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IN THE SUPREME COURT OF FLORIDA

LESHAWN TILLMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,715

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecuting authority in the trial court and appellee below and will be referred to herein as "the State" or "Respondent." Petitioner, Leshawn Tillman, was the defendant in the trial court and appellant below and will be referred to herein as "Petitioner."

STATEMENT OF THE CASE AND FACTS

The State would accept Petitioner's statement of the case and facts as reasonably accurate, but would note the following:

1. At no time did Petitioner challenge the constitutionality of the habitual felony offender statute in the trial court below. (R 155-63).

2, Petitioner's statement of judicial acts to be reviewed contained no indication that he had, or was, going to challenge the constitutionality of the habitual violent felony offender statute. (R 43).

SUMMARY OF ARGUMENT

By failing to challenge the constitutionality of the habitual violent felony offender statute in the trial court below, Petitioner has failed to preserve the issue for review. Since it cannot be said that the statute violates a defendant's substantive or procedural due process rights, Petitioner cannot claim fundamental error. Consequently, this Court should not accept jurisdiction to answer the certified questions.

Even if Petitioner's arguments are cognizable, though not preserved below, they are wholly without merit. Within its plenary power, the Legislature has defined the meaning of "habitual violent felony offender" and "habitual felony offender.'' For habitual felony offender status, a defendant must have two prior felony convictions within the specified time period. For habitual violent felony offender status, a defendant must have one prior enumerated violent felony conviction within the specified time period. Since it is wholly within the Legislature's power to define crimes, there is no internal conflict as Petitioner suggests. Likewise, as this Court and others have held for many years, recidivist statutes such as the one at issue here are rationally related to the object sought to be attained--protecting society from recidivists--and do not twice place a defendant in jeopardy for the same offense. Therefore, the habitual violent felony offender statute does not violate the due process or double jeopardy clauses of the Unites States or Florida Constitutions.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD ACCEPT JURISDICTION FOR THIS APPEAL.

Upon Petitioner's notice to invoke discretionary jurisdiction, this Court postponed its decision on jurisdiction and set a briefing schedule on the merits. For the following reasons, the State submits that this Court should not accept jurisdiction to answer the certified questions.

Initially, the State acknowledges that the First District Court of Appeal and the parties below failed to notice that the constitutionality issue had not been preserved in the trial court. Upon re-examining the record for this appeal, it was noted, Accordingly, because the issue impacts on this Court's jurisdiction, the State argues for the first time that the issue is not cognizable on appeal and that the certified questions should not be addressed, as they are inconsistent with the circumstances of the case. See Davis v. State, 383 So.2d 620 (Fla. 1980); discussion infra at 6-7.

Petitioner proceeds straight to the merits without even referring to the threshold question of whether the alleged unconstitutionality of § 775.084 may be raised for the first time on appeal. Based on cases from this Court and others, it may not. "Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

to a denial of due process," and stressing that the doctrine of fundamental error must remain a "limited exception"); Ray v. State, 403 So.2d 956, 960 (Fla. 1981) (same).

Although Sanford was a civil case, this Court applies the same philosophy, or doctrine, in criminal cases. For example, in Davis v. State, 383 So.2d 620, 622 (Fla. 1980), the defendant challenged the constitutionality of the statute under which he had been convicted. Finding that it lacked jurisdiction to consider the challenge, this Court stated:

> In the case sub judice the defendant entered a plea of nolo contendere and did not reserve any right to raise the constitutional question on appeal. The statute was not attacked at the trial level. Defendant has exercised his right to one appeal. If he had desired to appeal to this Court, he only had to raise a constitutional question before the trial court and, in event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court.
>
> For the reason stated, jurisdiction is declined and the judgment of the circuit court is not disturbed.

Id. See also Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985) (finding a constitutional challenge to a statute authorizing jury override in death penalty cases not cognizable for first time on appeal); Whitted v. State, 362 So.2d 668, 672 (Fla. 1978) (finding that the defendant's failure below to challenge the constitutionality of a statutory provision precluded appellate review); Silver v. State, 188 So.2d 300 (Fla. 1966) (strongly criticizing and refusing to condone the district court's indulgent review of a statutory challenge where its constitutionality was not raised in the trial court); Ellis v. State, 74 Fla. 215, 76 So, 698, 698 (1917) ("[I]t is suggested that the statute is unconstitutional. This question was not raised in the trial court, and, as the statute is not patently in conflict with organic law," it will not be considered.).

When the above case law is applied to the instant case, the issue becomes whether the application of the habitual violent felony offender statute to one previously convicted of a violent

felony, but presently convicted of a nonviolent felony, is so fundamental that it violates due process and justifies consideration of the issue even though it was not raised at the time of sentencing.[1] Further application of the same case law dictates a negative conclusion.

Due process takes two forms: substantive and procedural. Substantive due process requires only that there be a rational basis for the legislative enactment of the habitual offender statute. See State v. Saiez, 489 So.2d 1125, 1127-29 (Fla. 1986). The rational basis for habitual offender statutes is that society requires greater protection from recidivists, and that sentencing as habitual felons provides greater protection. Eutsey v. State, 383 So.2d 219, 223-24 (Fla. 1980).

Procedural due process has two components: reasonable notice and a fair opportunity to be heard. State v. Beasley, 580 So.2d 139, 141 (Fla. 1991); Goodrich v. Thompson, 96 Fla. 327, 118 So. 60, 62 (1928). There is no question that Petitioner was given reasonable notice and a fair opportunity to be heard. As this Court said in Davis, 383 So.2d at 622, "[H]e only had to raise a constitutional question before the trial court and, in event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court."

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[1] There is no question that Appellant did not raise, or otherwise preserve, the issue of whether Fla. Stat. § 775.084 (1989) violates substantive due process and double jeopardy.

In addition to the doctrine of fundamental error/due process, the facial validity of a statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1982). This is also a very narrow exception to the rule that issues not raised in the trial court may not be raised on appeal. There are two aspects to the facial challenge: overbreadth and vagueness. Overbreadth only arises when the statute in question impinges on behavior protected by the first amendment to the United States Constitution and by Article I, § 4 of the Florida Constitution. Saiez, 489 So.2d at 1126-27; State v. Olson, 586 So.2d 1239, 1243-44 (Fla. 1st DCR 1991). There can be no suggestion here that the habitual violent felony offender statute somehow facially impinges on first amendment rights. The same conclusion applies to facially void-for-vagueness, Nothing in the statute would cause a person of common intelligence to guess at its meaning. In short, there is no basis for arguing fundamental error, and this Court should decline review, finding acceptance of jurisdiction improvident.

ISSUE II

WHETHER THE HABITUAL VIOLENT FELONY OFFENDER STATUTE, FLA. STAT. § 775.084 (1989), VIOLATES A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS AND PUNISHES HIM TWICE FOR THE SAME OFFENSE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION (Restated).

Although the State maintains its position that acceptance of jurisdiction would be improvident since Petitioner failed to preserve the issue in the trial court below, the State will briefly address the issues raised on their merits.

Initially, before addressing the issues raised in the certified questions, Petitioner claims that the habitual violent felony offender provisions "suffer from internal conflict" because the title employs the term "habitual violent felony offender," while the body of the statute defines a habitual violent felony offender as one who has previously committed an enumerated violent felony within five years of the instant nonviolent felony. Brief of **Petitioner** at 4-5. In other words, the premise of Petitioner's argument is that the term "habitual" modifies the term "violent" in the title, so that the instant offense must also be a violent felony in order for one to be a "habitual violent" felony offender deserving an enhanced penalty.

Petitioner's reliance on the dictionary definition of "habitual" is misplaced. The Legislature has defined the meanings of "habitual violent felony offender" and "habitual felony offender." See Fla. Stat. § 775.084(1)(a),(b) (1989). A

habitual violent felony offender is a currently convicted felon whose previous record includes one or more of **eleven** specified violent felonies for which the defendant was sentenced to or released from incarceration within five years of the current offense. The distinction between a habitual violent felony offender and a habitual felony offender is that habitual felony offender status requires two previous felony convictions, neither of which have to be for violent offenses. In other words, a previous violent felony counts **as** two nonviolent felonies when determining the appropriate habitual offender status. Because of the Legislature's plenary authority under the Constitution, there is no constitutional impediment to the legislature's definitions. It may require one prior felony, violent or otherwise, or two prior felonies, or three, or any other number, as the defining characteristics of "habitual."

Turning to the questions certified, Petitioner next claims that "the habitual violent felony provisions fail the due process test of 'a reasonable and substantial relationship to the objects sought to be obtained,'" because the statute does not attain the object sought: "to enhance the punishment of those who habitually commit violent felonies." **Brief** of **Petitioner** at 7. Again, however, Petitioner's argument is premised on a false assumption. As noted above, the clear and unambiguous language of the statute indicates that the Legislature intended to punish mare severely those recidivist felony offenders with a previous violent felony. As previously stated, one prior violent felony is the functional equivalent of **two** nonviolent felonies for the purpose of habitualization.

In attempting to discredit an interpretation of the statute by the First District Court of Appeal, which is adverse to Petitioner's argument, Petitioner takes issue with the court's use of the word "propensity." Brief of Petitioner at 8 (citing to Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), rev. pending, Fla. S. Ct. No. 78,179, wherein the First District stated, "In 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,"). Correctly noting that the term connotes a tendency or inclination, Petitioner then spuriously concludes that "a single, perhaps random act of violence does not fit within the common understanding of the word." Id. Quite the contrary, a "tendency" is "[a] demonstrated inclination to think, act, or behave in a certain way." The American Heritage Dictionary 1252 (2d ed. 1985). It is certainly reasonable for the Legislature to decide that a single act of violence, when coupled with at least one other act of lawlessness, constitutes a sufficient basis for enhanced penalties, including mandatory minimum terms of imprisonment.

Besides being rejected by the First District in Ross, the same due process argument made by Petitioner was rejected by the First District in Perkins v. State, 583 So.2d 1105 (Fla. 1st DCA 1991), rev. pending, Fla. S. Ct. No. 78,613. In Perkins, the First District stated:

> Although the burglary for which [the defendant] is now sentenced is not one of the enumerated violent offenses, section 775.084(1)(b) does not require that the current offense be violent. The appellant argues that this application of the statute is not sufficiently related to the apparent purpose of the enactment, thereby offending the requirements of due process. Habitual offender provisions are generally designed to allow an enhanced penalty when new crimes are committed by recidivist offenders. See e.g., Eutsey v. State, 383 So.2d 219 (Fla. 1980). Section 775.084(1)(b) encompasses the general objective of providing additional protection to the public from certain repetitive felony offenders. When the statute is considered as a whole, section 775.084(1)(b) effectuates this objective by providing additional protection from repetitive felony offenders who have previously committed a violent offense. The decision to allow an enhanced sentence after only two felonies, and when only the prior felony is an enumerated violent offense, is a permissible legislative determination which comports with and is rationally related to this statutory purpose, so as to satisfy the requirements of due process.

Id. at 1104.

Petitioner's final challenge to the statute is equally specious, as it is likewise based on a false premise. Petitioner claims that the habitual violent felony offender statute violates state and federal constitutional provisions against double jeopardy because "the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony." Brief of **Petitioner** at 10. Acknowledging that the United States Supreme Court, this Court, and Florida district courts have rejected similar arguments for the past several decades, Petitioner nevertheless maintains his

position, while relying on a concurring opinion from Judge Zehmer in the First District. Petitioner's reliance on an anomalous position, however, cannot resurrect an argument long-dead.

As this Court so aptly stated in Cross v. State, 96 Fla. 768, 119 So. 380 (Fla. 1928):

> 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this Country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.' As was said in People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401: 'The punishment for the second [offense] is increased, because by his persistence in the perpetration of crime he [the defendant) has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.' And as was said by Chief Justice Parker in Ross' Case, 2 Pick. (Mass.) 165: 'The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself.' The statute does not make it an offense or crime for one to have been convicted more than once. The law simply prescribes a longer sentence for a second or subsequent offense for the reason that the prior convictions taken in connection with the subsequent offense demonstrates the incorrigible and dangerous character of accused thereby establishing the necessity for enhanced restraint. The imposition of such enhanced punishment is not a prosecution of or punishment for the former convictions. The Constitution forbids such action. The enhanced punishment is an incident to the last offense alone. But for that offense it would not be imposed.

Id. at 386 (quoting Graham v. West Virginia, 224 U.S. 616 (1912) (citation omitted)). See also Washington v. Mayo, 91 So.2d 621,

623 (Fla. 1956); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962); Conley v. State, No. 90-1745, slip op. (Fla. 1st DCA Jan. 2, 1992) (again rejecting the same argument raised by Petitioner).

As is evident from the sampling of cases cited to above, "[recidivist] statutes are neither new to Florida nor to modern jurisprudence. Recidivist legislation . . . has repeatedly withstood attacks that it violates constitutional rights against ex post facto laws, constitutes cruel and unusual punishment, denies defendants equal protection of the law, violates due process or involves double jeopardy." Reynolds, 138 So.2d at 502-03. After a century or more, Petitioner's challenges are no more viable now than they were when recidivist statutes were first created. With no new added twist or dimension, Petitioner's arguments must fail. Accordingly, the certified questions must be answered in the negative.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully asserts that this Honorable Court should decline to accept jurisdiction, or answer the certified questions in the negative if jurisdiction is taken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 16th day of January, 1992.

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