 9, of the Florida Constitution. The Supreme Court in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), decided that the double jeopardy clause prevented multiple punishments for a single, legislatively - defined offense. This cause does not involve the sometimes difficult question of whether two statutory offenses are actually one offense (for double jeopardy purposes), pursuant to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and Section 775.021(4)(a)(b), Florida Statutes. Petitioner was convicted of one offense for one act: Petit Theft.

Petitioner was punished twice for a single, discrete offense. The first punishment was the reclassification of Petit Theft to a Felony Petit Theft. This reclassification increased the punishment from a maximum of 60 days for a second degree misdemeanor to a maximum of five years as a third degree felony. This reclassification/enhancement based upon Petitioner's prior record, (at least two prior convictions for Petit Theft), did not violate double jeopardy because: 1) The reclassification creates a new substantive offense based upon prior record. See State v. Harris, 356 So.2d 315 (Fla. 1978); and 2) increased punishment due to recidivism does not punish a defendant again for past crimes, but only increases the punishment for the instant offense. See Moore v. Missouri, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301

(1895); Washington v. Mayo, 91 So.2d 621 (Fla. 1957). Consequently, Petitioner does not claim a double jeopardy violation for the enhancement/reclassification of Petit Theft to Felony Petit Theft (and its attendant increased punishment).

The double jeopardy violation in this case is the second enhancement of the punishment based upon the enhancement in the instant offense to a felony, coupled with Petitioner's prior record. Therefore, Petitioner's past record was twice used to increase his punishment. First, his prior convictions for Petit Theft were used to reclassify his instant conviction for Petit Theft to a Felony Petit Theft. Secondly, once the Petit Theft was elevated to a Felony Petit Theft, Petitioner's prior canvfction for Armed Robbery was used to elevate the Felony Petit Theft sentence to a Habitual Violent Felony Offender (H.V.F.O.) sentence (increasing the maximum sentence to ten years instead of five years, with a minimum, mandatory sentence of five years). See Section 775.084(4)(b)3, Florida Statutes.

Although a defendant's recidivism may be used to increase the punishment on the instant case, it may not be used twice to increase the penalty for an offense. The distinction between reclassification (as with Felony Petit Theft) of an offense and enhancement of a penalty for an offense (as with a H.V.F.O. sentence) is not significant in this case because Petitioner's punishment was undoubtedly increased twice - once from sixty days far Petit Theft to five years for Felony Petit Theft and then for a second time from five years to a possible ten years with a five year minimum, mandatory sentence for the H.V.F.O.

classification (Petitioner actually received five years with a five year minimum, mandatory sentence).

The First District Court of Appeal rejected Petitioner's argument that the two penalty enhancements in this cause were dependent on each other and were alternative methods of enhancement. The two enhancements were unquestionably dependent upon each other because if Petitioner's sentence had not been enhanced from a 60 day misdemeanor to a 5 year felony, then the habitual offender sentence would not have been possible. The two enhancements are alternative methods of penalty enhancement because each requires a separate predicate based upon prior record.

The opinion below rejected those arguments because felony petit theft is a substantive offense. As was discussed above, this fallacy of equivocation (changing the label of the offense) does not alter the fact that a felony petit theft does not exist except for a consideration of prior record after a conviction for petit theft.

C. The legislature did not intend to allow a double enhancement of the penalty for petit theft by classifying it first as a felony petit theft and then by classifying Petitioner as a Habitual Violent Felony Offender.

An examination of the case law on the issue of double enhancement by reclassification of an offense coupled with a minimum, mandatory sentence for the use of a firearm will demonstrate how the penalty in this case is the product of an improper

double enhancement. In Williams v. State, 517 So.2d 681 (Fla. 1988), the Supreme Court decided it was permissible to first enhance an offense for the use of a firearm (Burglary reclassified as Armed Burglary, Section 810.02(2), Florida Statutes) and then impose a minimum, mandatory sentence for the use of the same firearm. Section 777.087(2)(a), Florida Statutes (1985). The underlying rationale of this decision was Legislative intent. The Williams court reasoned that the reclassification and minimum, mandatory sentence were not double enhancements because, although the reclassification did allow for an increase in punishment, the minimum, mandatory sentence merely ensured a minimum period of incarceration. 517 So.2d at 683. ~~See also~~ State v. Whitehead, 472 So.2d 730 (Fla. 1986); Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983), approved, 449 So.2d 818 (Fla. 1984).

The minimum, mandatory was not another sentence enhancement because: 1) it did not increase the maximum penalty for the offense; and 2) it could be imposed even if the underlying offense was not reclassified. Therefore, the minimum, mandatory sentence would have the same practical effect whether the underlying offense was reclassified or not. The Williams court also noted that the reclassification and mandatory provision operated independently of each other and were not alternative methods of enhancement.

The reclassification/enhancements of Petit Theft to Felony Petit Theft and then to Habitual Violent Felony Offender are dependent on each other and are alternative methods of enhancement. Each enhancement increases the maximum penalty and does not

merely impose a minimum sentence. The reclassification of Petit Theft to Felony Petit Theft increases the maximum penalty from sixty days to five years. The attendant classification of the Felony Petit Theft as a habitual violent felony offender offense increases the punishment from five to ten years with a minimum sentence of five years.

The Wisconsin Supreme Court in State v. Upchurch, 305 N.W.2d 57 (Wisc. 1981), decided a case that is somewhat analogous to this cause. Upchurch was initially convicted of a drug offense and received a jail sentence. Based an that conviction and sentence, Upchurch was classified as a habitual offender and received a separate consecutive sentence. The Wisconsin Supreme Court decided Upchurch was punished twice for a single act: Possession of a Controlled Substance.

Unlike Section 775.087(2), Florida Statutes, the Habitual Vio ent Felony Offender classification increases the punishment as well as imposing a minimum, mandatory sentence. United States v. Gomberg, 715 F.2d 843 (3d Cir. 1983), (improper to "pyramid" two sentences for a violation of the Comprehensive Drug Prevention and Control Act where Congress designed a detailed penalty based upon prior predicate acts.) Consequently, under the holdings of Williams v. State, supra, and State v. Whitehead, supra, the imposition of a habitual violent felony offender sentence and a reclassification of Petit Theft to Felony Petit Theft were double enhancements because each action resulted in an increased sentence.

The First District noted that the felony petit theft statute itself permits a sentence as provided for in Section 775.084, Florida Statutes (the Habitual Offender Statute). The opinion uses this fact to suggest that the legislature intended to require separate punishments/enhancements pursuant to the Felony Petit Theft statute. Even if the legislature did intend this result, the legislature cannot violate the double-jeopardy clauses of the Florida and United States Constitutions. Moreover, the reference to the Habitual Offender statute in the felony petit theft statute is not a clear and unequivocal expression of legislative intent.

Judge Ervin in his concurring opinion in Burdick v. State, 16 FLW D1963, en banc, (Fla. 1st DCA July 25, 1991), review accepted, Case No. 78,466, expressly addressed the question of whether a reference to the habitual offender statute (in that case in Section 810.02(2), Florida Statutes - armed burglary) was proof of clear legislative intent. Judge Ervin wrote:

> The reference in section **810.02 (2)** to section 775.084 appears in all noncapital felony and misdemeanor statutes listed under Title XLVI of the Florida Statutes. Thus, even though offenses which are designated life felonies were never made subject to enhanced sentencing under the habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty for life felonies. See e.g., Section 787.01(3)(a) 5., Fla. Stat. (1980) (kidnapping); Section 794.011(3), Fla. Stat. (1989) (sexual battery). Additionally, although section 775.084 had formerly provided enhanced sentencing for habitual misdemeanants, the legislature, effective October 1,

> 1988, deleted the provisions relating to habitual misdemeanants. See Ch. 88-131, Subsections 6, 9, Laws of Fla. In the 1989 Florida Statutes, however, the legislature failed to delete references to section 775.084 in providing punishments for specified misdemeanors. See, e.g., Section 784.011(2), Fla. Stat. (1989) (assault), Section 784.03(2), Fla. Stat. (1989) (battery). Considering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are inapplicable, I do not consider that the state can take any comfort in the reference made in section 810.02(2) to section 775.084. 16 FLW at D1965.

This Court should adopt the cogent reasoning of Judge Ervin on the question of whether a reference to Section 775.084 in the felony petit statute clearly express the legislative intent on the issue.

The opinion below states that a reviewing court must give full effect to all statutory provisions and related statutory provisions should be construed in harmony with one another. Citing Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981). Although this is a general rule of statutory construction, Petitioner has argued that the twa statutory provisions in question violate the constitution. Consequently, this Court cannot give full effect to the statutes because such a construction would violate the double jeopardy clause of the Florida Constitution. The duty to enforce the constitution is obviously greater than the duty to construe two statutes in such a way as to give them full effect. ***See*** Delmonico v. State, 155 So.2d 368 (Fla. 1963); Miller, "The Medium is the Message: Standards of

Review in Criminal Constitutional Cases in Florida," 11 Nova.L.Rev. 97,99-100 (1986).

CONCLUSION

This Court should answer yes to the certified question and set aside the 5 year minimum, mandatory sentence under the Habitual Violent Felony Offender statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050 this 26th day of September, A.D. 1991.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER