IN THE SUPREME COURT OF FLORIDA

ROY NEBRASKA SCOTT,

Petitioner,

v. CASE NO. 79,823

STATE OF FLORIDA,

Respondent,

PETITIONER'S REPLY BRIEF ON THE MERITS

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I SUMMARY OF **ARGUMENT**

This court's opinion in Ross, infra, did not address petitioner's double jeopardy or statutory construction arguments, and thus, is not dispositkve of this case.

Contrary to the state's arguments, this court does have discretionary jurisdiction, which it may choose to exercise or not, over the second issue here.

Contrary to the state's arguments, the evidence was legally insufficient to find petitioner in constructive possession of crack found in the car he was driving, but which did not belong to him.

II 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.

The state argues that the issues in this case have been resolved against petitioner by this court's recent decision in **Ross v. State**, ____ So.2d ____, 17 FLW S367 (Fla. June 18, 1992).

Ross dealt primarily with the inclusion in the habitual offender statute of aggravated assault as a predicate to finding a defendant to be an habitual violent offender, while the more serious crime of aggravated battery was not included among the violent crimes which serve as such a predicate. As a secondary matter, Ross also rejected the defendant's due process argument, that is, that finding him to be an habitual violent offender when his present offense is nonviolent violates due process.

Petitioner **Scott** did raise the same due process argument in his merit brief, and that argument has been resolved against him by the decision in Ross. Petitioner made other arguments, however, which Ross did not address. Petitioner argued that rules of statutory construction require that the present conviction also be for a violent felony, otherwise, the statute does not make sense. He also argued that focusing on the character of the prior offense resulted in a double jeopardy

violation. Ross did not address, let alone resolve these issues, and they remain for the court to decide.

The statute's 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 which have been held to be constitutional. In Hall, 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), review pending no. 79,237. 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.

No Florida court, including this court, has addressed this distinction in a meaningful way. This court recently said in Ross:

> The entire focus on the statute is not on the present offense, but on the criminal offender's prior record,

Ross, 17 FLW at S368. Yes, and this is the very source of the double jeopardy problem.

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 the operation of section 775.084(4)(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, and is barred by the state and federal constitutions. Ross did not address this issue, and is not dispositive of the certified questions here.

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.

The state argues that this court should not reach this issue as it lies beyond the scope of the issue for which jurisdiction lies.

The jurisdiction of this court is based upon article V, section 3(b)(3), of the Florida Constitution, which states the supreme court may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified to be in direct conflict with a decision of another district court (emphasis added). See also Rule. 9.030(a)(2)(A)(v), Fla.R. App.P.

Once this court has jurisdiction over a decision, it has jurisdiction to rule on all issues raised in the case. See Trushin v. State, 425 So.2d 1126 (Fla. 1982); Savoie v. State, 422 So.2d 308 (Fla. 1982); Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Jacobson v. State, 476 So.2d 1282 (Fla. 1985). As this court said in Savoie, 422 So.2d at 312: "[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process.'' Thus, this court has the jurisdiction to reach all issues raised here. Whether it will choose to do so is a matter properly within the court's discretion.

The state begins its argument on the merits by seeking to make a highly-refined distinction between the issues of whether

the evidence was legally sufficient, and whether the trial court erred in denying petitioner's motion for judgment of acquittal (JOA). The fact is, no such distinction exists. The questions are in essence one and the same, and the issue can be expressed either way. However it is expressed, there is only one standard for review of the sufficiency of the evidence in Florida. State v. Law, 559 So.2d 187 (Fla. 1989); Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), review denied 503 So.2d 328 (Fla. 1987). The state's arguments to the contrary are meritless.

The state claims petitioner did not preserve the sufficiency argument for review, because his brief is more detailed than his motion for JOA. On motion for JOA, petitioner argued the state had presented no evidence to indicate he knew the contraband was present, or knew what it was. The state was obliged at this point to argue what evidence proved either knowledge element. The state failed to make any argument, but the trial court held the state had made a prima facie case. Especially on the facts of this particular case, where the knowledge element was directly related to the fact that Scott was driving a car which belonged to someone else, the motion for JOA was sufficient to preserve the issue for appellate review.

The state next argues that the court properly denied the motion for JOA because the cocaine was in "plain view" in a clear, plastic baggie beside the passenger seat near the hump in the middle of the vehicle (State's Brief (SB), 9). On the

basis of this fact, the **state** concludes the baggie was within reach, thus it was in petitioner's actual possession.

This argument omits a crucial portion of the facts, and the state's conclusion is not supported by the facts or the law. The cocaine was found by an officer searching the passenger side of the car by leaning over the seat with a flashlight. The cocaine was stuffed down between the passenger seat and the hump (T-95-97). The officer searching the driver's side did not **see** the cocaine until the first officer held it up (T-50-51). The first officer characterized the cocaine as having been in "plain view," and this is the characterization on which the state relies in making its argument. This conclusion, however, was for the court, not the officer, to make.

The evidence here is not at all convincing that the cocaine was in such "plain view" that it can reasonably be concluded that Scott must have known of its presence. The officer who found it had a flashlight; Scott did not. The officer had to fish around for it; there was no evidence Scott ever reached over to the passenger side. The officer on the driver's side, the side where Scott was sitting, did not see the cocaine until the first officer held it up. Perhaps, this case points out that there is plain view, and there is plain view. That is, while the officer might have considered the cocaine to be in "plain view," the officer's own testimony was not convincing that Scott must have known of the presence of the substance. Under the officer's account, it could easily be seen that Scott did not necessarily know the substance was there. There was no

proof that he did. That leaves the state with mere proximity as the only proof that Scott knew the cocaine was present, and that is not sufficient.

The assumption behind the actual possession standard is that the possession is so personal, so intimate - in the hand, the pocket, one's purse or bag - that the person must necessarily know he possesses the thing, and while less strong, that he knows the nature of the thing he possesses. The latter is a lesser inference because, for example, a person may know he possesses a sealed box nevertheless without knowing what the box contains. Assuming there is some basis for the state to argue actual possession here, whatever inference of knowledge could arguably be drawn therefrom is, in any case, rebuttable and not conclusive. Frank v. State, 199 So.2d 117, 120 (Fla. 1st DCA 1967). Any such inference was rebutted here.

The facts of this case show the fallacy of an actual possession theory based on a claim contraband is within reach, when the defendant claims he does not know it is there. If he does not know the thing is there, it does not matter that he could reach it, if he knew of it. In Brooks, when the police found the two defendants, who did not live in the house, one was talking on the phone, sitting on the floor in front of a walk-in closet, and the other was walking out of the same closet, holding a hanger. Cocaine was found in the closet, "sticking out from between blankets on the left shelf." Brooks v. State, 501 So.2d 176, 177 (Fla. 4th DCA 1987). Both women were charged with possession of the cocaine. The district

court said the evidence proved one of them was within arm's reach of the cocaine, and the other one would have been, had she stood up. Nevertheless, the court found it "clear" that neither woman was in actual possession of the cocaine because "actual possession exists where the accused has physical possession of the controlled substance and knowledge of such physical possession," citing Willis v. State, 320 So.2d 823, 824 (Fla. 4th DCA 1975). No other standard is rational or fair when the state claims the contraband was within reach, and the defendant denies knowing it was there.

The state argues that knowledge, being a state of mind, is a fact question for the jury. Whatever its value may be in other contexts, this is not a correct statement of the law, where the issue is joint possession of a thing later found to contain drugs or firearms. The state also argues that Scott cannot claim joint possession because "there was no one else in the car with him when he was stopped" (SB-LO). This is also an incorrect statement of the law. Perhaps calling it "joint possession" is somewhat imprecise, because it actually refers to whether the defendant has exclusive possession over the thing. There is no legal requirement at all that the joint possessor be present for a defendant to make this claim.

In A.S., the juvenile was stopped for a traffic violation while driving his sister's car. A.S. v. State, 460 So.2d 564 (Fla. 3d DCA 1984). During an ensuing search, cocaine was found in the glove compartment. The appellate court held the evidence did not support a finding that A. was in possession of

the contraband. Where the state failed to introduce evidence of knowledge, contrary to the state's argument, the question of whether knowledge had been proved was not solely a question for the trier of fact.

Similarly, while Mr. Doby was presumably the only person seated in his wheelchair, yet since others had access to the chair, he was found not to be in exclusive possession and could not be convicted of possessing contraband found in the chair. Doby v. State, 352 So.2d 1236 (Fla. 1st DCA 1978). Mr. White also won reversal on the theory that, despite the fact he was the only occupant in the car at that moment, he did not have exclusive possession of a borrowed car and its contents. White v. State, 539 So.2d 577 (Fla. 5th DCA 1989). In none of these cases was the question of whether the defendant had knowledge left solely to the jury. Rather, it was judged by the usual standard for sufficiency of the evidence.

In Sindrich v. State, 322 So.2d 589 (Fla. 1st DCA 1975), two college students were hired to drive a truck with a locked cargo area. They had no key or other access to the cargo area, and were found not to be legally in possession of the contraband found there. This finding was necessarily based on a theory of joint possession with the absent owner of the truck.

These cases all deal with issues very similar to the instant case. All found the defendants not to be in possession as a matter of law, not that it was a question for the jury. All recognized the concept of "joint possession" even though

the other possessor was **not** physically present at the time of the stop. The state's arguments to the contrary are incorrect.

Finally, the state argues that, because Scott did not testify, his theory **of** defense "was hardly the 'theory of defense' contemplated by this court in Law" (SB-11-12). The fact that Law's hypotheses of innocence were more detailed does not mean Scott does not have one, unless it meets Law's level of detail. Yet this is what the state argued.

This argument is contrary to the law. There is no requirement that the defendant testify in order to have a theory of **the** case cognizable under law. On a different, but related matter, Florida courts have held, for example, that a trial court must instruct the jury on any defense of which there is any evidence, even where the only evidence arose on cross-examination. Edwards v. State, **428** So.2d 357 (Fla. **3d DCA** 1983); see also Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied **402** So.2d 613 (Fla. 1981), in which the court said:

> ... which holds that a requested instruction on intoxication must be given even though the only evidence of it comes from cross-examination of **a** state witness, is not supported by empirical evidence, and the defendant **denies being** intoxicated.

Edwards, citing Mellins at 1209. Here, evidence **that** the car did not belong to Scott, even without evidence as to how long he had it or how he got it, was enough to make a claim of joint possession, which the state **was** obliged to overcome, and failed to do so. Thus, the evidence was insufficient to sustain conviction.

As to the prosecutorial misconduct argument, petitioner relies on his argument in the initial merit brief, except to add that the prosecutor's argument to the effect that Scott might have stolen the car was obviously improper. While it could be argued on appeal as improperly implying to the jury that Scott was a car thief as well as a crack user, it can also be argued as implying that the state had proof, which it failed to introduce, that he was a car thief as well as a crack user. As the trial court was well aware of the basis of the objection, contrary to the state's argument, Steinhorst (that the argument on appeal must be on the same basis as the objection at trial), is not applicable here. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

III 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 21 day of July, 1992.

KATHLEEN STOVER