047

IN THE SUPREME COURT OF FLORIDA

9/8

FRANCIS GENE JEFFRIES,

Petitioner,

v.

CASE NO.: 80,166

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #0333646

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #325791

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

FRANCIS GENE JEFFRIES,

Petitioner,

v. CASE NO.: 80,166

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on a certified question. Jeffries' second issue is ancillary to that question. Therefore the State's answer to that issue will be in two parts: the first addressing jurisdictional considerations; the second, addressing the merits.

STATEMENT OF THE CASE

The State accepts Jeffries' statement,

STATEMENT OF THE FACTS

The State accepts Jeffries' statement.

SUMMARY OF ARGUMENT

ISSUE I: Applicability of Habitual Felon Statute to Incarcerated Felon

By providing a five-year "window," after which a prior felony conviction (or release from imprisonment) cannot be used to invoke the habitual felony offender statute, the Legislature has granted recidivist felons a reprieve. This reprieve - in the nature of a statue of limitations - must not be interpreted unreasonably, to preclude the statue's application to a repeat felon who has not been released. The plain meaning of the statute does not require such. Jeffries, who committed another felony while in the eleventh year of 35 year sentence, must not get the benefit of his own wrongdoing.

ISSUE II: Defense of Necessity

This issue is not remotely related to the certified question. While the Court has jurisdiction to entertain this issue, the State respectfully suggests that further review would be improvident.

On the merits, Jeffries failed to demonstrate that his attempted escape was motivated by a real and present danger of great bodily harm if he did not immediately leave the confinement of his cell. Having failed to adduce any evidence substantiating the defense of necessity, Jeffries was not entitled to a jury instruction on that defense.

ARGUMENT

ISSUE I

WHETHER THE STATUTORY DEFINITION OF AN "HABITUAL FELONY OFFENDER" SHOULD BE INTERPRETED TO ALLOW AN INCARCERATED FELON TO COMMIT NEW FELONIES AT WILL YET NOT BE TREATED AS AN HABITUAL OFFENDER.

The statement of the issue answers itself and the certified question[1]. Not constitutionally required to do so, the Legislature has placed a five-year "window" -- akin to a statute of limitation -- upon the use of a prior felony conviction or release from prison to invoke the habitual felon statute. If a "released" felon abides by the law for five years, that person is not, as a matter of public policy, deemed a sufficient threat to society to trigger the statute.

Jeffries did not complete one third[2] of his present sentence before committing another felony. For him, the five-year limitation on use of a prior conviction had not yet began to run, since he had not been released.

---

[1] The prolix question reads: "Under the requirement of the habitual offender statute, section 775.084 (1)(a)2, Florida Statutes (1988 Supp.), that the offense for which a defendant is being sentenced be committed with five years of his release from a prison sentence imposed as a result of a prior conviction, can a defendant, who is still in prison under the sentence imposed for such prior conviction at the time he commits a new offense, be sentenced as an habitual offender?(slip op. at **p.2)**

[2] Jeffries had served about 11 years of his 35 year sentence for burglary of a structure with an assault, when he attempted to escape, etc. (R 199-205, S 10).

Relying primarily on a principle of statutory interpretation, Jeffries argues that the statute be strictly constructed in his favor. Unfortunately for him, the plain meaning of the statute controls, thereby precluding his argument and substantiating his sentence.

Specifically, Jeffries first relies upon Rogers v. Cunningham, 117 Fla. 760, **158 So. 430 (1930)** for the proposition that penal statutes must be strictly constructed. He argues that the "courts may not read into a penal statue an element which the legislature did not place there." (initial brief, p.11). Jeffries' reliance on this principle is unavailing. The plain meaning of §775.084(1)(a)2 does not require that a recidivist felon be released from prison in order to be classified as an "habitual felony offender." That statute - as a matter of legislative grace[3] - merely places a temporal limit on use of **past** convictions. If release or conviction occurred more than five years before the crime for which an enhanced sentence is sought, that release or conviction is considered too remote to trigger the habitual felon statute. However, nothing

[3] Until amended in 1971 by §5, ch. 71-136 (effective Jan. 1, 1972), Florida's repeat felon statute authorized an enhanced sentence for a defendant upon the second conviction, without any requirement that the first offense have been committed within a certain time. See **8775.09**, Fla. Stat. (1969). See also Barnes, supra, 595 So.2d at 23-4 (discussing the "legal theory" underlying older versions of the statute).

in the statute requires release from prison before the statute can be applied at all. [4]

The plain meaning of the statute calls for this result. Consequently, there is no reason to invoke the rule of interpretation - i.e., strict construction - urged by Jeffries. See Pardo **v.** State, 596 So.2d 665, 667 (Fla. 1992) (construing the statutory hearsay exception for prior statements by a child victim of sex abuse, and declaring that "it is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation").

As this court recently said, in construing the same statutory provision (among others) at issue here, "the current statute is clear and unambiguous . . . [u]nder these circumstances, this Court has no authority to change the plain

---

[4] It should be noted that the issue in Rogers, supra, was the definition of an offense, not the punishment itself. The Florida Legislature has adopted rules of construction which by their terms limit the rule of lenity to the definition of criminal offenses, not their punishment. See §775.021(1), Florida Statutes, "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Note the words "offense" and "accused" and the rule that the expression of one serves to exclude the unexpressed, See, also §775.021(4)(b), where the Legislature disavows lenity in sentencing as a means of determining legislative intent. This distinction the legislature is drawing is presumably based on the presumption of innocence afforded on accused which disappears after a guilty verdict.

meaning," State v. Barnes, 595 So.2d 22, 24 (Fla. 1992)(citations omitted).

The plain meaning of §775.084(1)(a) includes no requirement that a repeat felon's most recent crime be committed after release from prison. It provides only that if release has occurred more than five years earlier, then a felon's criminal past is not sufficiently recent to invoke the statute. Since the plain meaning of the statute precludes Jeffries' interpretation, this court has no authority to change the statute to conform to that interpretation. There is no need to *go* further to deny relief.

Should the Court resort to rules of statutory interpretation, it must adhere to the ang-standing principle that statutes cannot be interpreted to reach absurd or unreasonable results. In this regard, the Second District's decision in Smith v. State, 584 So.2d 1107 (Fla. 2d DCA 1991), is directly on point. There, the defendant argued that he could not be sentenced as a habitual violent felony offender because, at the time he committed the new offense, he had not yet been released from prison. The court stated:

> We recagnize that section 775.084(1)(b)2 provides that the offense far which defendant is being sentenced as **a** violent habitual offender be "within 5 years of the defendant's **release** . . . from a prison sentence , . . imposed as a result of a prior conviction . . ." However, we conclude that the legislature intended the word "within" in

> the statutory context to mean "no later than." The offense for which defendant was being sentenced in this case was no later than his release from prison for such prior conviction; in fact, he had evidently not been so released. The statutory interpretation contended by defendant would be irrational, and in interpreting legislative intent in the case of differing possible interpretations, rationality may properly be the guide.

Id. at 1108.

Jeffries relies on Trott v. State, 579 So.2d 807 (Fla. 5th DCA 1991), in which the defendant's agreed-upon sentence as an habitual violent felon was held illegal. That holding was based on the fact that Trott's predicate "violent" felony (armed robbery) was committed in 1972, and his release from prison was in 1984 (id. at 807, n.1); more than five years before felonies at issue. Since Trott had been released from prison for his predicate offense, the five year time limit applied. Factually and legally, Trott is not applicable, since he was not incarcerated when he committed his most recent crimes.

Allen v. State, 487 So.2d 410 (Fla. 4th DCA 1986) is equally unavailing to Jeffries. The defendant had been convicted and released more that 5 years before his most recent crimes. The Allen court correctly interpreted identical language from a predecessor statute to disapprove the sentence imposed. Allen simply has no bearing on the facts at hand; that is, on a felon who repeats such crimes while still in prison.

The statutory interpretation urged by Jeffries is as irrational as the interpretation argued by the defendant in Smith, supra[5]. Jeffries would "exhalts form over substance to the detriment of public policy, and such a result is clearly absurd." Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986); State v. Webb, 398 So.2d 820, 824 (Fla. 1981) ("construction of a statute which would lead to an absurd or unreasonable result or would render a statue purposeless should be avoided"). This Court must decline to adopt Jeffries' interpretation of the habitual felony offender statute, and affirm his sentence.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE A JURY INSTRUCTION ON THE DEFENSE OF NECESSITY WHEN JEFFRIES DID NOT PRESENT ANY EVIDENCE THAT WOULD SUBSTANTIATE SUCH DEFENSE.

A. Jurisdictional considerations

Even a cursory comparison of the issue raised by the certified question (applicability of habitual felon statue) and this issue (propriety of refusal to instruct jury on defense of necessity) reveals the lack of connection between the two. Further review of this issue is not needed, even remotely, to dispose of the certified question. The State respectfully

---

[5] Even Jeffries admits that the result reached may seem "incongruous." (initial brief, p.13).

suggests that the Court not exercise its authority to review ancillary issues.

In Ross v. State, 17 FLW S367 (Fla. June 18 1992), the petitioner raised several issues in addition to the issue (canstitutionality of 1988 habitual felon statute) upon which jurisdiction rested. This Court refused to decide them, and declared: "The remaining issues lie beyond the scope of the issue for which jurisdiction **lies,** and we see no need to exercise our prerogative to reach them." Id. at S368.

The declaration in Ross is significant in substance and context. It represents a recent example of this Court's laudable restraint in declining to re-decide issues unnecessarily. It also illustrates an oft-repeated sce ario of late: a discontented petitioner bootstrapping unrelated issues onto the multitude of habitual felon questions certified by the First District.

This Court should decline review of this issue. See Stephens v. State, 572 So.2d 1387 (Fla. 199) ("We do not reach the other issue raised by the parties, which lies beyond the scope of **the** certified question). Doing so respects the role of the district courts. Trushin v. State, 425 So.2d 1126, **1130** (Fla. 1982)("{W]e recognize the function of the district courts as court of final jurisdiction and will refrain from using that authority [to review "ancillary" issues] unless those issues

affect the outcome of the petition after review of the certified case,"3. Here, the certified "case" rests on circumstances affecting the applicability of the felon statue, which was invoked to enhance Jeffries' penalty. Nevertheless, he inappropriately seeks review of a ruling ultimately related to his guilt. This Court need not repeat the First District's effort on a settled point of law correctly decided under the evidence adduced.

B. Response on Merits

Should the Court be inclined to consider the merits, the State presents its answer. Jeffries asserts that the trial court erred in refusing to instruct the jury on his theoretical defense of necessity. He contends that this instruction should have been given, regardless of how improbable his testimony might have been; that he cut his prison cell window screen and bars because he was being harmed by light bulb glass dust.

A defendant is entitled to raise the limited defense of necessity to a charge of escape[6] by demonstrating that he had:

> reasonable grounds to believe that he is faced with a real, imminent and present danger of death, great bodily harm, or such type of danger to his health, if the does not temporarily leave his place of confinement.

Watford v. State, 353 So.2d 1263, 1265 (Fla. 1st DCA 1978). In State v. Alcantaro, 407 So.2d 922 (Fla. 1st DCA 1981), rev. denied, 413 So.2d 875 (Fla. 1982), the court enunciated five conditions which must be shown prior to the giving of an instruction on necessity. Here, Jeffries' claim that he was entitled to an instruction on the necessity defense fails because he cannot to demonstrate Alcantaro's first condition;

---

[6] In Count I, Jeffries was charged with attempted escape from the Florida State Prison, in violation of Section 944.40, Fla. Stat. (1989), which provides that any prisoner confined in prison who escapes or attempts to escape from such confinement shall be guilty of a second degree felony. (R 1).

that he was "faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future." Id. at 925.

Initially, the reason which Jeffries gave for cutting the window screen and bars in his prison cell was not to escape from the harmful light bulb glass. Rather, Jeffries testified on direct examination that he cut the bars because he was:

> going to get even with some people for putting stuff on me, because nobody else would do it. There was a five-gallon can of gasoline right out in a little shed not too far away. I'd already told all of them I was going to go out there and burn them all up that was blowing stuff on me. That's what I was getting out for. (T 143).

On cross-examination, Jeffries emphasized that he:

> cut the bars to get out to get to some gas. That's what I told the jury. I think all of them heard me real plain. (T 148).

The crucial issue of whether Jeffries was fearful for his life, or in fear of great bodily harm, arose only briefly after defense counsel asked him the following question:

> Q. [Defense counsel]: Were you in fear of your life or that you would be seriously harmed physically ok mentally if you did not try to leave or get some sort of help?
>
> A. Well, if you're eating ground-up glass in your food, what are you going to be? Do you think it's going -- you're not going to have some fear there? (T 145)

Jeffries testified that the light bulb glass dust which was blown on him made him "real nervous," made his "head ache, makes you sick to your stomach," and that both his "ears have been eat up by this stuff in the last year." (T 141-2). His cursory testimony is a far cry from the defendant's explicit testimony in Muro v. State, 445 So.2d 374, 376 (Fla. 3d DCA 1984). There, the court found that the defendant clearly apprehended an imminent threat to his safety, based upon a prior beating by fellow prisoners, and their promises to kill him upon his return to prison.

Here, Jeffries did not present evidence sufficient to raise the necessity defense. It is obvious that he did not act as he did because he was "faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future." Alcantaro, 407 So.2d at 925 (emphasis supplied). Jeffries was quite candid about his real motive in cutting the screen and bars. He wanted to get gasoline and burn those whom he believed were blowing light bulb glass on him. He admitted that the screen and bars had been cut for three or four days, and that he could have left his cell at any time. (T 144).

Had Jeffries claimed as his sole reason for cutting the cell screen and bars the fact that he was in fear for his life or health, he still would have failed to present evidence sufficient to raise a defense of necessity. Jeffries' personal belief that people were blowing light bulb glass dust on him is not a

"reasonable ground to believe that he was faced with a real, imminent and present danger of death, great bodily harm, or such type of danger to his health." Watford, 353 So.2d at 1265 (emphasis supplied). Mr. Miller, a psychological specialist at the state prison, testified that he had assured Jeffries that Jeffries food and cell were carefully watched to ensure that no one was putting ground-up glass in either. (T 134).

Jeffries failed to demonstrate that his attempted escape was motivated by fear of great bodily harm that was real or imminent. Having failed to adduce facts that would raise the defense of necessity, Jeffries was not entitled to a jury instruction on that defense.

The State will now respond to specific flaws in Jeffries' argument. After citing a plethora of cases (initial brief, p.16-17) on the uncontroverted principle that a defendant is entitled to an instruction on any defense for which some evidence is adduced, he relies upon only three. The first, Muro v. State, is distinguished above.

The second case is Mungin v. State, 458 So.2d 293 (Fla. 1st DCA 1984). The defendant, an inmate charged with possessing a knife, proffered testimony establishing that he picked it up during a fight with his assailant, who dropped the knife after attacking Mungin. Id. at 295. Factually, Mungin based his necessity offense on his fear of being harmed during an actual

attack by another armed inmate, a situation far removed from Jeffries' delusions.

Jeffries lastly relies on Ambrister v. State, 462 So.2d 43 (Fla. 1st DCA 1984). The defendant was convicted for carrying a concealed firearm, which he displayed briefly when first confronted by undercover police. Since the police were undercover and the defendant feared robbery, the First District held it was error to deny a jury instruction on necessity. Again, the defendant presented fear of immediate harm. Jeffries' delusions, credibility aside, were of long duration[7] and described no immediate threat. Ambrister is also inapplicable.

Jeffries offered no evidence of harm that was immediate, or fear of harm that was great, as opposed to slow injury through ingestion of light bulb glass dust. In short, there was no evidence of "necessity." The trial court correctly denied the requested jury instruction.

---

[7] In his initial brief (p.17-18), Jeffries describes his delusion as fear of being harmed by light bulb glass dust, and his fear of conspiracy by DOC officers, as a 10 year matter.

CONCLUSION

The certified question must be answered in the affirmative, thereby upholding Jeffries' sentence. Review of the ancillary issue should be declined. If the merits are reached, the trial court's initial refusal of an instruction on the defense of necessity, and the First District's affirmance, must be sustained.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #325791

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0333646

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) **488-0600**

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of August, 1992.

Charlie McCoy

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL