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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE COON, :

Petitioner, :

vs. : Case No. 80,151

STATE OF FLORIDA, :

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This is an appeal from the Tenth Judicial Circuit. The record on appeal will be referred to as "R" followed by the appropriate page number. The defendant is the petitioner/appellant and will be referred to as the respondent.

STATEMENT OF THE CASE

On March 6, 1991, the State Attorney of the Tenth Judicial Circuit, in and for Hardee County, Florida filed and information charging Petitioner, Robert Lee Coon, with possession of child pornography in violation of section **827.071** (5), Florida Statutes (1986). (R1, 2)

The Honorable R. Earl Collins presided over the jury trial conducted on August 22, 23, **1991.** (R51-303) Prior **to** trial, defense argued a motion in limine to prevent the State from presenting evidence of "child erotica" to the jury. (R56) Child erotica is any item that would serve a sexual purpose to a person that had a sexual interest in children. (R61) It is not illegal to possess child erotica. (R61) The court ruled that the child erotica items found at Appellant's house would be admissible. (R78) Defense made an objection to this ruling, which would stand throughout the trial. (R79, 80)

The jury returned a verdict of guilty **as** charged an August 23, 1991. **(R8, 301)** Petitioner was sentenced on September 3, 1991 to 10 years imprisonment as a habitual felony offender. (R308, 13) Petitioner timely filed his notice of appeal on September 6, 1991. (R17) The Second District Court of Appeal upheld the lower court's ruling, however they noted the decision was contra to Johnson v. State, 589 So. 2d 254 (Fla. 3d DCA **1991).** Johnson is currently pending in the Florida Supreme Court in case number **79,150.**

STATEMENT OF THE FACTS

Hal Emmons had known Petitioner for about three years (R100). Emmons told Detective Crawford that Petitioner, Robert Coon, was interested in making child pornographic videos (R101). Under the direction of Crawford, who is a special investigator with Hardee County Sheriff's Department, Emmons called Coon (R101, 106, 108). Two phone calls that were made were recorded (R101, 108, 109). Emmons took Al Danna, special agent with Florida Department of Law Enforcement (FDLE), to Coon's house (R103). Emmons introduced Danna to Coon as an acquaintance, who ran a video business (R104, 131).

After Emmons made the first phone call to Coon, Detective Crawford began to expand his investigation (R111). Crawford contacted Rose Giansanti of the FDLE (R111). Giansanti advised Crawford that Al Danna would be qualified to work on this type of case (R112). Giansanti and Danna, both of the FDLE, agreed to come to Hardee County to help Crawford on this case (RR112).

On January 29, Emmons introduced Danna to Coon (R130). Coon wanted Danna to help him professionally produce some child pornography videos (R132). Coon was to look for girls at the fair who would perform in the videos (R133). Coon and Danna exchanged phone numbers (R133). this first meeting was recorded and monitored by Giansanti and Crawford (R131).

Danna met again with Coon on February 7, 1991 (R138). Coon had failed to pick up any girls at the fair (R139). Danna mentioned to Coon that he wanted to produce child pornography

magazines (R140). Danna named some commercially produced magazines to see if Coon was familiar with any of them (R140). Coon knew of Lollitots (R140). Danna then told Coon he had some child pornography magazines in the car (R140, 141). Coon said "let's look at them" (R141). Danna and Coon went out to Danna's car where there were four child pornography magazines in the front seat (R141). Coon picked up the magazines and made sexual comments about the 8-12 year old girls depicted in them (R141). Coon asked how much and Danna said $35.00 each (R141). Coon didn't have any money but said he would get his check on Friday and wanted to buy one of the magazines for $30.00 (R142). Coon said he could sell the pictures to his buddies in prison for $5.00 to $10.00 each (R142). Coon said he preferred 10-11 year olds and referring to one depicted in the magazine he commented, "good eating material" (R142). Coon wanted to purchase the magazine Schoolgirls (R142, 143). They agreed to meet again on February 15 (R143).

Coon mentioned that he could abduct a girl to use in the video, but he needed Danna's van (R146). Danna and the other investigators decided to sell the magazine so they could arrest Coon because it could be dangerous to continue this scheme (R147). Danna called Coon to reschedule their meeting to February 16 (R147).

Danna met Coon at Coon's home on the 16th. Once again, the conversation was monitored by Crawford and Giansanti (R148). Coon said he couldn't get any young girls for the video, but he mentioned Lillian who was 19 years old (R149). Coon showed Danna

a picture of Lillian with her 3 year old sister and infant daughter (R149). Coon referred to blackmailing Lillian and doing whatever they wanted with the kids (R150).

Coon had a folder with two $20 bills in it and said "$40.00 right" (R151). Coon gave the money to Danna and Danna gave Coon the magazine Schoolqirls (R151). This transaction took place in Danna's car, which was parked next to Coon's house (R151).

Coon invited Danna into his house and showed Danna pictures of nude women with infant faces that had been pasted on over the original faces (R152). Coon said he got the children's faces from missing children flyers (R152). Danna asked if he could take a picture of the collage (R153). When Danna went to the car to get his camera, he advised back-up to move in for the arrest (R153). As Danna pretended to photograph the collage the two other agents responded (R154). Danna identified himself and arrested Coon for the purchase of the child pornography magazine (R154). The conversations between Danna and Coon were recorded (R157).

The magazine Coon had purchased, Schoolqirls, was recovered from Coon in a blue folder (R164). The State introduced numerous items of child erotica that Danna confiscated at the time he arrested Petitioner (R166-177). Danna described child erotica as any item that would serve a sexual purpose to a person that had a sexual interest in children (R61, 174). A star shaped chart of pornographic pictures with children's faces was introduced into evidence (R116, 167). There was a standing objection to any of the child erotica coming into this trial (R79, 80, 167). Danna said it

was common for persons who seek child pornography to possess child erotica (R168). Two posters of child erotica were admitted into evidence (R169, 173). A photo of Lillian and some children Coon talked about using in child videos was admitted into evidence (R173). A picture depicting an abduction of a girl by a man was admitted into evidence (R175).

The two $20 bills used to pay for the magazine were marked with an x on Jackson's forehead (R197). Danna had never seen money marked like that in any prior transactions (R198).

Rose Giansanti was the case agent in charge of documentation and monitoring the case (R213, 214). Giansanti was present when Coon was arrested (R217). She went back to Coon's house on February 29 (R218). Mrs. Coon didn't go into Robert Coon's getaway room and she had no knowledge of Appellant's involvement in child pornography (R219). Mrs. Coon consented to a search of the house (R220). Appellant's room was unlocked and Giansanti didn't know who had access to that room (R233). Giansanti seized, from the room, a box of child erotica and a doll clothed in children's underwear with pins stuck in the doll's vagina, anus and breast (R223). These items were admitted into evidence over defense counsel's standing objection (R222, 79, 80).

Giansanti had also seized a book Upper Triad (R231). In that book, there were serial numbers written that matched the numbers on the two $20 bills used to purchase Schoolsirls (R231). On one prior occasion, Giansanti encountered a suspect using marked bills and that was in a drug case (R231).

Petitioner testified that Barbara introduced him to Emmons in June of 1990 (R237). Emmons had film and equipment and wanted to make films (R237). Coon was a photographer, or at least that is what he related to Emmons, but he wouldn't do anything under 18 years of age (R237). Emmons introduced Coon to Danna, who could distribute pornography (R238). Danna kept pressuring Coon to supply children for pornographic videos (R239, 240).

Coon was doing his own investigation and was playing along to get something substantial on Emmons or Danna at which time he was going to report the crime to the police (R240). Coon only trusted one police officer, Albritton of the Wauchula Police Department, who he called once and tried to waive down on the street one time (R241, 249). On neither occasion was Coon successful in making contact with Albritton (R241, 249, 250). In preparation of making the child pornography purchase, Coon marked the two $20 bills with x's on the forehead and wrote the serial numbers of the bills in the book Upper Triad. This was so Coon would have evidence to show the police (R248). Coon purchased the magazines so he could bust the seller (R246).

Coon testified the child erotica box of pictures and poster board was his, but the baby doll did not belong to himself (R252). Coon used the box to hold pictures used for making the collages (R252). The collages were made to show to Danna to make him believe Coon was sincere about getting into the business (R252). It took Coon one day to make the collages, which he did to keep Danna's interest (R253).

William Albritton was called as a rebuttal witness. Albritton knows Appellant, but was not contacted by Coon regarding a pornography case (R262, 263). Albritton did not remember any occasion where Coon tried to flag him down (R263).

SUMMARY OF THE ARGUMENT

Chapter 89-280, Section 775.084, Florida Statutes (1989) violates the one subject rule of the Florida State Constitution, Appellant did not qualify to be sentenced as a habitual felony offender because there was not a valid statute that allowed for the use of out of state convictions as prior offenses which would trigger the habitual felony offender sentencing.

The collateral evidence of child erotica found at Petitioner's house should not have been admitted into evidence. Any probative value this evidence had was substantially outweighed by its prejudicial nature and served merely to show Petitioner's bad character.

ARGUMENT

ISSUE I

WHETHER SECTION 775.084, FLORIDA STATUTES (1989), CHAPTER 89-280, LAWS OF FLORIDA VIOLATES THE ONE SUBJECT RULE OF THE FLORIDA CONSTITUTION, MAKING APPELLANT'S SENTENCE ILLEGAL.

It is error if the trial court fails to make the required statutory findings as defined by Section 775.084(1)(a), Florida Statutes (1989), before sentencing a defendant as a habitual felony offender. Smith v. State, 573 So.2d 194 (Fla. 3d DCA 1991), citing Walker v. State, 462 So.2d 452 (Fla. 1985); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990); Section 775.084(3)(d), Florida Statutes (1989).

The trial court is required to determine: (1) whether a defendant has been convicted of two or more felonies or other qualified offenses; (2) whether the felony for which the defendant is to be sentenced was committed within five years of the conviction of the last prior felony: (3) whether the defendant has received a pardon for the predicate felony: and (4) whether a predicate conviction has been set aside in any post conviction proceeding. Section 775.084(1)(a), Florida Statutes (1989). Furthermore, all evidence relied upon by the trial court to justify an enhanced sentence under Section 775.084, Florida Statutes (198(), must be produced in open court. Thomas v. State, 575 So.2d

308 (Fla. 2d DCA 1991), citing Grimmett v. State, 357 So.2d 461 (Fla. 2d DCA 1978).

In the instant case the State produced a 1986 conviction for Lewd Assault out of Lee County, Florida, in which Appellant was sentenced to nine years in prison as one prior felony (R317-321). The other prior felony the state relied upon to habitualize Petitioner was a 1981 first degree sexual assault out of the State of Wisconsin. The title of the document is Judgment of Conviction Sentence Withheld (R329). Sentence was withheld and Appellant was placed on three years probation.

It was error for the court to use the out of state conviction as one of the priors. Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 9191), held the habitual offender statute unconstitutional for offenses committed between October 1, 1989, and May 2, 1991. Chapter 89-280, Laws of Florida, which amended Section 775.084, violates the one subject rule, Id. at 1371.

The 1st DCA in Hale v. State, 16 F.L.W. D2900 (Fla. 1st DCA 1991), declined to consider the argument that Section 775.084, Florida Statutes (1989), as amended by Chapter 89-280, Laws of Florida, violates the one subject rule. That was because Appellant could have been sentenced as a habitual offender under the pre-amended version of the statute. Such is not the situation in the instant case where one of the requisite prior offenses is from out of state.

The holding in Johnson, which was certified to the Florida Supreme Court, should apply to the factual situation in the instant

case. The current charge for which Appellant received a habitual sentence occurred on February 16, 1991 (R1). There was not a constitutionally valid habitual offender statute, any time prior to May 2, 1991, that allowed use of out of state convictions to qualify as prior convictions. Therefore, Petitioner only has one prior conviction which could be considered for purposes of habitual offender sentencing. Petitioner does not qualify to be sentenced as a habitual felony offender.

Petitioner further adopts the argument on this issue as set forth in respondents brief in the Florida Supreme Court in State v. Johnson, Case No. 79,150, which will be designated Appendix B.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF CHILD EROTICA THAT WAS IN PETITIONER'S POSSESSION.

Prior to trial, defense counsel presented a motion in limine to prohibit testimony and introduction of child erotica found in Petitioner's house (R36-80). Special Agent Danna described child erotica as any material relating to children that serves a sexual purpose for a given individual (R61). Child erotica is not illegal to possess (R61). The trial court ruled that the child erotica would be admitted into evidence to show state of mind (R78, 79). Defense counsel objected to the court's ruling which was to be a standing objection throughout the trial (R79, 80). Appellee will likely argue that defense counsel waived the objection when he said, "no objection" when the child erotica was admitted. However,

it is clear from the record that counsel was simply trying to maintain rapport with the jury rather than waiving the objection as he clarified at a bench conference (R167). There was nothing to retract the standing objection which remained in full force and effect throughout the trial.

The trial court's denial of defense counsel's objections is reversible error. Florida Rule of Evidence 90.403 (1978), prohibits the admission of evidence if the evidence's "probative value is substantially outweighed by the danger of unfair prejudice..." Evidence of the child erotica collages and doll, if at all, were only marginally relevant to show Appellant's intent. However, what relevancy the child erotica may have had to show Appellant's intent is substantially outweighed by the danger of unfair prejudice. A juror who disdains items depicted in the child erotica could readily form the prejudice that if one views such materials he is a sexual deviant and just such a deviant would purchase child pornography.

Florida case law dealing with the admission of pornographic materials in a possession of child pornography case is sparse. However, a parallel can be drawn to admitting evidence of an accused's homosexuality. Like viewing adultmagazines, homosexuality fosters prejudice in a number of ways: one, both are perceived as deviant sexual conduct; two, evidence of both can be highly damaging to a person's character; three, both can be considered as revealing an unhealthy libido, a propensity to commit deviant sexual behavior.

In Sias v. State, 416 So.2d 1213, 1217 (Fla. 3d DCA 1982), the court held that evidence of the defendant's homosexuality was inadmissible in a sexual battery case because the probative value was outweighed by the prejudicial effect. The court noted the large homosexual populace and the lack of any finding that they were predisposed to sexual crimes. Id.; See also, Roby v. Kingsley, 492 So.2d 789, 792 (Fla. 1st DCA 1986).

Cases from outside of Florida have held evidence of pornographic material inadmissible in cases involving sexual offenses, In People v. Hansen, 708 P.2d 468, 471 (Colo. Ct. App. 1985), the defendant argued that the trial court erred in admitting evidence of pornography found at his residence. The evidence consisted of photographs of six adult magazines found at Appellant's residence. Id. The appellate court concluded that the trial court erred in admitting the evidence. Id. The court said that the "primary role" of the evidence was to show the defendant's bad character. Id. The court reversed the defendant's conviction and remanded the case for a new trial. Id.; See also, State v. Vanderham, 717 P.2d 647 (Or. Ct. App. 1986) (Court holds that evidence of pornographic magazines inadmissible in sexual assault case because prejudicial impact outweighed probative value).

In this case, the evidence of Petitioner's possession of child erotica had the prejudicial impact of flaunting his bad character and propensity for sexual deviancy. This impact outweighs any slight relevancy to show Petitioner's Appellant's intent. Petitioner's knowledge and intent in purchasing Schoolsirls from Danna

was manifest in Danna's testimony about the transaction and its existence did not depend on inferences drawn from other facts. Thus the presentation of the child erotica primarily served to portray Mr. Coon as a person of bad character or a sexual deviant. This case must be reversed and remanded for a new trial.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES *TO* FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT, OF APPEAL

OF FLORIDA

SECOND DISTRICT

ROBERT LEE COON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 91-02863

Opinion filed June 17, 1992.

Appeal from the Circuit Court for Hardee County; R. Earl Collins, Acting Circuit Judge.

James Marion Moorman, public Defender, and Julius Aulisio, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sue R. Henderson, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See & —— v. State, 595 So. 2d 254 (Fla. 3d DCA 1992); Jamison v. State, 583 So. 2d 413 (Fla. 4th DCA 1991), rev. denied, 591 So. 2d 182 (Fla. 1991); contra Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991).

SCHOONOVER, C.J., and DANAHY and PATTERSON, JJ., Concur.

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APPENDIX B

ISSUE II

SECTIONS 775.084, FLORIDA STATUTES (1989), CHAPTER 89-280, LAWS OF FLORIDA, VIOLATES THE ONE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

An information was filed against the respondent on July 23, 1990, charging Sale or Delivery of Cocaine (Vol. I. p.5). On July 26, 1990, the State of Florida filed notice of intent to have the respondent classified as an Habitual Violent Felony Offender (Vol. I. p.7). The respondent pled not guilty, and a jury trial was held. At trial, the respondent was found guilty as charged (Vol. I. p.19). On February 21, 1991 the respondent was declared an Habitual Violent Felony Offender by the trial court, and sentenced to twenty five years DOC with a ten year minimum mandatory prison term (Vol. II. p.187). The respondent was sentenced as a habitual violent felony offender based upon his 1987 conviction for aggravated battery (Vol. 11. p.181, 187).

Respondent's offense date was July 5, 1990 which was after the October 1, 1989, effective date of Section 775.084, Florida Statutes (1989), Ch. 89-280, Laws of Fla.

Section 775.084, Florida Statutes (1989), Ch 89-280, Laws of Florida violates the one subject rule of Article 111, Section 6, of the Florida Constitution. Article 111, Section 6 of the Florida Constitution provides that:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in

> full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida."

Chapter 89-280 embraces two subjects: habitual felony offenders or habitual violent felony offenders, and the repossession of motor vehicles. The first three sections of Chapter 89-280 amended sections 775.084 (habitual offender statute), 775.0842 (career criminal statute), and 775.0843 (policies for career criminals), Florida Statutes. Section four of Chapter 89-280 created section 493.30(16), Florida Statutes, defining "repossession". Section 493.306(6), adding license requirements for repossessors. Section six created section 493.31717) and (8), prohibiting repossessors from failing to remit money or deliver negotiable instruments. Section seven created section 493.3175, regarding the sale of property by repossessors. Section eight amended Section 493.318(2), requiring repossessors to prepare and maintain inventory. Section nine amended Section 493.3176, requiring certain information to be displayed on vehicles used by repossessors.

In State v. Burch, 558 So.2d 1 (Fla. 1990), the Florida Supreme Court quoted the following from State v. Thompson, 120 Fla. 860, 163 So. 270 (1935):

> Where duplicity of subject matter is contended for as violative of Section 16 of Article III of the Constitution relating to and requiring but one subject to be embraced in a single legislative bill, the test of duplicity of subject is whether or

> not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort.

Burch, supra, at 2.

The Burch Court also quoted from Chenowith v. Kemp, 396 So.2d 1122 (Fla. 1981):

> The subject of an act "may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection."

Burch, supra, at 2.

The different targets of the act must be naturally and logically connected Blankenship v. State, 545 So.2d 908 (2d DCA 1990). There is no natural or logical connection between recidivist and repossessors of cars and boats. Half of Chapter 89-280 addresses the prosecution and sentencing of recidivists, while the other half addresses the regulation of a lawful occupation. It is, therefore, clear that the law is "designed to accomplish separate and disassociated objects of legislative effort."

In Burch, the Florida Supreme Court upheld Chapter 87-243. In doing so, however, the Burch Court distinguished Bunnell v. State, 453 So.2d 808 (Fla. 1984):

> In Bunnell this court addressed chapter 82-150, Laws of Florida, which contained two separate topics: the creation of a statute prohibiting the obstruction of justice by false information and the reduction in the membership of the Florida Criminal Justice Council. The relationship between these two subjects was so tenuous that this court included that the single-subject provision of the constitution had been violated. Unlike Bunnell, chapter 87-243 is a comprehensive

> law in which all of its parts are directed toward meeting the crisis of increased crime.

Burch, supra, at 3.

Like the law in Bunnell, Chapter 89-280 is a two-subject law; it is not a comprehensive one. The relationship between recidivists and repossessors of cars and boats is even more tenuous than the relationship between the obstruction of justice by providing false information and reduction in the membership of the Florida Criminal Justice Council. Accordingly, the inescapable conclusion is that Chapter 89-280 violates the one-subject rule and is unconstitutional. To hold otherwise would ignore the single subject requirement under the Florida Constitution. If Article 111, Section 6 of the Florida Constitution is to have any meaning, whatsoever, then this court should come to the logical conclusion that Chapter 89-280 violates the single subject requirement. The single subject requirement has a valuable and necessary purpose, and it should be enforced by declaring that Chapter 89-280 violates the single subject rule and is unconstitutional.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Sue R. Henderson, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15 day of October, 1992.

Respectfully submitted,

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