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FILED

SID J. WHITE

AUG 24 1992

CLERK, SUPREME COURT

By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. CASE NO. 80,157

TYRONE M. CLAYBOURNE,

Respondent.

_____ :

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The district court rejected petitioner's argument that respondent's failure to object in the trial court prevents him from doing so on appeal. This court should do the same thing. Respondent has raised the single-subject issue in order to show that his sentence is illegal and thereby reduce his term of imprisonment. Hence, as the district court concluded, the challenge here goes to the foundation of the case. Petitioner's argument muddles the distinction between trial and sentencing error. The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If this court agrees chapter 89-280 violates the single-subject provision, respondents sentence would be illegal, and a simple remand for resentencing would end the case.

Petitioner strains to find a connection between the two parts of chapter 89-280, Laws of Florida: career criminals and repossession of motor vehicle. Petitioner has failed to demonstrate a logical or natural connection. Career criminal sentencing and repossession of motor vehicles have nothing to do with one another. Even though the repossession law will reside in a chapter that contains criminal penalties, the repossession law does not address the same matter as career criminal sentencing.

ARGUMENT[1]

I. RESPONDENT NEED NOT HAVE RAISED THE ISSUE OF THE STATUTE'S CONSTITUTIONALITY IN THE TRIAL COURT SINCE THE FAILURE TO DO SO IS FUNDAMENTAL ERROR WHICH COULD BE RAISED ON APPEAL.

The district court rejected petitioner's argument that respondent's failure to object in the trial court prevents him from doing so on appeal. Claybourne v. State, 600 So.2d 516, **17 FLW D1478** (Fla. **1st** DCA 1992). Petitioner relegates its discussion of the district court's opinion to a footnote and passes it off **as** specious, IB.5. In that same footnote, petitioner asserts that the length of respondent's imprisonment has never been at issue. IB.5. Petitioner argues that the only matter at issue is the number of subjects in chapter **89-280**. This is wrong. Only if legal issues arose in a vacuum, would petitioner's argument have merit. Respondent has raised the single-subject issue in order to show that **his** sentence is illegal **and** thereby reduce his term of imprisonment. Hence, as the district court correctly held: the statute affected the "central issue in litigation: i.e., Claybourne's term of imprisonment." Id.

Since the challenge here goes to the foundation of the case, Sanford v. Rubin, 237 So.2d 134 (Fla. 1970), which the state cites **as** helpful to its cause, actually supports respondent's position, The district court cited Sanford **as** favorable

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[1]Citation to petitioner's merit initial brief will be as IB.(page number).

authority, stating that the challenged act in Sanford "related only to whether attorney's fees would be awardable to the prevailing party in a lawsuit.". Id.

Petitioner argues that the number of subjects in an otherwise proper legislative act can never be fundamental error. IB.5. Yet, as the district court stated: "it has been long recognized that a facial invalidity challenge to an act of the legislature based upon violation" of the single-subject provisions can be raised for the first time on appeal. Claybourne, citing, Parker v. Town of Callahan, 115 Fla. 266, 156 So. 334 (Fla. 1934); Town of Monticello v. Finlayson, 156 Fla. 568, 23 So.2d 843 (Fla. 1945); Sanford.

Petitioner's argument muddles the distinction between trial and sentencing error, The contemporaneous objection rule was fashioned primarily for use in trial proceedings, to ensure that objections are made when witness recollections are freshest and to prevent sandbagging reversible issues as a hedge against conviction. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984). The purpose for the rule "is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge." Id. See also, Castor v. State, 365 So.2d 701 (Fla. 1978). Moreover, an error which could cause an offender to be incarcerated for a period longer than permitted by law is fundamental and may be raised at any time. Lentz v. State, 567 So.2d 997, 998 (Fla. 1st DCA 1990); Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981). Petitioner's assertion that courts apply the rule of preservation uniformly in trial and

sentencing (IB.lO) is misleading, for the test of fundamental error differs from one context to the other. If this Court finds that petitioner's sentence was unauthorized by statute or that the statute is unconstitutional as applied to him, he will face longer incarceration than the law permits, an error he may raise at any time.

Petitioner cites a wealth of cases, all of which are distinguishable for the foregoing reasons. Nonetheless, petitioner argues Davis v. State, 383 So.2d 620 (Fla. 1980) is "particularly instructive". IB.9. Davis may well be instructive, but not on the issue before this court. Davis pled no contest without reserving any issues, then on appeal attacked the trespass statute under which he was prosecuted. Clearly, there is a distinction between the unpreserved constitutional challenge to a substantive criminal statute in Davis and the sentencing challenge made here. The former is sandbagging; the latter is not. Section 924.06(1)(d), Florida Statutes, expressly provides for appeals from illegal sentences. This statute was not at issue in Davis.

Petitioner urges this Court to turn its face from constitutional sentencing issues unless a defendant has gone through his paces below. If this Court takes the hard line, trial counsel will habitually hold up sentencing hearings to utter the required incantations. This cannot be a pleasing prospect to anyone in the criminal justice system. These issues will have their day in this court; better now than later.

II. CHAPTER 89-280 VIOLATES THE SINGLE SUBJECT PROVISION OF THE FLORIDA CONSTITUTION, THUS RESPONDENT'S HABITUAL OFFENDER SENTENCE IS ILLEGAL.

In Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), the first district court of appeal held that chapter 89-280, Law of Florida, violates the single-subject provision of the Florida Constitution.[2] Art. III, § 6 Fla. Const. Based on Johnson, the district court reversed respondent's habitual offender sentence. Claybourne at 17 FLW D1478; See also Pride v. State, 17 FLW D1737 (Fla. 1st DCA July 15, 1992). Petitioner argues that chapter 89-280 relates to one subject and thus Johnson and Claybourne are in error. This court should reject petitioner's argument.

Petitioner strains to find a connection between the two parts of chapter 89-280, Laws of Florida: career criminals and repossession of motor vehicles. The repossession provision amends a statute that protects the public against abuse by repossessors, and provides criminal penalties, while the habitual felon statute is designed to protect the public against repeat felons. Petitioner argues the two are "properly connected" because they relate to controlling crime. IB.14. However, the connection is tenuous, at best.

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[2]The third and the fourth district court of appeals, have held that Chapter 89-280 does not violate the single subject provision. Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992); Jamison v. State, 583 So.2d 413 (Fla. 4th DCA 1991). Neither court has provided any analysis as they have rejected the argument in cursory fashion.

The portion of chapter **89-280** concerning repossession did not add, delete, reduce or enhance criminal penalties under chapter 493, Florida Statutes. Petitioner nonetheless argues that because another provision of chapter 493 provides criminal penalties, (IB.15) the test of singularity is satisfied. Petitioner cites no authority for this proposition. Yet Article 111, section *6*, governs "enactments", not the overall statutory scheme to which the enactments relate.

Merely finding a broad topic on which each provision touches is insufficient to satisfy the requirement of singularity. See Bunnell v. State, 453 So.2d 808 (Fla. 1984) (creation of statute prohibiting the obstruction of justice by false information and the reduction in the membership of the Florida Criminal Justice Council violates single-subject provision **as** relationship between two subjects too tenuous). As noted in Johnson, the matters included in an act must have a natural connection to the broad subject matter of an act. 589 So.2d at 1371. The test is whether "the provision of the bill are designed to accomplish separate and disassociated objects of legislative effort." Id. The Johnson court found no logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators. Indeed, there is none.

In Burch v. State, 558 So.2d 1 (Fla. 1990), this court upheld a broad criminal law, chapter 87-243, against a single-subject challenge. In doing so this court distinguished Bunnell, supra. This court stated:

> Unlike Bunnell, chapter 87-243 is a comprehensive law in which all of its parts are directed toward meeting the crisis of increased crime.

Id. at 3. The same can not be said of chapter 89-280. Repossession of motor vehicles has nothing to do with "meeting the crisis of increased crime" and thus there is no logical connection to career criminal sentencing. Id.

This court should affirm the district court's decision.

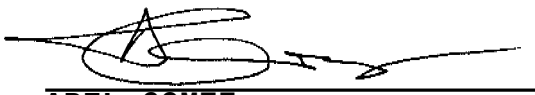
CONCLUSION

Based on the foregoing argument, this court should affirm the decision of the district court.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been ~~hand~~ mailed ~~delivered~~ to Assistant Attorney General Charlie McCoy in Tallahassee, Florida, on 24 August 1992.

Respectfully submitted,



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