047

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 REPLY BRIEF ON THE MERITS

LOUIS O. FROST, JR.
PUBLIC DEFENDER
FOURTH CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepted Petitioner's Statement of the Case and Facts.

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.

Respondent has not addressed this issue as framed by Petitioner. Respondent, like the opinion of the First District, commits the fallacy of equivocation. Respondent relies upon the fact that this Court defined felony petit theft as a substantive offense - Respondent then uses this definition to obscure the fact that Petitioner was convicted at trial of petit theft and then his offense/sentence was first enhanced to felony petit theft and then to a Habitual Violent Felony Offender (H.V.F.O.) classification. Respondent commits the fallacy of equivocation by treating felony petit theft like any other substantive offense; Respondent then argues that any substantive offense may be enhanced by the habitual offender statute. Although this statement is generally true, as applied to the facts of this cause, felony petit theft is

not like all other offenses. Most other substantive offenses are not defined by a reference to past record.

Respondent misuses the special construction given to the felony petit theft statute in State v. Harris, 356 So.2d 315 (Fla. 1978). In Harris, supra, this Court found the felony petit theft statute to be a substantive offense in reference to constitutional challenges concerning the proof of the prior petit theft convictions before a jury. There is nothing in the State v. Harris, supra, opinion which suggests that this Court even considered the issue presented by this cause: May a person convicted of petit theft at trial have his sentence first enhanced to a felony petit theft classification and then enhanced again to a habitual violent felony offender classification. Regardless of how one labels felony petit theft (sentence enhancement or enhancement), an individual's past record is used to increase the degree of crime from a misdemeanor to a felony. The second use of the past record (H.V.F.O. classification) then results in a second increase of the maximum possible sentence. Consequently, regardless of the labels one gives to these acts, Petitioner's possible sentence attendant to the petit theft conviction (by a jury verdict) was increased twice.

The First District Court of Appeal also erroneously found that the felony petit theft and H.V.F.O. classifications were not dependent on each other and were not alternative methods. This position is simply illogical. The two classifications are absolutely dependent upon each other. The habitual violent felony offender classification was completely dependent

upon the felony petit theft classification. Without the petit theft first being enhanced to a felony petit theft, the H.V.F.O. classification would have been impossible because a H.V.F.O. classification requires a predicate felony conviction.

Respondent also argued that the felony petit theft and H.V.F.O. classifications are not alternative methods of enhancement because they serve different purposes and address separate evils. However, Respondent cites a case dealing with reclassification of an offense and minimum, mandatory provisions. Williams v. State, 517 So.2d 681 (Fla. 1981). This analogy is not applicable to this case because Williams v. State, supra, dealt with reclassification and minimum, mandatory provisions instead of two penalty enhancements which each increased the maximum penalty for the respective offense/classifications. Williams is also not applicable to this case because a minimum, mandatory provision does not enhance the statutory maximum amount of time or degree of the crime, it merely ensures that a certain minimum amount of time will be served before release. The two enhancements in this case each increased the statutory amount of permissible sentence.

The two classifications in this case address the same, not different, evils: Recidivism. The petit theft can be enhanced based upon past convictions and the H.V.F.O. sentence is based upon a past violent felony conviction. Consequently, Respondent's argument that the double enhancement is proper because each classification addresses a separate evil is not persuasive. Respondent does not identify the separate evils addressed by the respective statutes.

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 sinqle offense, Petit Theft.

Respondent relies upon Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), as support for the argument that Petitioner was not punished twice far the single discrete offense of petit theft. However, Respondent has significantly misapplied Missouri v. Hunter, supra. In that case, the United States Supreme Court held that if two statutes were violated at the same time, the double jeopardy clause of the Constitution did not prohibit cumulative punishment, if the State legislature intended such cumulative punishments. 103 S.Ct. at 679. In Missouri v. Hunter, the defendant was convicted of armed robbery and for use of a weapon during the commission of a felony. In this cause, Petitioner was found guilty of only one offense, petit theft. Therefore, Missouri v. Hunter is simply not applicable to this cause.

Respondent has not cited any cases which have permitted double enhancements of a single, discrete offense. Respondent has not addressed Petitioner's citation of State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). In State v. Hegstrom, supra, this Court held that the double jeopardy clause of the Constitution prohibited multiple punishments for a single, legislatively-defined offense.

Respondent has not addressed Petitioner's reference to State v. Upchurch, 305 N.W.2d 57 (Wisc. 1981), the only case Petitioner was able to find which addressed the issue of double punishment for a single offense. Petitioner urges this Court to adopt the reasoning of State v. Upchurch.

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.

Respondent has completely ignored Judge Ervin's analysis of the legislative intent in this area in his opinion in Burdick v. State, 16 FLW D1963, en banc, (Fla. 1st DCA, July 25, 1991), rev. accepted, Case No. 78,466. Petitioner respectfully requests this Court to adopt the cogent reasoning of Judge Ervin. He demonstrates that the mere reference to the habitual offender statute in the felony petit theft statute is not demonstrative proof of legislative intent.

Like the First District, Respondent argues that this Court must give full effect to both statutes, if possible. Although Respondent correctly cites the applicable rule of statutory construction, the rule does not apply in this cause because Petitioner has alleged that the two provisions violate constitutional provisions. Consequently, the rule of statutory construction must yield to the constitutional provisions discussed above.

See Delmonico v. State, 155 So.2d 368 (Fla. 1963); 6 Fla.Dig.2d, Constitutional Law, ss. 45.

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 13th day of November, 1991.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER