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JUL 6 1992

CLERK, SUPREME COURT

By [Signature]  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,877

THOMAS JAMES GILMORE ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the Appellee in the District Court of Appeal, Fourth District.

In the brief, the parties will be referred to as they appear before this Honorable Court except that the Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented in the Initial Brief of Petitioner to the extent that they are nonargumentative.

## SUMMARY OF THE ARGUMENT

### I.

Petitioner argues that he was denied a fair trial by the use of his statement. However, he did not preserve this issue for appellate review, and the error, if any, is not fundamental. Further, the record does not demonstrate that the statement **was** given during a plea negotiation. The statement was **made** after Petitioner waived his right to remain silent, and was given in the presence of his attorney.

### II.

Petitioner argues that certain portions of Florida Statute 775.084 (the "habitual offender" statute) violate the single-subject rule of the Florida Constitution. This issue was not preserved because it was not raised in the trial court. Further, Petitioner has no standing to bring the argument, **because** he is not one of the individuals whose rights **were** affected by the 1989 amendment of the statute. Finally, the statute is constitutional under the guidelines laid down by this Court in Burch v. State, 558 So. 2d 1 (Fla. 1990).

A R G U M E N T

PETITIONER WAS NOT DENIED A FAIR  
TRIAL BY THE USE OF HIS STATEMENT

Petitioner argues that a statement which he gave to the assistant state attorney who was assigned to his case was improperly admitted and deprived him of a fair trial. Appellant's argument on this point must fail for two reasons:

A. Petitioner's objection was not  
preserved for appeal

In the first place, Petitioner did not preserve his objection for appeal by objecting to the testimony or moving for mistrial in the trial court. It is axiomatic that such an objection is necessary for preservation. In Clark v. State, 363 So. 2d 331 (Fla. 1978), this Court said:

. . . . we have consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. (citation omitted).

Clark, Id., at 333

In Donovan v. State, 417 So. 2d 674 (Fla. 1982), this Court reiterated its position with respect to the necessity of a timely objection:

. . . . unless a timely objection **and** a motion for mistrial are made, the error is waived and cannot be **raised** for appellate review.

Donovan, Id., at 675,



Likewise, in Tillman v. State, 471 So. 2d 32 (Fla. 1985),  
this Court said:

In order to be preserved for further review by a higher court, an issue must first be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be past of that presentation if it is to be considered preserved.

Petitioner admits that the trial counsel did not object to the testimony of the assistant state attorney. Therefore, in order for this Court to consider Petitioner's argument on this point, it would have to find that the error was fundamental. However, in Ray v. State, 403 So. 2d 956 (Fla. 1981), this Court equated fundamental error with a denial of due process when it said:

This Court has indicated that for error to be so fundamental that it may urged on appeal, though not properly presented below, the error must amount to a denial of due process.  
(citation omitted)

\* \* \* \*

Fundamental error has been defined as "error which goes to the foundation of **the** case or goes to the merits of the cause of action."  
(citation omitted) The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly" . the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application, (citation omitted)

Ray, Id., at 960

In the case at bar, Petitioner gave a statement to the prosecutor which was essentially exculpatory (R 126, 128, 132), in the presence of his attorney and after being advised of his rights. It is impossible to accept the argument that **the** subsequent use of that statement is "fundamental error." **Hence**, Petitioner's argument on this point must fail for lack of preservation.

B. Petitioner's statement was not used improperly

Petitioner's conclusion that the statement was made in the course of a plea negotiation appears to **be** based on **one** sentence in the transcript:

MR. KILLER: Those are other matters that Mr. Spiller [the original prosecutor] inquired into some involving Darren Coleman and some involving this Defendant. He also goes over a plea offer.

(R 136, emphasis added)

However, when the prosecutor introduced the statement and explained how it was taken, no such offer was mentioned:

Q. [By the prosecutor] Okay. **And** can you explain generally the circumstances surrounding the interview?

A. Mr. Killer, who is the Defense attorney present in the courtroom at this time with the Defendant, and I had a discussion concerning the knowledge that the Defendant had concerning the offense that **he is charged** with as well as other matters. And he

provided me the opportunity to take a taped statement of the Defendant.

( R 120-121 )

Although Petitioner alleges that his statement was taken as part of a plea negotiation which fell through, it is not clear that the statement and the offer (if there was one in this case -- the record is silent on this point as well) were related to each other. By the same token, it is clear that the statement is exculpatory in nature (R 126, 128, 132) and that the references to the plea offer were redacted before the transcript of the statement was shown to the jury (R 136). It goes without saying reversible error cannot be based conjecture. As this Court pointed out in Sullivan v. State, 303 So. 2d 632 (Fla. 1974) cert. denied, 428 U.S. 911, 96 S. Ct. 3226, 49 L. Ed. 2d 1200 (1976):

Reversible error cannot be predicated on conjecture. (citation omitted) This is especially the case when, as here, the testimony in question does not lead to one interpretation rather than another. . . .

Sullivan, Id., at 635

It is Petitioner's burden to show error and make it appear from the record. In re Estate of Lieber, 103 So. 2d 192, 196 (Fla. 1958); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). At bar, the record does not clearly establish that the statement which was given to the assistant state attorney was given as part of a plea negotiation; Petitioner's argument should fail for that reason alone.

Be that as it may, even assuming the statement was given during a plea negotiation, it is not inadmissible per se. In dealing with such statements, this Court has used a two-tier analysis borrowed from the federal courts. In Bottoson v. State, 443 So. 2d 962 (Fla. 1983); this Court said:

. . . . **before** excluding statements made during a plea negotiation, a trial court must apply a two-tier analysis and determine, first, whether the accused exhibits an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances, (citations omitted)

Bottoson, Id., at 965

Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Stevens v. State, 419 So. 2d 1058 (Fla. 1982), cert. denied. 459 U.S. 1228, 103 S. Ct. 1236, 75 L. Ed. 2d **469** (1983).

In the case at bar, the record is silent as to the reason for the statement and the context within which it was given. Given the "presumption of correctness" expressed by this Court in Appagate, supra, and the lack of information in the record regarding whether a plea negotiation took **place** and if the statement was given **as** a part of it, this Court should affirm the Fourth District Court of Appeal.

POINT II

**THE TRIAL JUDGE DID NOT FUNDAMENTALLY VIOLATE  
SINGLE SUBJECT PRECEPTS BY DECLARING APPELLANT  
A HABITUAL FELONY OFFENDER AND SENTENCING HIM  
ACCORDINGLY.**

Petitioner lastly essentially alleges that the trial judge fundamentally erred by declaring him an habitual felony offender and sentencing him to thirty years of imprisonment as such for committing the crime of possession of a firearm by a convicted felon. Petitioner notes that certain portions of section 775.084, Fla. Stat., under which he was habitualized, were enacted by section 1 of Chapter 89-280 of the Laws of Florida. He points that this legislation was enacted in violation of the "single subject rule" found in Article III, Section 6 of the Constitution of the State of Florida. The State disagrees that Appellant is entitled to any relief.

Preliminarily, the State submits that Appellant cannot fruitfully litigate this claim here insofar as he did not raise it below. Compare Henderson v. State, 568 So. 2d 925 (Fla. 1st DCA 1990) and Walker v. State, 565 So. 2d 873 (Fla. 4th DCA 1980); contrast Trushin v. State, 425 So. 2d 1126 (Fla. 1982).

More importantly, Appellant lacks the standing to pursue this claim here. The portions of the statute under which he was habitualized and sentenced, sections 775.084(1)(a)(1-2) and 775.084(a)(2), Fla. Stat., were not substantially affected by the portions of the statute which were amended by section 1 of Chapter 89-280). See Wright v. State, 16 FLW D1453 (Fla. 4th DCA

May 29 1991) citing Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952); compare also Webster v. North Orange Memorial Hospital Tax District, 187 So. 2d 37, 42 (Fla. 1966).

Turning alternatively to the unrepresented merits, it is abundantly clear that the 12 sections of Chapter 89-280 comprise one "comprehensive law in which all of its parts are directed towards meeting the crisis of increased crime," rather than a law involving "two separate ....subjects.. so tenuous[ly]... relat[ed] ....that...the single-subject rule of the constitution ha[s] been violated" under Burch v. State, 558 So. 2d 1, 3 (Fla. 1990). In Burch, this Court upheld the constitutionality of the 76-section Chapter 87-243, Laws of Florida, despite the fact that this law contained many quasi-civil facets which were designed to meet the crime crisis. Therefore, the mere fact that some sections of Chapter 89-280 deal directly with solving the crime crisis by strengthening criminal enhancement statutes, while other sections of this chapter deal indirectly therewith by regulating the often problematic and crime-related practice of repossessing vehicles, does not render the entire chapter void under Burch. Petitioner's main case of Bunnell v. Stte, 453 So. 2d 808 (Fla. 1984) is readily distinguishable, since it involved two practically unrelated topics.

Assuming arguendo that Appellant's single subject challenge to the constitutionality of the habitual offender statute was both preserved and meritorious, the State would note for the record that any such holding would not constitutionally bar the

habitualization of criminal defendants who have committed their predicate offenses on or after May 2, 1991. The passage of Chapter 91-44, Laws of Florida on this date, reenacting all of Chapter 89-280 as codified, prospectively cured any single-subject flaws in its original enactment. See e.g. Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 515 So. 2d 217, 218-219 (Fla. 1987); State v. Combs, 388 So. 2d 1029, 1030 (Fla. 1980); Santos v. State, 380 So. 2d 1284 (Fla. 1980), and Florida Statutes, Vol I (1989), "Preface," page vi.

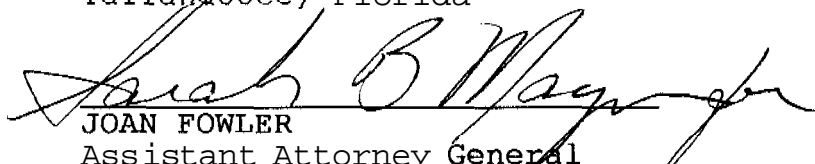
In sum, the trial judge did not fundamentally err in sanctioning Appellant as a habitual offender, and the Fourth District Court of Appeal should be affirmed.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and citations of authority cited herein, Appellee respectfully requests that the certified question of the Fourth District Court of Appeal be answered in the negative.

Respectfully submitted

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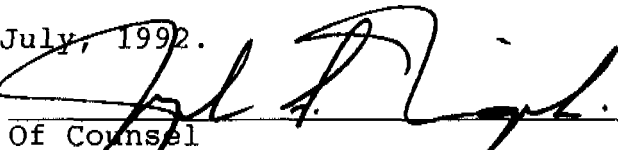
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits has been furnished to **DEBRA MOSES STEPHENS, ESQ.**, Assistant Public Defender, 15th Judicial Circuit, Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 2nd day of July, 1992.

  
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