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IN THE SUPREME COURT OF FLORIDA

KENNETH L. MAEWEATHER, :

Petitioner, :

v. : CASE NO. 79,995

STATE OF FLORIDA, :

Respondent. :

_____ :

REPLY BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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I SUMMARY OF ARGUMENT

Under Bryan v. State, infra, it is clear that evidence that appellant Maeweather allegedly shot Joe Ramirez in the head was not admissible in his trial for possession of a firearm, which was based on constructive possession of a firearm when he was arrested the day after the alleged shooting. The state wholly failed to distinguish Bryan and relied on other cases, which are inapplicable here.

This court's opinion in Ross, infra, did not address petitioner's double jeopardy or statutory construction arguments, and thus, is not dispositive 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 first issue here.

II ARGUMENT

ISSUE I

THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING THE TESTIMONY OF JOE RAMIREZ. FIRST, HIS TESTIMONY WAS IRRELEVANT TO THE CHARGE BEING TRIED: SECOND, THE STATE'S DISCOVERY VIOLATION WAS SUBSTANTIAL AND CAUSED PROCEDURAL PREJUDICE TO PETITIONER. THUS, ON EITHER GROUND, THE TRIAL COURT ERRED IN ALLOWING RAMIREZ TO TESTIFY.

The state argues that this issue is not reviewable by the court because it was not the subject of a certified question. This argument is not correct. Its own jurisdiction is well-known to the court and ought to be well-known also to the attorney general's staff.

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. Thus, this court has jurisdiction to rule on all issues raised here. 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." Surely, this principle is well-known to the attorney general's office.

As to the merits of the state's brief, the state's claim that the prior shooting of Ramirez was "inextricably intertwined" with the presence of a gun in a couch the following day is ludicrous (State's Brief (SB), *8).* The two events are easily separable one from the other. Since the state's premise is erroneous, the cases supporting that premise, Austin and Erickson, are irrelevant to this case. Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990); Austin v. State, 500 So.2d 262 (Fla. 1st DCA 1986), review denied 508 So.2d 13 (Fla. 1987).

The facts of this case are much closer to Bryan, in which this court held that evidence that the murder weapon had been used earlier in a bank robbery was inadmissible, as any probative value was substantially outweighed by the danger of unfair prejudice. Bryan v. State, 533 So.2d 744, 747 (Fla. 1988), cert. denied 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989). The state did not even mention Bryan, let alone distinguish it, in its brief.

A characteristic which both Austin and Erickson share, which this case does not, is that the collateral crime sought to be presented to the jury in both was similar to the crime being tried. That was not the case here, or in Bryan, which is similar in its essential facts to the instant case. Austin was being tried for a robbery and shooting, and the state wanted to introduce evidence of another attempted robbery, with an

attempted shooting, on the same day. Erickson involved a sex offense against a child; the evidence sought to be admitted involved sexual misconduct with another child at the same picnic.

While the Bryan court found the evidence of the bank robbery to be harmless, the evidence here of the alleged shooting was not harmless. The bank robbery in Bryan was a less serious crime than the first-degree murder being tried, while here, the allegation that Maeweather shot Ramirez in the head is much more serious, and far more prejudicial, than the status offense - possession of a firearm - being tried. Contrary to the state's argument, there was no inextricable link between the shooting one day and Maeweather's arrest the next day, and Bryan refutes the state's arguments. The jury did not need to know what led up to Maeweather's arrest, letting the jurors know of the shooting prejudiced appellant, and this cause must be remanded for new trial.

The state cited Gillion v. State, 573 So.2d 810 (Fla. 1991), for the proposition that Ramirez' testimony was admissible to "fill in the background of the narrative and give it interest, color, and lifelikeness" (SB-9). The question in Gillion was whether it was prejudicial for a police officer to characterize the neighborhood in which he found the defendant as a "high-crime area," and whether the officer's remarks in that particular case constituted such a characterization.

The supreme court said that such comments could be reversible error in some circumstances, but they were not in that

case, because the officer confined himself to his factual observations and did not testify about the reputation of the place. Gillion focused on the characterization of a place; it did not address the characteristics of a defendant. The facts of Gillion are not relevant to the issue here, and Gillion can hardly be read as receding from the proscription of Bryan that collateral crime evidence can be admitted only when it is relevant.

The state argued that evidence Maeweather possessed the gun on a different date was relevant to the crime charged, citing United States v. Donofrio, 450 F.2d 1054 (5th Cir. 1971). While the Fifth Circuit did permit evidence that Donofrio had possessed a gun prior to the charged incident, this court should remember that Donofrio was decided on a constructive possession theory. The Fifth Circuit said the earlier possession tended to prove the knowledge and dominion and control elements of constructive possession. By comparison, the issue here was actual possession, the elements of which are not the same as for constructive possession. Further, Donofrio admitted evidence of prior possession, an apparently simple and unadorned possession, without any fact anywhere near as distracting as the allegation here that Maeweather had shot Ramirez in the head. Donofrio cannot be read as permitting any and all kinds of evidence of prior possession, and it most certainly did not justify the introduction here of evidence of the alleged shooting.

The state's argument itself makes clear the inadequacy of the Richardson inquiry here. Richardson v. State, 246 So.2d 771 (Fla. 1971). Ramirez was the only witness who claimed that the gun found when Maeweather was arrested was the same gun allegedly used to shoot Ramirez. In other words, this identification of the gun as the same gun in both incidents is wholly dependent on Ramirez' testimony. If it were not the same gun, Ramirez' testimony cannot prove that Maeweather possessed the gun found upon his arrest, and thus, the testimony seems to have little probative value.

On the other hand, since Maeweather is a convicted felon, he is not permitted to possess any gun, **so** Ramirez' testimony might have some probative value, although there is still the issue of charging the defendant with a definite crime. More importantly, however, defense counsel argued that, had he known Ramirez would testify about the shooting, he would have presented witnesses who would say that no shooting occurred that night. Ramirez' testimony would have very little probative value, if he were lying about Maeweather having a gun that night.

The issue was never that Maeweather did not know that Ramirez had some association with his **case,** Maeweather knew about him, but could reasonably believe Ramirez would not be permitted to testify. That is how Maeweather was misled by the state's late discovery, and even the state's argument in this appeal makes that clear. Maeweather could reasonably believe that, since Ramirez had no personal knowledge as to the

circumstances of his arrest, and except as the precipitating incident, the alleged shooting of Ramirez was not relevant to his arrest, Ramirez would not be permitted to testify about the shooting. By permitting Ramirez to testify about the shooting, without giving the defense sufficient time to gather witnesses to contradict Ramirez' account, the trial court's Richardson proceeding was inadequate and denied appellant a fair trial.

ISSUE III

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 Maeweather 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. Tillman, the leading case on the remaining questions, remains set for oral argument. Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending Fla. S.Ct. no. 78,715.

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.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse his conviction and remand for new trial, or in the alternative, reverse and remand for resentencing within the guidelines.

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 Bradley Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida" and a copy has been mailed to Mr. Kenneth L. Maeweather, inmate no. 541206, Mayo Correctional Institution, P.O. Box 448, Mayo, Florida 32066, this 25 day of August, 1992.

KATHLEEN STOVER