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FILED
SID J. WHITE
DEC 16 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LESHAWN TILLMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,715

INITIAL BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND **FACTS**

The state charged Petitioner, LESHAWN TILLMAN, with sale of cocaine and use of a minor in the sale of cocaine. (R16)[1] The state filed notice of intent to classify him as a habitual violent **felony** offender. (R12) A jury found him guilty as charged of both offenses. (R30-31, T149) At sentencing, **the** state introduced evidence of a 1989 armed robbery conviction. (R18-21, T156) The court pronounced Tillman a habitual violent felony offender, adjudicated him guilty, and sentenced him to concurrent sentences of 25 **years** in prison, with mandatory minimum terms of 10 and **15 years.** **(R34-37, T157-163)**

The First District Court of Appeal affirmed the judgments and sentences, but certified to this Court two questions of great public importance. Tillman v. State, **16 FLW D2542 (Fla.** 1st **DCA Sept.** 30, **1991).**

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[1] References to pleadings, orders and other paperwork in the record **appear as** (R[page number]), while transcript citations are designated (T[page number]).

CERTIFIED QUESTIONS

1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 775.084, AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NONVIOLENT FELONY?

2. DOES SECTION 775.084(1)(B) VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE?

SUMMARY OF THE ARGUMENT

Principles of statutory construction require that an offense for which the state seeks an enhanced punishment as a habitual violent felony offender must be an enumerated, violent felony. The title evinces a legislative intent to require that the instant felony be a violent crime, so that it comports with the term "habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, and achieves the evident legislative intent to punish habitual violent crime more severely. Additionally, this reading of the statute is required to avoid the constitutional defects explored below.

If the Court rejects this interpretation and reaches the two certified questions, both should be answered in the affirmative. Thus interpreted, the statute bears no substantial and reasonable relationship to its objective of punishing repetition of violent crime. It permits imposition of an enhanced sentence as a habitual violent felon upon one who has committed but a single violent felony. The fixation on the prior offense, for which an offender has already been punished, also renders the enhanced sentence a violation of constitutional prohibitions against double jeopardy.

ARGUMENT

THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES, MUST BE CONSTRUED TO REQUIRE THAT THE OFFENSE FOR WHICH A SENTENCE UNDER THOSE PROVISIONS IS IMPOSED BE A VIOLENT, ENUMERATED FELONY: A CONTRARY CONSTRUCTION RENDERS THAT STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PROVISIONS.

In 1988, the legislature amended section 775.084, Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, s. 6, Laws of Fla. Section 775.084(1)(b), Florida Statutes (1989), now defines a habitual violent felony offender as one who has committed one of 11 violent felonies within the past five years, or been released from a prison sentence for one of these crimes within the past five years, and then commits a new felony. Section 775.084(4)(b) provides enhanced penalties for those who qualify, including mandatory minimum terms.

The First District Court of Appeal has certified two questions, asking whether a sentencing scheme that permits enhancement of a sentence for a habitual violent felon violates constitutional Due Process and Double Jeopardy clauses when the offense for which the sentence is imposed is nonviolent. Petitioner addresses those questions below, First, however, this Court should determine whether an alternative construction which avoids these potential constitutional defects is possible.

A. STATUTORY CONSTRUCTION

The habitual violent felony provisions suffer internal conflict. The statute's title invokes the term "habitual violent felony offenders.'' The term is repeated in Section

775.084(1)(b). The word habitual denotes an act of custom or habit, something that is constantly repeated or continued. Oxford American Dictionary (1980 ed.) However, section 775.084(4)(b) defines a habitual violent felony offender as one who commits a felony within five years of a prior, enumerated violent felony. The statute may thus be construed as permitting habitual violent felon enhancement for an unenumerated, nonviolent instant **offense,** as it was here. That construction permits **a** habitual violent felony offender sentence for **a** single, prior crime of violence.

Courts have a duty to reconcile conflicts within a statute. In Re Natl. Auto Underwriters Assoc., 184 So.2d 901 (Fla. 1st DCA 1966); Vocelle **v.** Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st **DCA** 1960). A court may resolve such conflict by considering the title of the act and legislative intent underlying it, and by reading different sections of the law in pari materia. See Parker v. **State**, 406 So.2d 1089 (Fla. 1981) (legislative intent); State **v.** Webb, 398 So.2d 820 (Fla, 1981) (title of the act); Speights **v.** State, 414 So.2d 574 (Fla. 1st **DCA** 1982) (in pari materia). If doubt over the meaning of the law remains, the court must apply a strict scrutiny standard and resolve the ambiguity in favor of the defendant. State v. Wershow, 343 **So.2d 605** (Fla. 1977). This result is consistent with the rule of lenity, a creature of statute in Florida. S. 775.021(1), **Fla.** Stat. (1989). **The** rule, which requires the construction most favorable to the accused when different constructions are plausible, extends to the entire criminal code, sentencing provisions

included. Cf. Bifulco v. State, 447 U.S. 381, 387 (1980) (federal rule of lenity applies to interpretation of penalties imposed by criminal prohibitions).

Applying these principles, this Court should find that the instant offense must be a violent felony, as enumerated in section 775.084(4)(b)1, to subject the offender to habitual violent felony sentence enhancement. The statute is certainly susceptible of different constructions on this point. See Canales v. State, 571 So.2d 87, 89 (Fla. 5th DCA 1990) (in dicta, court states that when requirement of prior violent felony is met, legislature intended offender be eligible for enhanced penalty "for a subsequent Florida violent felony.") The title evinces a legislative intent to require that the instant felony be a violent crime, so that it comports with the term "habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" in section 775.084(1)(b)2, should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, achieves the evident legislative intent to punish habitual violent crime more severely, and comports with the rule of lenity. Additionally, this reading of the statute is required to avoid the constitutional defects explored below. See Schultz v. State, 361 So.2d 416, 418 (Fla. 1978) (when reasanably possible, a statute should be construed so as to, avoid conflict with the Constitution).

Adoption by the Court of this interpretation does not require reconsideration of the statute as a whole, or review of

sentences imposed under the nonviolent provisions. Presumably, only a small portion of sentences imposed under the habitual violent felony offender provisions are for commission of nonviolent instant offenses. These provisions would remain fully viable, although available in more limited circumstances.

B. CONSTITUTIONALITY

1. Due Process

If a construction of the statute which does not require the instant offense to be an enumerated violent felony is approved, the habitual violent felony provisions fail the due process test of "a reasonable and substantial relationship to the objects sought to be obtained." See State v. Saiez, 489 So.2d 1125 (Fla. 1986); State v. Barquet, 262 So.2d 431 (Fla. 1972). This defect goes to the first of the two certified questions. As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. S. 775.084(1)(b), Fla. Stat. This is the object the statute seeks to attain. However, as applied by the trial court, the statute does not require the current offense to be an enumerated violent felony. Here, the state established only one prior violent felony, armed robbery, plus the instant, nonviolent drug felonies. On this record, there is no evidence of a habit of violent crime. The statute permits an even greater absurdity: A defendant may be convicted of attempted aggravated assault -- a misdemeanor -- in 1986, then be sentenced to 30 years with a 10-year mandatory minimum term in 1991 as a habitual violent offender for dealing in stolen property. Thus, despite its

objective as expressed four times in the statute's use of the term "habitual violent felony offender,'' the only habit this construction of the statute punishes is crime, not necessarily felonious crime and certainly not habitual violent felonious crime.

The First District Court of Appeal rejected a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), rev. pending, Fla. Sup. Ct. No. 78,179. The court held that, "[i]n our view, just as the state is justified in punishing a recidivist more severely than it punishes a first offender, its even more severe treatment of a recidivist who has exhibited a propensity toward violence is also reasonable.'' Id. at 878. Petitioner has no quarrel with this proposition, except that the court's use of the word "propensity" does not reflect the showing required for habitual violent felon enhancement. Propensity connotes tendency or inclination. If the habitual violent provisions required that the state establish commission of two prior violent felonies, a propensity would be shown. However, a single, perhaps random act of violence does not fit within the common understanding of the word. In a guideline departure case, Judge Cowart of the Fifth District Court of Appeal has noted:

> If the term "pattern" is not carefully defined by reference to objective criteria, looking for a "pattern" in a defendant's criminal record is like looking for a pattern or figure in the moon, or in the clouds or in the Rorschach test or in tea leaves or in sheep entrails--the process is highly subjective and the result is in the eye of the beholder. One sees largely what one wants to see. Those who do not like guideline sentencing can always say, "I spy a pattern and

> two offenses show continuous and persistent conduct!"

Lipscomb v. State, 573 So.2d 429, 436 (Fla. 5th DCA), rev. dismissed, 581 So.2d 1309 (1991)(Cowart, J., dissenting). The manner in which the Ross court puts the word "propensity" to use sparks the same concern. By any objective measure, one violent affense does not establish a propensity. Moreover, as noted above, the expressed legislative intent is to punish habitual violent conduct, not merely a loosely defined propensity. The failure of the contested provisions to reasonably and substantially relate to this purpose renders its application a violation of due process of law.

2. Double Jeopardy

The state and federal constitutions both forbid twice placing a defendant in jeopardy for the same offense. U.S. Const., amend. V. Fla. Const., art. 1, s. 9. This First Distric Court of Appeal has noted that the violent felony provisions of the amended habitual offender statute implicate constitutional protections. Henderson v. State, 569 So.2d 925, 927 (Fla. 1st DCA 1990). The fixation of the habitual violent felony provisions on prior offenses renders application of this statute to petitioner a violation of these constitutional protections. This goes to the second of the certified questions.

To punish a defendant as a habitual violent felony offender, the state need only show that he has one prior offense within the past five years for a violent felony enumerated within the statute. The current offense need meet no criteria, other than that it be a felony committed within five years of commission,

conviction or conclusion of punishment for the prior "violent" offense. Analysis of the construction of this statute and its potential uses leads to an inescapable conclusion: that the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony, The almost exclusive focus on this prior offense renders use of the statute a second punishment for that offense, violating state and federal double jeopardy prohibitions. When that prior offense also occurred before enactment of the amended habitual offender statute -- not the case here -- the statute's use also violates prohibitions against ex post facto laws.

Habitual offender and enhancement statutes have been upheld against challenges similar to the one made here, as long ago as 1948, on the grounds that the enhanced sentence was based not on the prior offenses but on the offense pending for sentencing. See, e.g., Gryger v. Burke, 334 U.S. 728 (1948). There the Court explained:

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

Id. at 728. Using the same reasoning, Florida's courts have also rejected challenges based on double jeopardy arguments. See generally, Reynolds v. Chochran, 138 So.2d 500 (Fla. 1962); Washington v. Mayo, 91 So.2d 621 (Fla. 1956); Cross v. State, 96 Fla. 768, 119 So. 380 (1928). If the provisions in question were more concerned with repetition, the inquiry might end here. The

only repetition on which this portion of the statute dwells, however, is the repetition of crime, not the repetition of violent crime, Its focus on the character of the prior crime, without regard to the nature of the current offense, distinguishes Florida's habitual violent felony offender sentencing scheme from other enhanced sentencing provisions. See Hall v. State, 16 FLW D2894 (Jehmer, J., concurring). This distinction is the point at which the amended statute runs afoul of constitutional double jeopardy clauses.

The First District Court of Appeal did not meaningfully address this distinction in Ross, supra, or in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), rev. pending, No. 78,613. In Perkins, the Court rejected the same arguments made here, on the authority of Washington, Cross and Reynolds, concluding that "the reasoning of these cases is equally applicable to this enactment." Id. at 1104. Perkins thus left unaddressed the constitutional implications identified by Judge Zehmer in Henderson, supra.

The amended statute also differs from recidivist schemes focused on repetition of a particular type of crime. In U.S. v. Leonard, 868 F.2d 1393 (5th Cir. 1989), enhancement of a sentence under a federal enhancement statute was upheld against an ex post facto attack. Leonard was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act, which authorized increased punishment for that offense upon proof of conviction of three prior enumerated violent or drug felonies. Id. at 1394-1395. In contrast to the statute at

issue here, the U.S. statute applied exclusively to persons convicted of a specific offense, possession of a firearm by a convicted felon. In that respect, the defendant was being punished primarily for the instant offense, as held by the court. Id. at 1400. The Florida provisions at issue focus not on any specific offense pending for sentencing, but on the character of a prior offense for classification purposes. Consequently, an offender subjected to the operation of s. 775.084(b), Florida Statutes, is being punished more for the prior offense than for the current one. In effect, as noted by Judge Zehmer in Hall, this then is a second punishment for the prior offense, barred by the state and federal constitutions. 16 FLW at D2594 (concurring opinion).

C. CONCLUSION

For these reasons, petitioner's sentence must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions of section 775.084. Either the statute must be construed to require that the sentence for which the sentence is imposed be an enumerated felony, or the statute violates constitutional due process and double jeopardy provisions. In such case, the certified questions should be answered in the affirmative. As either result applies only to those sentenced as habitual violent felons for commission of a nonviolent felony, retroactive application would require resentencing of a relatively small portion of those sentenced as habitual offenders since the 1988 amendment.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court vacate his sentences and remand for resentencing with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Sara D. Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 16th day of December, 1991.

GLEN P. GIFFORD
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