IN THE SUPREME COURT OF FLORIDA

ROY NEBRASKA SCOTT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,823

INITIAL BRIEF OF PETITIONER ON THE MERITS

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I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal below, Scott v. State, ____ So.2d ____, 17 FLW D1196 (Fla. 1st DCA May 5, 1992) (on motion for rehearing or to certify questions).

All proceedings were held in Duval County before Circuit Judge David C. Wiggins.

II STATEMENT OF THE CASE

The state charged petitioner, Roy **Nebraska** Scott, with possession of cocaine (R-2). The state filed notice of intent to classify him **as** an habitual violent felony offender (R-10, 41,49,66). At trial, **a** jury found him guilty **as** charged **(R-46)**. At sentencing, the state introduced evidence of a 1988 conviction of unarmed robbery (R-61-62), plus a 1988 conviction for sale, purchase or delivery of cocaine (one count) and a 1990 conviction for sale of counterfeit drugs (R-53-60). The trial court sentenced Scott as an habitual violent felony offender to **7** years in prison (R-68-71).

The First District Court of Appeal affirmed the judgments and sentences per curiam, Scott v. State, infra, but certified to this court the same two questions previously certified in Tillman v. State, 586 So.2d 1269 **(Fla.** 1st **DCA** 1991), review pending Fla. S.Ct. no. 78,715:

> **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?**

III STATEMENT OF THE FACTS

On January 16, 1991, around 3:00 a.m., Jacksonville Sheriff's Officer Shannon Douberly was riding with a trainee, Sherman Webb. According to Douberly, he saw a Ford Branco come speeding out of the Caravan Apartments area, and followed it. When he saw he was not going to able to catch up with it, Douberly radioed Officer R.D. Case, who stopped the truck on Southside Boulevard. Douberly and Webb arrived shortly after. Petitioner, Roy Scott, was driving the truck (T-15-19).

The Caravan Apartments are subsidized housing and, according to Douberly, high in drug and vice activity. At this remark, defense counsel moved for mistrial. The motion was denied, but the trial court told the jury to disregard the remark (T-17-18). It was hard to tell if the Bronco had come from the apartments, because the road to the apartment complex also leads to a Jiffy Food Store (T-19).

When Douberly arrived, Case had Scott out of the vehicle and was talking to him. They detained Scott and put him in the back seat, while Webb and Case looked in the truck. Webb found a small baggie containing what appeared to be crack cocaine (T-20-21). On cross, Douberly said the car did not belong to Scott, and Scott said he did not know what was in the truck (T-27-28).

On proffer, Douberly said he had earlier seen Scott talking to a black male near the Caravan Apartments and was suspicious that they were doing a drug deal. After stopping him, they called in and found out Scott had an outstanding capias

for misdemeanor battery. Scott was arrested on the capias, and his car was searched incident to arrest (T-34-37). Douberly said Scott was cited for speeding (T-39). On questioning by the court, Douberly said he called ahead for Case to stop Scott, in order to check out what he was up to at the apartments (T-42).

With the jury present, Case described the stop and search of the car. Case checked out the Bronco on the driver's side; Webb searched the passenger side. Case used a flashlight to look under the seat; he believed Webb also had a flashlight. Case did not see the baggie until Webb picked it up (T-50-51). During proffer, Case hedged as to whether he had seen the truck previously at the Jiffy Mart, and whether he was suspicious of a drug transaction (T-58-59),

On proffer, Webb described the search of the car and finding the baggie containing cocaine. When Webb leaned over the passenger seat, he found the baggie on the passenger side down by the seat by the hump, It was kind of stuffed down "not completely out of view." Webb characterized it as being in plain view (T-68-69).

Defense counsel argued the stop was pretextual; the state argued it was not pretextual, but was for speeding (T-78-88). The motion to suppress was denied (T-90-91).

When trial resumed the next day, Webb testified to the search and finding the baggie. When Scott was detained, they asked whether he wanted the leave the vehicle at the scene or have it towed. Scott said he wanted it left at the scene.

Webb asked if they could secure it, which is normal procedure. The truck was dirty inside; there were several things laying about. The baggie was near the passenger seat beside the hump (T-95-96). On cross, Webb said they asked Scott if knew anything about the baggie, and he denied it (T-103-04).

J. Thomas testified to the chain of custody (T-106-09). Oda Somera, an FDLE chemist, identified the substance as a half-gram of crack cocaine (T-116). There are **28** grams in an ounce **(T-118).**

IV SUMMARY OF THE ARGUMENT

Principles of statutory construction require that an offense for which the state seeks an enhanced punishment as an 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 an 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.

Because it failed to prove Scott knew of the presence of hidden cocaine in a truck which he was driving, but which did not belong to him, the state failed to prove an essential

element of the charge of possession of cocaine, and the evidence was legally insufficient to support the conviction. Assuming arguendo this court were to find the evidence to be legally sufficient, then it would have to reverse for new trial because of prosecutorial misconduct in closing argument, in suggesting the truck was stolen, when there was no evidence to that effect.

V ARGUMENT

ISSUE I

THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES (1989), MUST BE CONSTRUED TO REQUIRE THAT THE OFFENSE FOR WHICH A SENTENCE IS IMPOSED UNDER THOSE PROVISIONS BE AN ENUMERATED VIOLENT FELONY; A CONTRARY CONSTRUCTION RENDERS THE STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PRINCIPLES.

In 1988, the legislature amended section 775.084, Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, § 6, Laws of Fla. Section 775.084(1)(b), Florida Statutes (1989), now defines an habitual violent felony offender as one who has committed one of 11 named 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 an habitual violent felon violates constitutional due process and double jeopardy clauses when the offense for which the sentence is imposed is nonviolent. These questions have been certified several times, the first in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending Fla, S.Ct. no. 78,715. 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 an 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 an habitual violent felony offender sentence for a single, prior crime of violence.

Courts have a duty to reconcile conflicts within a statute. In re Nat'l Auto Underwriters Assn., 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. § 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, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (federal rule of lenity applies to interpretation of penalties imposed by criminal prohibitions).

Applying these principles, this court should find that the current 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 current 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 reasonably 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 current 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 current 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. § 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 - unarmed robbery - plus the current, nonviolent cocaine possession. 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 an 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 rejected a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), review pending, 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 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), review dism., 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 offense 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., am. v; Fla. Const., art. 1, § 9. The First District Court 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 an habitual violent felony offender, the state need show only that he has one prior offense within the past five years for a violent felony enumerated in 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: 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, as it did 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. Cochran, 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. In another case certifying the same questions here, Judge Zehmer said in his concurring opinion:

> 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 prohibited by the Florida and United States Constitutions.

Hall v. State, 588 So.2d 1089 (Fla. 1st DCA 1991) (Zehmer, J., concurring). As for how this section was distinguishable from other recidivist statutes, Judge Zehmer said:

> 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.

Id. This distinction is the point at which the amended statute runs afoul of constitutional double jeopardy clauses.

The First District Court did not meaningfully address this distinction in Ross or in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), review pending, no. 78,613. In Perkins, the district 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 Hall.

The amended statute also differs from recidivist schemes focused on repetition of a particular type of crime, In United States 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. *868* F.2d at 1394-1395. In contrast to the statute at issue here, the federal 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

current 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 section 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. 588 So.2d at 1089 (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 current conviction for which sentence is being 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.

ISSUE II

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION OF POSSESSION OF COCAINE, BECAUSE THE STATE FAILED TO PROVE THE KNOWLEDGE ELEMENT OF CONSTRUCTIVE POSSESSION.

When he was stopped, purportedly for speeding, at 3:00 a.m., petitioner, Roy Scott, was driving a car which did not belong to him (T-27). Scott did not testify, and no other detail was revealed at trial of who the car belonged to, how Scott had obtained it, or how long he had had it. While not evidence, there was an exchange between the attorneys during closing argument when defense counsel argued that someone who borrowed a car did not ordinarily search it from stem to stern, to which the prosecutor objected on the ground there was no evidence it was borrowed, or whether it was stolen for that matter, to which defense counsel objected because there was no evidence it was stolen, and the prosecutor knew the truck was not stolen (T-146).

When the Bronco was searched prior to securing it, both officers had flashlights. The Bronco was dirty inside, with several things laying about. Officer Case, who searched the driver's side, shined his flashlight under the seat, but found nothing. Officer Webb searched the passenger side. When Webb leaned across the passenger seat, he found a clear baggie containing suspected crack between the passenger seat and the middle hump. Case did not see the baggie until Webb picked it up (T-51).

A. Sufficiency of the evidence

Because he did not have personal possession of it, Scott could be convicted only if the state proved he was in constructive possession of the cocaine. Conviction on a constructive possession theory requires proof the defendant 1) knew of the presence of the substance; 2) knew of the illicit nature of the substance; and 3) exercised dominion and control over it. Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981); see also Hiveley v. State, 336 So.2d 127 (Fla. 4th DCA 1976).

While the owner of the truck is unknown in this case, because Scott did not own the truck, there is also here an element of joint occupancy of the truck. Where there is joint ownership or occupancy, the ability to control the premises cannot be inferred, but must be established by independent proof. Brown v. State, 428 So.2d 250 (Fla.), cert. denied 463 U.S. 1209, 103 S.Ct. 3541, 77 L.Ed.2d 1391 (1983). On the issue of occupancy, the Fourth District Court has said:

> It is not occupancy alone, then, but it is "exclusive" occupancy that proves "constructive possession."
>
> * * *
>
> Perhaps the rule...should be restated that proof of occupancy is not sufficient to prove scienter as to hidden drugs unless proof is adduced that excludes the possibility of possession and scienter by others. That is simply reaffirming the state's burden of proving circumstances that are consistent with no other reasonable hypothesis than the guilt of the accused.

Thompson v. State, 375 So.2d 633, 635-36 (Fla. 4th DCA 1979); see also Frank v. State, 199 So.2d 117 (Fla. 1st DCA 1967).

Here, while the crack was perhaps not completely hidden, it was hidden well enough that only an officer with a flashlight on the passenger side saw it. The officer with a flashlight on the driver's side did not see the baggie until Webb picked it up. There was no evidence Scott had a flashlight, or had searched the car, or otherwise knew the cocaine was there. The evidence was legally insufficient to prove that Scott knew of the presence of the crack.

It is well-settled that mere proximity to drugs does not prove dominion and control over the drugs, an essential element of proof of constructive possession. See Corson v. State, 527 So.2d 928 (Fla. 5th DCA 1988) (Corson drove vehicle and was present when passenger purchased cocaine; not sufficient to establish constructive possession); Brooks v. State, 501 So.2d 176 (Fla. 4th DCA 1987) (accused exiting closet containing cocaine in plain view; not sufficient to show ability to exercise dominion and control over drug); Harris v. State, 501 So.2d 735 (Fla. 3d DCA 1987) (Harris rode in truck in which he knew there was cocaine; evidence insufficient to support constructive possession because no evidence Harris "had the ability to maintain control over the cocaine"); Kickasola v. State, 405 So.2d 200 (Fla. 3d DCA 1981) (Kickasola, present at sale of controlled substance to undercover agent, asked agent why he did not buy all the drugs: insufficient to establish dominion and control over drugs); Taylor v. State, 319 So.2d 114 (Fla. 2d DCA 1975) (Taylor's presence at party where controlled substance was in

plain view not sufficient to prove she could maintain control over drug, or reduce it to her control).

There are some firearm possession cases which are instructive as to Scott's situation here. In Parnell v. State, 438 So.2d 407 (Fla. 4th DCA 1983), the defendant was convicted of possession of a firearm by a convicted felon. The rifle was found on the floor behind the front seat of a car belonging to another man, Furlong. The court said:

> Since the evidence failed to show actual possession by [Parnell], the State's case rises or falls on the probative value of the evidence adduced regarding constructive possession. The State needed to prove beyond a reasonable doubt that [Parnell] (1) knew the rifle was in the car, and (2) had the ability to maintain dominion and control over the piece.

Id., citing Hiveley v. State, supra.

The police officer testified the rifle was in "plain view" in the backseat, and apparently concluded that, since he could see it, anyone could see it. Also, Parnell initially lied about how he came to Fort Lauderdale, but eventually admitted he had been a passenger in Furlong's car. Furlong admitted he owned the car and possessed the rifle, which he had taken with other items from his cousin, a policeman in Miami. The district court concluded that, even if the state had been able to prove ability to maintain dominion and control, "which we doubt," the evidence was insufficient to prove Parnell knew the rifle was in the car. 438 So.2d at 408.

The instant case is very similar, The Bronco belonged to someone else, to whom the items inside the car could well have

belonged. In Parnell, the searching officer characterized the rifle as being in plain view in the backseat. Similarly, here, Webb characterized the baggie as being in plain view. Here, even more than in Parnell, however, this characterization is obviously misleading. Here, in a dirty, cluttered van, Webb found the baggie stuffed between the passenger seat and the hump when he leaned across the passenger seat and looked with a flashlight. Officer Case, who was searching the driver's side with a flashlight, did not see the baggie until Webb picked it up. The officers saw Scott only on the driver's side. Nothing in the record shows that Scott looked or reached over to the passenger side, or had a flashlight, or used any interior light. It is entirely possible on this record to conclude that Scott had no idea that, there in the dark, in a car that did not belong to him, there was cocaine stuffed between the passenger seat and the hump. There was simply no proof Scott knew the cocaine was there.

In Broughton v. State, 528 So.2d 1241 (Fla. 1st DCA 1988), a police officer observed Broughton and a codefendant drive a vehicle behind some commercial buildings. He blocked the car's exit. The officer saw quite a bit of movement in the front seat, before the occupants exited the car. As the officer walked around the now-empty car, he saw a firearm underneath the car. It was brand new, had no scratches on it, and had no humidity built up even though the day had been a humid one. He concluded the firearm had just been placed under the car, but

he did not see who did it. No fingerprints were found on the gun.

The court vacated Broughton's conviction of possession of a firearm by a convicted felon because the circumstantial evidence was legally insufficient to sustain conviction. That is, the evidence was insufficient to prove that Broughton, as opposed to the other occupant of the car, had placed the gun under the car. Similarly here, no evidence proved the crack belonged to Scott, as opposed to the owner of the truck. That is, the only possible evidence was Scott's present possession of the truck, but Parnell and Broughton held that present possession of a vehicle was legally insufficient to sustain conviction, when the vehicle belonged to someone else, to whom its contents may also have belonged.

In White v. State, 539 So.2d 577 (Fla. 5th DCA 1989), the defendant was convicted of possession of a firearm by a convicted felon. White was stopped for a traffic violation. A search of his person revealed a shotgun shell. A search of the car then revealed a shotgun under the front seat. White did not own the car and had borrowed it from Bertha Caldwell, White denied any knowledge of the gun under the seat and said another person had had the car only hours before White was arrested. The court said:

> As explained in Wilcox v. State, 522 So.2d 1062 (Fla. 3d DCA 1988), "in order to prove possession of a firearm, there must be evidence to support a finding that the defendant had knowledge of the presence of the gun and the ability to exercise control over it." Wilcox at 1064, citing Parnell

> v. State, [supra]. (first emphasis in original; second emphasis **added)**

539 So.2d at 578-79.

The court then said that, "(b)ecause the conviction cannot be sustained on an ownership theory, the state had the burden of proving that White's possession was conscious and substantial and not merely involuntary or superficial" (emphasis added). 539 So.2d at 579. Because the state failed to prove here that Scott knew of the presence of the crack in the borrowed truck, the state's evidence was insufficient to sustain conviction.

B. Prosecutorial misconduct

Petitioner believes the evidence was legally insufficient to prove he had knowledge of the presence of the cocaine, thus, the evidence was insufficient to sustain conviction. Assuming arguendo this court were to find the evidence met the threshold of sufficiency, however, then this court must consider a second matter - prosecutorial misconduct. The prosecutor's interruption of defense counsel's closing argument to suggest that Scott had stolen the Bronco (T-146), when there was no evidence to that effect, constituted misconduct.

It is absolutely improper for a prosecutor to suggest in closing argument that he has evidence which has been withheld from the jury. In one of the leading cases, the Fourth District Court of Appeal said:

> It is well settled that a prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from the

> evidence. While some courts have subscribed to the view that it is not improper for a prosecutor to express his individual belief in the guilt of the accused under certain circumstances, i.e., if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence known to the prosecutor (but not introduced) justifying that belief, it has consistently been held to be reversible error for the prosecutor to express his belief in the guilt of the accused, or the credibility of a key witness, where doing so implies that he does have additional knowledge or information about the case which has not been disclosed to the jury. (cites omitted)

Thompson v. State, 318 So.2d 549, 551 (Fla. 4th DCA 1975), cert. denied 333 So.2d 465 (Fla. 1976). See also Williamson v. State, 459 So.2d 1125, 1127 (Fla. 3d DCA 1984) ("court reiterated the well-established rule that a prosecutor may not express his belief in the guilt of the accused where doing so implies that he has additional knowledge or information about the case which has not been disclosed to the jury"); Salazar-Rodriguez v. State, 436 So.2d 269 (Fla. 3d DCA 1983); Cummings v. State, 412 So.2d 436, 439 (Fla. 4th DCA 1982) ("it is error to express belief in the credibility of a witness where doing so implies the prosecutor has additional knowledge about the case which has not been disclosed to the jury").

In Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), review denied 462 So.2d 1108 (Fla. 1985), in holding it was improper to refer to extra-testimonial facts during final argument, the court said:

> Unsubstantiated statement which concern references to other crimes committed by a

> defendant are particularly condemned by the Florida courts.

Id. at 1090. The court then quoted from Ailer v. State:

> When statements or intimations are made by a prosecuting attorney in his argument to a jury that an accused has committed other crimes than that for which he is on trial, this constitutes error unless there is evidence in the record from which the jury could infer the commission of another crime by the accused.

Ryan, 457 So.2d at 1090, quoting Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959), which cited Simmons v. State, 139 Fla. 645, 190 So. 756, 758 (1939).

Moreover, in the instant case, the prosecutor's improper comment could not be harmless, because the comment could have affected the jury's verdict. State v. Lee, 531 So.2d 133 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

For example, in Singletary v. State, 483 So.2d 8 (Fla. 2d DCA 1985), where the defendant was convicted of aggravated battery with a firearm, the Second District Court said:

> ...the prosecutor's closing argument in which, after twice accusing defendant of being a liar, the prosecutor said, "You know as well as I that he [the defendant] certainly intended to harm ... [the victim] with that gun ...,

constituted reversible error, In the instant case, the prosecutor smeared petitioner's character and credibility, with no evidence to support the allegations, and at the last moment, interrupting defense counsel's closing argument to do it.

In Singletary, the Second District said:

> The basic issue as to contention (2) is whether the evidence of guilt was so

> overwhelming as to render the prejudice insignificant. We cannot conclude that it was. However probable in light of the evidence it may have been that defendant would have been convicted had the prosecutor not made the foregoing statements to the jury, we cannot say that in this case acquittal was not reasonably within the realm of possibility. We cannot say that it is beyond a reasonable doubt that defendant would have been convicted without the improper Statements having been made to the jury...

483 So.2d at 9, citing State v. DiGuilio, supra. The court went on to explain:

> Defendant testified that the gun discharged accidentally. There was testimony from another witness that the gun discharged when that witness bumped defendant's arm.

Singletary, 483 So.2d at 9. The court concluded of the prosecutorial misconduct:

> In any event, whatever chance defendant had to be acquitted depended upon the jury believing his testimony. It was as to this critical aspect that the prosecutor improperly inserted into the trial his personal beliefs. (emphasis added)

Id. The same is true of the instant case. The evidence, on which the jury had to decide whether Scott knew the cocaine was present in the Bronco, was equivocal - it was dark, it was not his truck, the officer found the cocaine only by using a flashlight and leaning over the passenger seat, the officer on the driver's side did not see it until the other officer held it up. The jury might well have wondered whether Scott knew the cocaine was there, but they were aided in their deliberations by Officer Douberly's improper comment about the high vice area

in which he saw Scott, and then, very shortly before deliberations began, by the prosecutor's suggestion that the truck may have been stolen. This was a completely improper attack upon petitioner's character and credibility, unsupported by anything in the record. The jury might have had a reasonable doubt about Scott's knowledge, but for the improper attack by the prosecutor.

In holding that the prosecutor's comments in Singletary constituted reversible error, the Second District said:

> A prosecutor's role in our system of justice, when correctly perceived by a jury, has at least the potential for special significance being attached by the jury to any expressions of the prosecutor's personal beliefs. That expression in this case involved critical issues in the trial, to wit, defendant's credibility and intent. (emphasis added)

483 So.2d at 10. The court held that, against the background of the case, the error could not be harmless and reversed the cause for new trial. Nor can the misconduct here be harmless.

While Bass v. State, 547 So.2d 680 (Fla. 1st DCA), review denied 553 So.2d 1166 (Fla. 1989), involved a "two witness 'swearing match,"' the First District Court's observation is enlightening in the context of the instant case:

> ...witness credibility is pivotal and inappropriate prosecutorial comment which might be found to be harmless in another setting may become prejudicially harmful.

Bass, 547 So.2d at 682. While there was corroborating physical evidence in the instant case - the cocaine - there was no evidence which proved that Scott knew the cocaine was present in

the truck. The evidence on this point was purely circumstantial, and susceptible to improper meddling by the prosecutor.

In O'Callaghan v. State, 429 So.2d 691 (Fla, 1983), a capital case, following certain testimony of the defendant, the prosecutor objected and said, "That's a lie." The Florida Supreme Court said of this comment:

> The comment of the prosecutor was unquestionably improper. Any trial lawyer should know that this type of conduct is completely beyond the limits of propriety.

429 So.2d at 696. The court went on, however, to find the comment involved a collateral matter which was not critical to the issue actually being tried, and the evidence of guilt was overwhelming (the pre-DiGuilio harmless error standard), and held the remark was harmless in the context of that case. The prosecutor's comment here was equally "unquestionably improper" and "completely beyond the limits of propriety," and it was not saved from harmfulness by referring only to a collateral matter. Rather, it went to the critical issues of Scott's character and credibility.

In Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985), this court said:

> It is patently improper for an attorney to suggest in closing argument that he has additional knowledge or additional reasons for believing that certain witnesses are credible or believable. The comments in this case are a flagrant violation of the moral, ethical, and legal duty of a state prosecutor....(cite omitted)

That is what the prosecutor did here - by suggesting the truck was stolen, the prosecutor was suggesting he knew more about

the case than the jury had been told. He insinuated that Scott had committed yet another crime. This was reversible error.

Lacking legally sufficient evidence, petitioner's conviction cannot be sustained and must be discharged. Even if this court were to find the evidence to be legally sufficient, then it must reverse for new trial due to prosecutorial misconduct.

VI CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this court discharge his conviction on the ground of insufficient evidence, or in the alternative, vacate his habitual violent offender sentence and remand for resentencing with appropriate directions.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Sara Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Roy Nebraska Scott, DOC no. *288082*, Putnam Correctional Institution, P.O. Box 279, East Palatka, Florida 32131, this 8 day of June, 1992.

KATHLEEN STOVER