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IN THE SUPREME COURT OF FLORIDA

JOHN E. WARD,

Petitioner,

v.

CASE NO. 79,986

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner in this brief. A one volume record on appeal, including transcripts, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the decision *of* the lower tribunal.

STATEMENT OF THE CASE AND FACTS

By information filed April 5, 1991, petitioner was charged with 4 counts of attempted armed robbery and 1 count of possession of a short barrel shotgun (R 155-56). The cause proceeded to jury trial on August 21-22, 1991, and at the conclusion thereof petitioner was found guilty of 3 counts of attempted armed robbery and 1 count of possession of a short barrel shotgun (R 169-73).

At trial, the state's evidence tended to prove that petitioner confronted 2 men and 2 women at Lost Lake; he pointed a sawed-off shotgun at three of them and made them kneel on the ground as he demanded money; one of the men grabbed the gun and it went off; the gun was removed from petitioner, who was chased by one victim but ran away (R 14-26; 31-44; 51-67). The gun was delivered to the police (R 70-75), who apprehended petitioner (R 76-88).

Petitioner's defense was that he and his wife went to lost Lake; one of the two men had pointed the shotgun in his face; they struggled and it went off; and then the men beat him (R 89-98).

At sentencing, the prosecutor noted the attempted robberies were second degree felonies (R 237). The state proved that petitioner had prior 1990 Leon County convictions for aggravated assault and resisting an officer with violence (R 206-207; 240-46). Petitioner was sentenced as an habitual violent offender to concurrent 20 year sentences, with a 10

year mandatory minimum (R 247-48). His sentencing guidelines scoresheet called for 9-12 years on all charges (R 211).

On appeal, petitioner argued the habitual violent offender statute was unconstitutional. Petitioner also argued the degree of crime for the attempted robbery charges on the judgment was incorrect, with which the lower tribunal agreed. See appendix.

The lower tribunal held that the habitual violent offender statute was constitutional, but certified one of two questions it had previously certified in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending, case no. 78,715:

> 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?

On June 8, 1992, a timely notice of discretionary review was filed. On June 10, 1992, this Court entered its briefing schedule order.

SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the affirmative. 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 a 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.

The proper remedy is to vacate the sentences and remand for resentencing under the sentencing guidelines.

ARGUMENT

THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES, ARE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PROVISIONS.

A. INTRODUCTION

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 Florida. Section 775.084(1)(b), Florida Statutes, now defines a habitual violent felony offender as one who has committed one of 11 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 a question, asking whether a sentencing scheme that permits enhancement of a sentence for an habitual violent felon violates the constitutional Double Jeopardy clause.

B. 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.). This Court has held that

unambiguous statutory language must be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1979).

However, Section 775.084(4)(b) defines a habitual violent felony offender as one who commits only one felony within five years of a prior, enumerated violent felony. That construction permits a habitual violent felony offender sentence for a single, prior crime of violence, even though the common definition of habitual means something more.

C. CONSTITUTIONALITY

1. Due Process

If a construction of the statute which does not require the defendant to be a repeat, constant, or continual felon 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). As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. Section 775.084(1)(b), Florida Statutes. This is the object the statute seeks to attain. However, as applied here, the statute does not require the defendant to have more than one enumerated violent felony. Here, the state established only one prior violent enumerated felony, aggravated assault,

plus the instant felony.' 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 a 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.

In the sentencing guidelines arena, this Court has held that one prior crime (second degree murder), followed by a subsequent crime (another second degree murder), does not constitute a continued or persistent pattern of criminality. State v. Dodd, 594 So.2d 263 (Fla. 1992). Petitioner asks: if persistent means the same thing as habitual, and if a defendant who commits two murders is not persistent, how can a defendant who commits an aggravated assault followed by three attempted robberies be habitual?

The First District Court of Appeal rejected a similar due process argument in Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), review pending, case no. 78,179, oral argument held April

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[1]The prior resisting arrest with violence is not an enumerated prior violent felony.

7, 1992.[2] 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 of Appeal 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) (Cowart, J., dissenting), review dismissed, 581 So.2d 1309 (Fla. 1991). The

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[2] Petitioner is not arguing the statute is unconstitutional because the legislature failed to include aggravated battery in 1988 as one of the enumerated prior violent felonies.

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., amend. V, XIV.; Fla. Const., art. 1, §9. The First District Court of Appeal 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 certified question.

To punish a defendant as a habitual violent felony offender, the state need only show that he has one prior offense within the past five years for a violent felony enumerated within 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: that 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 -- not the case 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. See Hall v. State, 588 So.2d 1089 (Fla. 1st DCA 1991) (Zehmer, J., concurring), questions certified by unpublished order dated Dec. 12, 1991, review pending, case no. 79,237:

> 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 other jurisdictions.

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

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

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(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, barred by the state and federal constitutions.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner's sentences must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions of Section 775.084. The statute violates constitutional due process and double jeopardy provisions. The certified question should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, and a copy has been mailed to petitioner, #565644, P.O. Box 2000, Blountstown, Florida 32424, on this 11th day of June, 1992.

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

FIRST DISTRICT, STATE OF FLORIDA

JOHN E. WARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

* CASE NO. 91-3288

Opinion filed June 2, 1992.

Appeal from the Circuit Court for **Leon** County, William Gary, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Ward raises various constitutional challenges to the habitual violent felony offender sentences imposed following his convictions on three counts of attempted armed robbery. We have rejected each of these challenges in many prior decisions, and we do so again. However, as we did in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), we certify the following question to be of great public importance:

> DOES SECTION 775.084(1)(b) VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE

JEOPARDY BY INCREASING DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE?

Nevertheless, we remand this cause to the trial court to correct clerical errors in the judgment and sentence forms. The judgment should be corrected to indicate that the attempted armed robberies are second degree felonies, and the sentence forms should be corrected to indicate that the trial judge imposed concurrent ten-year minimum mandatory sentences for the attempted armed robberies.

SHIVERS, MINER and ALLEN, JJ., CONCUR.