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IN THE SUPREME COURT OF FLORIDA

WOODROW WILSON ALLEN,

Petitioner,

v.

CASE NO. 80,561

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

WOODROW WILSON ALLEN,

Petitioner,

v. CASE NO. 80,561

STATE OF FLORIDA,

Respondent.

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 one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A three volume transcript will be referred to as "T." Attached hereto as an appendix is the decision of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

By information filed April 19, 1991, petitioner was charged with possession of cocaine (R 6). The cause proceeded to jury trial on July 17, 1991, and at the conclusion thereof petitioner was found guilty as charged (R 26).

At trial, Jacksonville police officer Charles E. Reagor testified that on April 8, 1991, he was patrolling the 6000 block of Redpoll Avenue at 12:30 p.m. He saw two cars parked on the side of the road and saw petitioner standing between them. Petitioner walked to the rear of one of the cars and threw a small blue object to the ground. Another officer arrived and watched petitioner while Reagor retrieved the object, which was a matchbox containing rocks of cocaine (T 23-31).

An FDLE chemist determined the matchbox contained cocaine, and the state rested (T 50-59). Petitioner's motion for acquittal was denied (T 60).

Petitioner testified that Officer Reagor drove up as he and Penny were walking home that morning and frisked petitioner. He then accused petitioner of having drugs and put him in the back of the car. When his computer check came back negative, Reagor let petitioner go but said he was going to get petitioner (T 86-89).

Later, petitioner was standing next to the cars on Redpoll, planning to change a flat tire. Officer Reagor drove by and then returned with another officer. Reagor put petitioner in the other officer's car and came up with a

matchbox from under the car. Petitioner denied having the matchbox or throwing it down. He said nothing about a crack pipe (T 89-93). Petitioner's renewed motion for acquittal was denied (T 103-104). The jury subsequently returned its guilty verdict (T 144).

At sentencing, the state proved that petitioner had a prior conviction for armed robbery (R 34-37; T 153-74). Petitioner was adjudicated guilty and sentenced as an habitual violent offender to 10 years in prison, with credit for time served (R 38-44). On August 29, 1991, a timely notice of appeal was filed (R 48). On October 21, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that he should not have received habitual violent offender sentencing for a nonviolent crime. He also argued the use of his prior violent felony to impose violent offender sanctions for a nonviolent crime violated double jeopardy. The lower tribunal disagreed, but certified two 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 held October 9, 1992:

> **1. WHETHER IMPOSITION OF HABITUAL VIOLENT FELONY OFFENDER SENTENCING PURSUANT TO SECTION 775.084, FLORIDA STATUTES, VIOLATES A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF AN ENUMERATED VIOLENT FELONY, BUT** HIS **PRESENT OFFENSE** IS **A NONVIOLENT FELONY?**
>
> **2. WHETHER SECTION 775.084, FLORIDA STATUTES, VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A** PRIOR **OFFENSE?**

Appendix at 2.

On October 2, 1992, a timely notice of discretionary review was filed.

SUMMARY OF THE ARGUMENT

The first certified question has been answered by this Court, contrary to petitioner's position,

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

The proper remedy is to vacate the sentence and remand for resentencing under the sentencing guidelines.

ARGUMENT

SECTION 775.084(1)(B) VIOLATES THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE.

A. DUE PROCESS

This Court has answered the first certified question contrary to petitioner's position that habitual violent offender sanctions cannot be imposed on one who commits a nonviolent crime. Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), approved, 601 So.2d 1190 (Fla. 1992).

B. 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. I, §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). The fixation of the habitual violent felony provisions on prior offenses renders application of this statute to petitioner a violation of these constitutional protections. This goes to the second of the certified questions.

To punish a defendant as an habitual violent felony offender, the state need only show that he or she has one prior offense within the 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 -- not the case here -- 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.

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 Zehmer in Hall, supra.

As this Court correctly stated in Ross, supra:

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

601 So.2d at 1193.

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.

For these reasons, petitioner's sentence must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions. The statute violates constitutional double jeopardy provisions. In such case, the second certified questions should be answered in the affirmative. Retroactive application would require resentencing of a relatively small portion of those sentenced as habitual offenders since the 1988 amendment.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court declare the habitual violent offender statute unconstitutional, vacate his sentence, and remand for resentencing with appropriate directions.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail upon Charlie McCoy, Assistant Attorney General, 2020 Capital Circle Southeast, Alexander Building, Suite 211, Tallahassee, Florida, 32301, and a copy has been mailed to petitioner, #071150, P.O. Box 699, Sneads, Florida 32460, on this 12th day of October, 1992.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WOODROW WILSON ALLEN,

Appellant/
Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/
Cross-Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-02898

Opinion filed September 21, 1992.

An Appeal from the Circuit Court for Duval County. Frederick Tygart, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant/Cross-Appellee.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee/Cross-Appellant.

PER CURIAM.

This cause is before us on appeal and cross appeal from a judgment and sentence following jury trial and conviction of possession of cocaine. The trial court adjudged defendant to be a habitual violent felony offender and sentenced him to ten

year's imprisonment. We affirm as to all issues raised. However, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), and in accord with recent decisions of this court, we certify the following questions to be of great public importance:

> (1) WHETHER IMPOSITION OF HABITUAL VIOLENT FELONY OFFENDER SENTENCING PURSUANT TO SECTION 775.084, FLORIDA STATUTES, VIOLATES A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF AN ENUMERATED VIOLENT FELONY, BUT HIS PRESENT OFFENSE IS A NONVIOLENT FELONY; AND
>
> (2) WHETHER SECTION 775.084, FLORIDA STATUTES, VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE.

Reeves v. State, 593 So. 2d 232 (Fla. 1st DCA 1992); Becker v. State, 592 So. 2d 1266 (Fla. 1st DCA 1992); Raulerson v. State, 589 So. 2d 369, 370 (Fla. 1st DCA 1991), jurisdiction accepted, 593 So. 2d 1052 (Fla. 1992), review pending, No. 79,051; Tillman v. State, 586 So. 2d 1269 (Fla. 1st DCA 1991), review pending, No. 78,715 (Fla. 1991); Perkins v. State, 583 So. 2d 1103, 1104 (Fla. 1st DCA 1991), jurisdiction accepted, 590 So. 2d 421 (Fla. 1991), review pending, No. 78,613.

AFFIRMED.

BOOTH, SMITH, AND ALLEN, JJ., CONCUR.