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IN THE SUPREME COURT OF FLORIDA

KEITH JOLLY,

Petitioner,

v. CASE NO. 79,121

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

Petitioner, defendant and appellant below, will be referred to herein as "Petitioner" or "Jolly". Respondent, the State of Florida, will be referred to herein as "Respondent" or "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s). References to petitioner's initial brief on the merits will be by the use of the symbol "IB" followed by the appropriate page number(s). References to the state's composite exhibit #1 at trial will be by the use of the symbol "SCE 1".

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts on page 1, until the last line, as accurate and relevant.

It should be noted in summary that the district court below entered a per curiam affirmance on all guilt issues and separately certified the two following questions from Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991):

> (1) Does it violate a defendant's substantive rights when he is classified as a violent habitual felony offender pursuant to section 775.084, and thereby subjected to an extended term of imprisonment, if he has been convicted of an enumerated violent felony within the previous five years, even though his present offense is a nonviolent felony? and
>
> (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?

From the last line of page 1 through page 4, petitioner recites a fulsome account of the various evidence on which the convictions were based and on which the district court below affirmed without comment.

UMMARY OF ARGUMENT

The habitual violent felony offender statute, 8775.084, Fla. Stat. (1989), does not violate a defendant's substantive due process rights or the constitutional protections against ex post facto laws and double jeopardy. Petitioner's reliance on a dictionary definition of "habitual" is misplaced. The Legislature has defined the term within the statute.

The rest of petitioner's argument has already been rejected by the district courts of appeal and this Court. Recidivist statutes have been repeatedly upheld against due process, ex post facto, and double jeopardy challenges. Petitioner brings no new argument to the issue and thus his challenge must fail. Accordingly, the certified questions must be answered in the negative.

The Court should not exercise its discretion to address issues which are entirely irrelevant to the certified questions. See, Stephens, infra. This is particularly so where as here, the DCA did not even address the issue. In effect, petitioner is seeking review of a per curiam affirmance without opinion.

Should this Court choose to reach the merits of the issue, it will find the admission of "mug shots" into evidence at petitioner's trial was not error, and, even if so, was harmless beyond a reasonable doubt. This Court should affirm the admission of the photographs below.

ARGUMENT

ISSUE I

WHETHER THE HABITUAL+VIOLENT OFFENDER STATUTE, 8775.084, FLA. STAT. (1989), VIOLATES A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS OR THE CONSTITUTIONAL PROTECTIONS AGAINST EX POST FACTO LAWS AND DOUBLE JEOPARDY.

Before addressing the issues raised in the certified questions, Petitioner claims that the habitual violent felony offender provisions "suffers 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. (IB 8-9). 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 statute' 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 certified questions, 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." (IB 12). However, Petitioner's argument is again premised on a false assumption. The clear and unambiguous language of the statute indicates that the Legislature intended to punish more severely those recidivist felony offenders with a previous violent felony. 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." (IB 13) (citing to Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), rev. pending, Fla. S. Ct. No. 78, 79) 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 far 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. Case 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 next 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 and ex post facto laws because "the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony." (IB 14). 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. Cachran, 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 cases cited 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.

ISSUE II

WHETHER THIS COURT SHOULD IT EXERCISE ITS JURISDICTION TO ADDRESS ISSUES WHICH WERE NOT CERTIFIED BY THE FIRST DISTRICT.

In its opinion below, the First District affirmed without comment Petitioner's conviction for petit theft and false imprisonment. On Petitioner's subsequent motion for certification, the court certified the same questions a5 in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991): (1) Does it violate a defendant's substantive rights when he is classified as a violent habitual felony offender pursuant to section 775.084, and thereby subjected to an extended term of imprisonment, if he has been convicted of an enumerated violent felony within the previous five years, even though his present offense is a nonviolent felony? and (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?

Instead of addressing the issues as framed by the First District for this Court in Tillman, supra, Petitioner has filed a 27 page merits brief, addressing one of the certified questions in section B of the first issue. Section A of Petitioner's first issue and the entirety of his second issue, however, are devoted to issues argued before the First District -- the construction of the habitual violent felony offender statute and the admission of "mug shots" into evidence at trial -- but not certified to this Court. Respondent will address the construction of the statute

and Petitioner's second "mug shot" issue, but neither of the issues are properly brought before this Court. This Court should follow its own precedent and decline to address these issues because they "lie[] beyond the scope of the certified question[s]." Stephens v. State, 572 So.2d 387 (Fla. 1991).

While Respondent is asking this Court to not exercise its jurisdiction and address the merits of these issues, it would be helpful to practitioners before this Court if it would address the issue of petitioners raising issues and arguments not included in certified questions when those questions are the basis for this Court's jurisdiction over a case. Respondent contends that this Court should hold that it will not address issues outside of certified questions when it has jurisdiction on that basis. This will positively affect the administration of justice in Florida's appellate courts. Alternatively, the Court should permit Appellee/Respondents to decline to respond unless directed to do so by this Court.

Such a rule would reduce the workload of this Court by eliminating unnecessary argument on issues previously found meritless by a district court. It would also assist practitioners before this Court by allowing them to concentrate solely on the certified issues instead of filing extensive arguments for no purpose. The result would be a streamlining of the appellate process in Florida with no prejudice to either party and, hopefully, an increase in the quality of the arguments made before this Court.

However, if this Court chooses to reach the merit of this issue, respondent submits the following argument. A ruling admitting or excluding evidence will not be reversed unless the trial court abused its discretion. Welty v. State, 402 So.2d 1159 (Fla. 1981); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. den., 73 L.Ed.2d 1322 (1982); State v. Wright, 473 So.2d 268 (Fla. 1st DCA 1985), rev. den., 484 So.2d 10 (Fla. 1986). An abuse of discretion is an arbitrary or fanciful action taken by the trial court that no reasonable person could adopt. Canakaris v. Canakasis, 382 So.2d 1197 (Fla. 1980). The trial court in the present case did not abuse its discretion when it admitted the photographs into evidence. This Court should affirm the admission of the photographs as well as the conviction below.

Petitioner in this appeal points out various features of the back of the photos: the preprinted labels, date notations, and notations of crimes (IB 19-20). However, Jolly focuses on what was on the back of photos other than his. The persons in the other photos were not on trial. On the back of Jolly's photo was a pre-printed label containing information on his birthdate, race, sex, height, weight, address, the date of the photo, the victim's signature, and an illegible, scratched-through notation. SCE 1. Such innocuous information could not have prejudiced Jolly in any manner. Such photographs are used for other purposes and Petitioner has not overcame the presumption of correctness.

Petitioner first cites D'Anna v. State, 453 So.2d 151 (Fla. 1st DCA 1984), for the proposition that the admission into evidence, or even the mere mention of mug shots constitutes error (IB 21). But Petitioner does not set out the rest of the First District's opinion:

> However, it is likewise clear that the introduction per se of "mug shots" into evidence is not reversible error. Rather, the reviewing court must examine "the entire record and surrounding circumstances," to determine whether the error must be considered harmless. Among the factors to be considered are the extent of other clear, unequivocal evidence of identification of the defendant rendered in court, whether the photographs were "cropped" so as to hide the identity of the photographing agency, whether a curative instruction was given, and the extent to which the photographs or reference to them at trial refer to a defendant's past criminal record.

Id., 453 So.2d at 152; see Loftin v. State, 273 So.2d 70 (Fla. 1973).

Applying the above standard to the entire record and surrounding circumstances, this Court will plainly see that the admission of the photos, if error, was harmless beyond a reasonable doubt. The first factor to be considered is the extent of other clear, unequivocal identification of Jolly rendered in court. The victim in the present case, a cabdriver named John Stevens, made exactly that identification in court.

Mr. Stevens testified that he picked up Jolly in his cab three times in one night, twice with two female companions, and that during the third ride Jolly robbed him at gun point (T 26, 30-35). Mr. Stevens first identified Jolly in court (T 27). Mr. Stevens testified that he had seen Jolly before he picked him up in his cab, in and around the area where Stevens lived (T 27). Mr. Stevens further testified that he looked at Jolly while making change for him when Jolly paid for the first cab ride (T 29). Stevens testified that he picked up Jolly the second time and got another look at Jolly who was wearing the same clothes (T 30-31).

The third time Mr. Stevens picked up Jolly, Jolly was by himself (T 32). Jolly sat in the front of the cab, right beside Stevens, and was wearing the same clothes (T 32). Mr. Stevens and Jolly were talking during the third ride (T 33). During the third ride Jolly pulled out a revolver, pointed it directly into Mr. Stevens face and robbed him of his wallet and money (T 34-35). Jolly then locked Mr. Stevens in the trunk of his cab (T 36-37). Mr. Stevens finally managed to unbolt the trunk lid and escape (T T 37-38), after which he called the police (T 38).

On redirect examination, Mr. Stevens testified that he knew Jolly, knew Jolly's father, and knew Jolly's people. Stevens stated that he and Jolly's family all lived in the same area and that he spoke to Jolly's father. (T 64).

Respondent submits that a more unequivocal identification of a criminal offender would be hard to find. Besides identifying Jolly in court, Mr. Stevens had seen Jolly before the night Jolly robbed him, knew him, knew his family, lived in the same area as Jolly, and saw Jolly three times the night Jolly robbed him. The third time, the time Jolly pulled out his pistol, Jolly was sitting directly beside Mr. Stevens and talking with him.

AS Petitioner admits, Mr. Stevens' in-court identification of him was unequivocal (IB 22). Jolly's further contention that Stevens' testimony was impeached and inconsistent is of no consequence; the points Stevens was challenged on had nothing at all to do with his identification of Jolly as the man who robbed him. Further, Jolly's contention that the jury rejected most of Stevens' testimony is simply wrong. The jury found Jolly guilty of petit theft and false imprisonment, of which neither verdict rejected Mr. Stevens' identification of Jolly. The introduction of the photos was thus harmless. See, **Fuster** v. State, 480 So.2d 173 (Fla. 3rd DCA 1985).

The second D'Anna factor to be considered is whether the photographs were cropped to 'hide the identity of the photographing agency. D'Anna, supra, 453 So.2d at 152. Not a single one of the six photos, including Jolly's, had any indication at all of the photographing agency. (SCE 1, T 97). Thus the error is again shown to be harmless. Id.; see Houston v. State, 360 So.2d 468 (Fla. 3rd DCA 1978).

The third D'Anna factor is whether a curative instruction was given. D'Anna, Supra, at 152. Jolly's counsel never requested a curative instruction on the photos. Even when Mr. Stevens referred to the photos as "mug shots," Jolly's counsel merely objected "to the reference of mugshots and photographs.'' (T 41). Jolly's failure to request a curative instruction concerning the photos waived the issue of whether the court not giving one was error. See, Barnes v. State, 562 So.2d 729 (Fla. 3rd DCA 1990) (instruction on evidentiary issue). Thus the lack of a curative instruction does not show any error on the court's part in admitting the photographs.

The final D'Anna factor to be considered is the extent to which the photographs or reference to them at trial refer to a defendant's past criminal record. D'Anna, supra, at 152. Neither Jolly's photograph itself or the reference to it at trial referred to his past criminal record in any manner. The photo itself merely was two views of Jolly, with either innocuous or illegible information on the back. Mr. Stevens' calling the photo a "mug shot" did not refer to Jolly's criminal history, but to the type of photograph; the two views, full face and profile.

The Third District had this to say on the topic of a witness referring to mug shots:

> The words "mug shot," used by the witness in describing how she identified appellant, on this record,

> did not injuriously affect the substantial rights of the defendant and was therefore, at most, harmless error. A reference to a mug shot in police files does not necessarily convey to a jury that a defendant has committed prior crimes or has previously been in trouble with the police. Under these circumstances, including eyewitness identifications, a jury instruction, if requested and given, would have cured the error. Affirmed.

Evans v. State, 422 So.2d 60 (Fla. 3rd DCA 1982) (citations omitted); see, Laftin, supra.

The reference to and admission of the photographs in the present case likewise did not injuriously affect Petitioner's substantive rights or the jury in the face of Mr. Stevens' unequivocal identification, and thus was at most harmless error. See, State v. Diguilio, 491 So.2d 1129 (Fla. 1986). This Court should affirm the admission of the photographs and the conviction below.

CONCLUSION

Based on the foregoing arguments and authorities, respondent requests this Honorable Court affirm the constitutionality of the habitual violent felony offender statute, §775.084, Fla. Stat. (1989), by answering the certified questions in the negative.

For the same reason, Respondent requests this Honorable Court refuse to address the issues Petitioner raises that were not certified by the First District Court of Appeal, should this Honorable Court choose to reach the issue of the admission of "mug shots" at trial, it should affirm the admission as harmless beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Abel Gomez, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of February, 1992.

Charles T. Faircloth, Jr.
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