IN THE SUPREME COURT OF FLORIDA

SYLVESTER MANN WARREN,

Petitioner,

v.

CASE NO. 80,199

STATE OF FLORIDA,

Respondent,

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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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 two 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 January 16, 1991, petitioner was charged with armed robbery with a deadly weapon, battery on a law enforcement officer, two counts of resisting arrest with violence, and one count of carrying a concealed weapon (R 107-108). The cause proceeded to jury trial on June 12, 1991, and at the conclusion thereof petitioner was found guilty of robbery with a weapon as a lesser offense, guilty of battery on a law officer, guilty of one count of resisting arrest with violence, guilty of one count of resisting arrest without violence as a lesser offense, and not guilty of carrying a concealed weapon (R 110-11).

At trial, the state's evidence tended to prove that petitioner took some t-shirts from an Amoco Oil station, and when the clerk, David Russell, confronted him, petitioner started to pull a knife from his front pocket. Russell could see the blade (R 11-17). Petitioner was apprehended shortly thereafter with a knife in his rear pocket; he was returned to the scene, where the victim identified him. He then damaged the patrol car after his arrest and kicked deputy Rusty Bjorensen and struggled with deputy John Powell (R 22-45).

Petitioner's counsel moved for acquittal on the concealed weapon charged only (R 45-47). Petitioner had been drinking and admitted going into the store and taking the shirts. He had a knife in his pocket, but he did not display it. He admitted beating on the patrol car, but the officers then

struck him on the leg with a flashlight (R 47-53). The jury returned the verdicts noted above (R 103-104).

At sentencing on August 21, 1991, the state proved that petitioner had prior convictions for sexual battery, from which he was released on July 16, 1990 (R 114; 120-24). Petitioner was adjudicated guilty and sentenced as an habitual violent offender to 15 years in prison for the robbery, with a mandatory 15 years: for the other felonies, he was sentenced as an habitual violent offender to 10 years, with a mandatory 5 years; for the misdemeanors, he was sentenced to time served; all sentences were designated to run concurrently, and credit for time served of 241 days was granted (R 132-36).

On September 17, 1991, a timely notice of appeal was filed (R 137). On November 6, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that his habitual violent offender sentences were unconstitutional as a violation of due process and double jeopardy. The lower tribunal rejected these arguments on authority of its prior decisions but certified the questions it had previously certified in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending, case no. 78,715, oral argument set for October 9, 1992:

> IS SECTION 775.084(1)(b), THE HABITUAL VIOLENT FELONY OFFENDER STATUTE, UNCONSTITUTIONAL BECAUSE: (1) IT IS INEQUITABLE AND SUBJECT TO ARBITRARY AND CAPRICIOUS APPLICATION IN VIOLATION OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND (2) IT

VIOLATES THE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY?

On July 20, 1992, a timely notice of discretionary review was filed.

SUMMARY OF THE ARGUMENT

It would appear that this Court has rejected the due process argument in a prior decision.

The double jeopardy argument is still viable. The statute permits imposition of an enhanced sentence as a habitual violent felon upon one who has committed but a single violent felony. The statute's sole fixation on the prior offense, for which an offender has already been punished, renders the enhanced sentence a violation of constitutional prohibitions against double jeopardy.

ARGUMENT

SECTION 775.084(1)(b), FLORIDA STATUTES, THE **HABITUAL** VIOLENT FELONY **OFFENDER** STATUTE, IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE **CONSTITUTIONAL PROVISIONS** AGAINST DOUBLE JEOPARDY,

1. Due Process

Both the lower tribunal and this Court rejected a due process challenge to the statute in Ross v. State, 579 So.2d 877 (Fla. 1st **DCA** 1991), approved, **17** FLW S367 (Fla. June 18, 1992), rehearing pending. If upheld on rehearing, Ross controls the due process issue here.

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).**[1] The fixation of the habitual violent felony provisions on prior offenses renders application of this statute to petitioner a violation of these constitutional protections.

To punish a defendant as an habitual violent felony offender, the state need only show that he has one prior offense within the

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[1]The court labeled the undersigned's argument as "perfunctory." Id. at 927,

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 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 [non-violent] 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, as this Court correctly noted in Ross, supra, 17 FLW at S368:

> The entire focus of the statute is not on the present offense, but on the criminal offender's prior record,

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 Zehrner 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(1)(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 requests that this Honorable Court vacate his sentences and remand for resentencing with appropriate directions.

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 Andrea D. England, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, and a copy has been mailed to petitioner, 4086819, P.O. Box 221, Raiford, Florida 32083, on this 31st day of August, 1992.

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER