IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH PENTON, :

Appellant, :

v. : CASE NO. 80,709

STATE OF FLORIDA, :

Appellee. :

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant and defendant below and will be referred to as petitioner or by his name in this brief. Cites to the record will be referred to as "R" followed by the appropriate page number in parentheses. All proceedings below were before Circuit Judge Frank Bell.

II STATEMENT OF THE CASE AND FACTS

On December 18, 1990, a jury found Mr. Penton guilty of attempted aggravated battery on a law enforcement officer, aggravated battery, resisting arrest with violence, resisting arrest without violence, fleeing or attempting to elude a law enforcement officer, and operating a motor vehicle in violation of a driver's license restriction (R 236-37). At sentencing on January 30, 1992, the trial court sentenced Mr. Penton to thirty years as an habitual violent felony offender with a ten-year minimum mandatory for the attempted aggravated battery on a law enforcement officer; ten years consecutive as an habitual violent felony offender with a ten-year minimum mandatory for the aggravated battery; ten years concurrent as an habitual violent felony offender for resisting arrest with violence; one year concurrent for resisting arrest without violence and for fleeing and eluding; and 60 days concurrent for the driver's license offense (R 244-73).

On appeal the First District Court of Appeal affirmed Mr. Penton's convictions without comment. (Appx., p.1). The Court then vacated the consecutive minimum mandatory portions of the sentences and ordered resentencing to concurrent minimum mandatory portions. (Appx., p.2). Finally, the court affirmed the trial court's determination that Penton was an habitual violent felon, but certified to this Court the following question of great public importance:

> DOES SECTION 775.084, FLORIDA STATUTES (1989) VIOLATE THE CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY AND EX POST FACTO?

III SUMMARY OF THE ARGUMENT

The exclusive focus of the habitual violent offender statute on the nature of the prior crime makes the habitual violent sentence in reality a second punishment for the prior offense. This is double jeopardy, and if the prior offense was committed before the 1988 enactment of the statute, also a violation of the prohibition against ex post facto laws.

IV ARGUMENT

THE HABITUAL OFFENDER STATUTE UNDER WHICH MR. PENTON WAS SENTENCED VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM 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, s.9. This Court has acknowledged with regard to the Florida habitual violent offender sentencing provision that "[t]he entire focus of the statute is not on the present offense, but on the criminal offender's prior record." Ross v. State, 601 So.2d 1190, 1193 (Fla. 1992). The fixation of the habitual violent felony provisions on prior offenses renders application of the 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 felony of the enumerated felonies within the past five years. The current offense need meet no criteria, other than being another felony. The conclusion is inescapable. The enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior felony. The 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, as 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 courts have als 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).

In contrast to the provisions discussed in the Gryger excerpt, the key problem with the present statute is that violence is not repeated in the pending offense. Repetitiveness of violence thus cannot justify the especially enhanced sentence of the habitual violent provisions.

At least two judges of the First District recognize the distinction:

> Although the instant offense for which petitioner was sentenced was not a violent felony, petitioner was sentenced as a habitual violent felony offender based on the fact that his prior conviction (for which he has presumably already served his sentence) met the statutory definition of violent felony. Had petitioner been sentenced as a [regular] habitual felony offender ... based

> on the nature of his current offense rather than as a habitual violent felony offender based on the nature of his prior convictions, the sentence would necessarily have been less.... I view the imposition of the extent of punishment for the instant 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 all other jurisdictions.

Hall v. State, 588 So.2d 1089 (Fla. 1st DCA 1991) (Zehmer, J. concurring specially and joined by Barfield, J.)

This issue is pending before this Court in a number of other cases. See, e.g., Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), review pending, No. 78,613; Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending, No. 78,715.

The habitual offender statute focuses on a prior offense for sentencing. An offender sentenced under this statute is being punished twice for the prior offense. This violates double jeopardy protections, and, for prior offenses committed before the effective date of the 1988 law, the statute also breaches the prohibition against ex post facto laws.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court strike the habitual violent felony offender provisions as unconstitutional for violating double jeopardy and ex post facto principles, and remand for resentencing within the guidelines.

Respectfully Submitted,

NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Attorney General's Office, Criminal Appeals Division, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, William Joseph Penton, DC #211881, Okaloosa Correctional Institution, Post Office Box 578, Crestview, Florida, 32536, this 24th day of November, 1992.

JOSEPHINE L. HOLLAND

IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH PENTON,	:	
	:	
Appellant,	:	
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vs.	:	CASE NO. 80,709
	:	
STATE OF FLORIDA,	:	
	:	
Appellee.	:	
	:	

A P P E N D I X I

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM JOSEPH PENTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

* CASE NO. 91-709

Opinion filed October 14, 1992.

Appeal from the Circuit Court for Escambia County
Frank Bell, Judge.

Nancy Daniels, Public Defender; Steven A. Been, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General; Charles McCoy, Assistant Attorney General, for appellee.

KAHN, J.

William Joseph Penton appeals after a jury verdict finding him guilty of attempted aggravated battery on a law enforcement officer, aggravated battery, resisting arrest with violence,

resisting arrest without violence, fleeing or attempting to elude a law enforcement officer, and operating a motor vehicle in violation of a driver's license restriction. The trial court sentenced Penton as an habitual violent felony offender. We affirm Penton's convictions without comment, but find it necessary to address his contentions concerning the sentences.

Penton argues that the trial court erred in imposing consecutive minimum mandatory habitual violent felony offender sentences for attempted aggravated battery on a law enforcement officer and aggravated battery. The record indicates that these crimes occurred on a single victim during a single criminal episode. The trial judge did not have the discretion under sections 775.021(4) and 775.084, Florida Statutes (Supp. 1988), to impose consecutive minimum mandatory sentences for first degree felonies committed by an habitual violent felony offender arising from a single criminal episode, since the minimum mandatory sentences were imposed under section 775.084 and not the statute which prescribes the penalty for the offenses. Daniels v. State, 595 So.2d 952, 953-954 (Fla. 1992). Consequently, we vacate the minimum mandatory portions of Penton's sentences for attempted aggravated battery on a law enforcement officer and aggravated battery and remand with directions that the minimum mandatory sentence for aggravated battery be imposed concurrently with the minimum mandatory sentence for attempted aggravated battery on a law enforcement officer.

We affirm the trial court's determination that Penton was an habitual violent felon. Ross v. State, 601 So.2d 1190 (Fla. 1992). However, we certify to the Florida Supreme Court the following question of great public importance:

> DOES SECTION 775.084, FLORIDA STATUTES (1989), VIOLATE THE CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY AND EX POST FACTO?

See Funchess v. State, 597 So.2d 985 (Fla. 1st DCA 1992), pet. for rev. pending, No. 79,963; Reeves v. State, 593 So.2d 232 (Fla. 1st DCA 1991), pet. for rev. pending, No. 79,386; Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), pet. for rev. pending, No. 78,715.

Convictions AFFIRMED, sentences partially VACATED, and REMANDED.

SHIVERS and ZEHMER, JJ., CONCUR.