IN THE SUPREME COURT OF FLORIDA

JAMES REEVES, III,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 79,386

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON **THE MERITS**

STATEMENT OF THE CASE AND THE FACTS

Petitioner James Reeves, 111, was charged with and convicted of possession of a firearm by a convicted felon, a second degree felony, in violation of S790.23, Fla. Stat. (R **6**, 46, T 168-169). The offense was committed on March **2**, 1990 (T 22,34). The state sought and petitioner opposed classification as a habitual violent felony offender (R 9,29). The state presented a 1982 judgment of conviction for second degree murder (T 180-181), and asserted that petitioner had been released from prison for the 1982 murder on October 6, 1989 (T 175-176). Petitioner's counsel did not contest these facts (T 176-177). The court sentenced petitioner to fifteen years incarceration as a habitual violent felony offender, with a ten year mandatory minimum (T 181, 187-188).

An appeal was taken to the First District Court of Appeal, which, on November 19, 1991, affirmed without opinion. On the

motion of petitioner, the First District issued an opinion certifying the following questions:

> Does section 775.084, Florida Statutes (1989), authorize habitual felon sentencing for a criminal defendant who has previously been convicted of a violent offense enumerated in the statute, but who is currently being sentenced for a non-violent offense?
>
> If section 775.084, Florida Statutes (1989), authorizes habitual felon sentencing for a criminal defendant who is currently being sentenced for a non-violent offense, does the statute violate the constitutional principles of equal protection, due process, double jeopardy, or ex post facto?

Reeves v. State, 17 FLW D281 (Fla. 1st DCA Jan. 17, 1992).

The jurisdiction of this court was invoked by notice an February 17, 1992.

SUMMARY OF ARGUMENT

Issue I **$775.084**, Fla. Stat., can reasonably be interpreted to limit habitual violent felon sentencing to persons being sentenced for a violent crime enumerated in the statute. This interpretation is supported by the term "habitual violent felony offender," which implies commission of more than one violent crime. The alternative reading of 5775.084 **as** applying in the sentencing of any offense, violent or non-violent, conflicts with the common sense meaning of habitual, since this reading authorizes habitual violent felon sentencing for a person who has only committed one violent offense. Given these two reasonable interpretations of the statute, the construction favoring the defendant must be chosen. Under this construction, petitioner should not have been subjected to habitual violent felon sentencing because his offense was not violent and was not enumerated in the statute.

Issue II Equal protection. If the law were interpreted to mean that persons could be sentenced **as** habitual violent felony offenders for non-violent crimes, this would cause persons who commit a violent crime first and a non-violent crime second to be sentenced more harshly than persons who commit a non-violent crime first and a violent crime second. Such disparity in sentencing has no rational basis, **and** thus denies persons in petitioner's situation equal protection of the law.

Due process. Due process requires that a statute impinging on liberty have a reasonable relation to a legitimate

object. Here, the enhanced sentencing for non-violent crimes bears no reasonable relation to the statute's object of punishing more severely those who commit repeated acts of violence.

Double jeopardy and ex post facto. The exclusive focus of the habitual violent offender provision on the nature of the prior crime means that the habitual violent sentence is really a second punishment for the prior offense. This is double jeopardy and, where the prior offense was committed before the 1988 enactment of the habitual violent felon statute, also a violation of the prohibition against ex post facto laws.

ARGUMENT

ISSUE I 5775.084, FLA. STAT., DOES NOT AUTHORIZE SENTENCING AS A HABITUAL VIOLENT FELONY OFFENDER FOR A NON-VIOLENT OFFENSE

This case raises an issue of statutory construction that this court has not previously considered. Petitioner contends that there is an ambiguity in 5775.084, Fla. Stat. This statute can be read to authorize enhanced habitual violent sentencing whenever the defendant has a prior conviction for one of the violent felonies enumerated in the statute, and the defendant is currently being sentenced for a new crime that is also one of those enumerated felonies. Alternatively, the statute may be read to authorize habitual violent felon sentencing whenever a defendant has a prior conviction for one of the enumerated felonies, and is currently being sentenced for *any* felony, violent or non-violent. Petitioner contends that given these two reasonable interpretations of 9775.084, the courts are bound to choose the former, more narrow, interpretation, in compliance with the rule of strict construction of criminal statutes.

§775.084(1)(b) provides:

> "Habitual violent felony offender" means a defendant for whom the court may impose an extended term of imprisonment ... if it finds that:
> 1. The defendant has previously been convicted of a felony ... and one or more of such convictions was for (any of the violent felonies listed] ...

Webster's Third New International Dictionary, Unabridged (Merriam-Webster, Inc. 1986) gives as the first definition of

"habitual": "of the nature of a habit : according to habit : established by or repeated by force of habit : customary." "Habit," in the meaning that is pertinent here, is defined as: "a settled tendency of behavior or normal manner of procedure : custom, practice, way." It is quite clear that "habitual" and "habit" have a meaning that implies that a behavior is repeated. Someone who smokes a cigarette once and never again, is not a habitual smoker. Similarly, using the normal meaning of the term, a "habitual violent felony offender" is not one who commits one violent crime, and no more. In the normal way the term "habitual" is used, a habitual violent felon is one who repeatedly commits violent felonies. The legislature's use of the term "habitual violent felony offender" in 5775.084 thus indicates that the intent of the section is to enhance the punishment of persons who commit a violent felony more than once.

The statute does not explicitly require as a prerequisite for habitual violent sentencing that the current offense be one of the enumerated violent felonies. 5775.084 does not state which current offenses subject a defendant with a prior violent felony conviction to habitual violent felony offender treatment. The references in S775.084 to the current offense do not resolve the question, §775.084(1)(b)(2) states that "[t]he felony for which the defendant is to be sentenced" must have been committed within five years of the "last prior enumerated felony," or within five years of release from prison imposed as a result of an enumerated violent felony.

§775.084(4)(b) gives the sentences that may be imposed for each degree of felony. Nowhere does the section state which felonies for which the defendant is being sentenced are subject to habitual violent felony offender sentencing.

One possibility is that the legislature did not specify what current offenses would be eligible for habitual violent sentencing because it assumed that such offenses would be limited to the violent offenses enumerated in the section. This construction is supported by the use of the term "habitual violent felony offender," since under this construction, no one would be subject to habitual violent sentencing without committing at least two violent offenses. This is the natural reading of the statute.

The reasonableness of this construction of §775.084 is supported by the assumption expressed in at least one district court opinion, that habitual violent sentencing would be for violent crimes:

> [T]he legislature intended that any previous violent felony committed within five years, wherever committed, would justify an enhanced penalty for a subsequent Florida violent felony.

Canales v. State, 571 So.2d 87,89 (Fla. 5th DCA 1990).

The alternative interpretation, implicitly adopted by the affirmance below, is that the section's failure to specify to which current felony it applies means that it applies to any felony. This reading has the disadvantage of deeming someone a habitual violent felon after only one violent offense, contradicting the plain meaning of "habitual."

The First District, in Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990), raised questions about §775.084 that suggest a recognition that deeming a person a habitual violent felon for committing a non-violent crime does not make sense, In Henderson, the appellant assumed that S775.084 authorized habitual violent felon sentencing for non-violent felonies, and challenged the statute as violating substantive due process for lacking a rational relationship to the law's purpose. The district court said:

> We cannot ignore the obvious, however, and shut our eyes to the manifest fact that the 1988 amendment to section 775,084, ch. 88-131, s.6, Laws of Fla., introduced the new, and somewhat novel, concept that a defendant in Florida may now be sentenced as a habitual violent felony offender for committing a nonviolent felony, ie., one other than the enumerated violent felony offenses, because he has a prior conviction for a violent felony falling among those listed in the statute.

569 So.2d 927. (emphasis by the court). This novel concept is not mandated by the statute. The failure of §775.084 to state to which felonies it applies can be corrected without imputing to the legislature the creation of such an anomaly.

Moreover, §775.084 must be construed in accord with the fundamental principle embodied in §775.021(1), Fla. Stat. (1989):

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This court emphasized the importance of this rule of construction in Perkins v. State, 576 So.2d 1310 (Fla. 1991):

> One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. ... Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute. ... [T]o the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused, ... The state's reliance on common law rules of construction such as ejusdem generis must yield to the rule of strict construction.

576 So.2d 1313-1314.

The meaning of 5775.084 is not clear. One reasonable way to resolve the ambiguity is to construe the section to apply only to current offenses that are on the section's list of violent felonies. This construction leaves the statute making the most sense, avoids a novel concept not expressly created by the legislature, avoids internal conflict by being consistent with use of the term "habitual violent felony offender,'' and complies with the requirement of construing penal statutes in the favor of the accused. This court should adopt such an construction. Under this construction, petitioner was not properly deemed a habitual violent felony offender. His sentence must be vacated, and the case remanded for resentencing.

ISSUE II IF S775.084, FLA. STAT. AUTHORIZES HABITUAL VIOLENT FELONY OFFENDER SENTENCING FOR NON-VIOLENT CRIMES, IT VIOLATES THE CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION, DUE PROCESS, DOUBLE JEOPARDY AND EX POST FACTO.

Equal protection.

If **S775.084**, Fla. Stat. (1989), were construed to make a person with a prior conviction for an enumerated violent crime followed by a conviction for a non-violent crime **a** habitual violent felony offender, this would result in disparate treatment of different categories of defendants. Persons convicted of a violent crime, who then commit a second crime that is not violent, would be subject to enhanced sentencing, while persons who are convicted of **a** non-violent crime, and then commit a second crime that is one of the enumerated violent crimes, would not be subject to enhanced sentencing. In other words, persons who commit **a** violent crime first, and **a** non-violent crime second, would be habitual violent felons. Persons who commit a non-violent crime first, and a violent crime second, would not be habitual violent felons.

Petitioner concedes that this difference in treatment is not based on any suspect class, and does not involve any fundamental right. It is, however, a denial of equal protection under the United States and Florida constitutions because there is no rational basis for treating the person who commits a violent crime first more harshly than the person who commits a violent crime second.

This rational basis standard, repeated in many decisions, may be found in Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986):

> [A] statutory classification that is neither suspect nor invades a fundamental right must only be rationally related to a legitimate state interest. However, a statutory classification cannot be wholly arbitrary,

492 So.2d 1050. (citations omitted).

Rollins v. State, 354 So.2d 61 (Fla. 1978) applied the same standard:

> For a statutory classification to satisfy the equal protection clauses found in our organic documents, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed.

354 So.2d 63. See also, Mikell v. Henderson, 63 So.2d 508 (Fla. 1953).

In upholding an old version of Florida's recidivism statute, this court noted that similarly situated defendants must be treated alike:

> [A] different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated.

Cross v. State, 119 So. 380,387 (Fla.1928).

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), considered the validity under the equal protection clause of a statute, like 5775.084, that imposed special punishment on certain defendants. Skinner struck down the law because it authorized sterilization of persons convicted of

three felonious larcenies but not of those convicted of three felonious embezzlements. No meaningful distinction could be found between larcenies and embezzlements that would explain their different treatment.

Similarly, there is no reasonable basis for punishing persons convicted of a non-violent crime **after** a violent crime more severely than persons convicted of a violent crime after **a** non-violent crime. If anything, the policy of the law is to punish more severely persons whose crimes become more serious over time, **not** less serious. See Keys v. State, 500 So.2d 134 (Fla. 1986), holding the escalation of a defendant's offenses from crimes against property to violent crimes against persons to be a valid reason for imposing a greater sentence than authorized by the sentencing guidelines.

If S775.084 is construed to treat persons committing a violent crime before a non-violent crime more severely than persons committing a violent crime after a non-violent crime, there is no rational basis for such disparate treatment and the statute must fall.

Due process.

The due process clauses of the state and federal constitutions require that a statute's purpose be for the **general** welfare and that "the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious." State v. Saiez, **489** So.2d 1125,1128 (Fla. 1986). The object of the habitual violent provision is not to simply

punish more severely everyone who commits a violent offense. If this were the purpose, the penalty for all violent offenses would be increased, not just the penalty for those who have committed a prior violent offense. Rather, the object of the habitual violent felon provision must be to punish more severely those who are habitually violent, ie., those who are repeatedly violent. The "means selected," however, if habitual violent sentencing is held to apply to non-violent offenses, is not reasonably related to the object of the statute.

Double jeopardy and *ex* post facto.

If the habitual violent offender sentence petitioner received was additional punishment for his 1982 violent crime, then ch.88-131, §6, Laws of Fla., which created habitual violent sentencing, violates the double jeopardy and ex post facto provisions of the state and federal constitutions. Courts have generally upheld recidivism sentencing schemes against this sort of attack. See, eg., Cross v. State, 119 So.2d 380 (Fla. 1928). The First District rejected the double jeopardy/ex post facto argument in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), rev. pending, No. 78,613. As at least two judges of the First District recognize, however, the habitual violent felon statute is different. It enhances the penalty based not on the nature of the current offense, but rather on the nature of the prior offense. As a result, the habitual violent sentence is a second punishment for the prior crime. As Judge Zehmer, joined by Judge Barfield, wrote in Hall v. State, 588 So.2d 1089 (Fla. 1991):

> Although the instant offense for which petitioner was sentenced was not a violent felony, petitioner was sentenced as a habitual violent felony offender based on the fact that his prior conviction (for which he has presumably already served his sentence) met the statutory definition of violent felony. Had petitioner been sentenced as a **[regular]** habitual felony offender **...** based on the nature of the instant offense **rather** than as **a** habitual violent felony offender based on the nature of his prior conviction, the sentence would necessarily have been less **...** I view the imposition of the extent of punishment for the instant criminal offense **based** on the nature of the prior conviction as effectively imposing a second punishment on defendant solely based on the nature of his prior offense, a practice I had thought was prohibited by the Florida and United States Constitutions. This new statutory procedure is entirely different from the former concept of enhancing sentences of habitual offenders having prior offenses without regard to the nature of the prior felony, which has been upheld in this state and all other jurisdictions.

(emphasis on "violent," by **Judge** Zehmer; other emphasis **supplied),**

Unlike traditional recidivism laws, the habitual violent offender statute does breach the prohibition against double jeopardy, and, as to prior offenses committed before the 1988 law went into effect, such as petitioner's 1982 second degree murder conviction, the statute **also** breaches the prohibition against **ex** post facto laws.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court construe §775.084, Fla. Stat., to authorize habitual violent felony offender sentencing only for enumerated violent felonies, reverse the determination that petitioner is a habitual violent felony offender, and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Petitioner's Initial Brief on the Merits has been furnished by hand delivery to Carolyn J. Mosley, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, James Reeves, 111, this 12 day of March, 1992.

STEVEN A. BEEN

IN THE SUPREME COURT OF FLORIDA

JAMES REEVES, III,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CASE NO. 79,386**
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JAMES REEVES, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. 90-3336

Opinion filed November 19, 1991.

An Appeal from the Circuit Court for Duval County, R. Hudson, Olliff, Judge.

Nancy A. Daniels, Public Defender, and Steven A. Been, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

JOANOS, C.J., WOLF and KAHN, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JAMES REEVES, 111,

Appellant,

v. CASE NO. 90-3336

STATE OF FLORIDA,

Appellee.

Opinion filed January 17, 1992.

An Appeal from the Circuit Court for Duval County, R. Hudson Olliff, Judge.

Nancy A. Daniels, Public Defender, and Steven A. Been, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Appellant's motion for certification is granted, and we hereby certify to the Florida Supreme Court the following questions:

Does section.775.084, Florida Statutes, (1989), authorize habitual felon sentencing for a criminal defendant who has previously been convicted of a violent offense enumerated in the statute, but who is currently being sentenced for a non-violent offense?

2. If section 775.084, Florida Statutes (1989), authorizes habitual felon sentencing for a criminal defendant who is currently being sentenced for a non-violent offense, does the statute violate the constitutional principles of equal protection, due process, double jeopardy, or ex post facto?

JOANOS, C.J., WOLF and KAHN, JJ., CONCUR.