IN THE SUPREME COURT OF FLORIDA

WILLIAM JOSEPH PENTON,

Petitioner,

vs. Case No. 80-709

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

Issue I of this brief answers only the issue raised by Penton. Issue II raises the ancillary question of whether the trial court properly stacked Penton's minimum mandatory sentences. The latter issue is before the Court in Downs v. State, no. 79,322; which was briefed in April, 1992. Downs is scheduled for oral argument on January 6, 1993.

STATEMENT OF THE CASE AND FACTS

The State accepts Penton's statement.

SUMMARY OF THE ARGUMENT

ISSUE I: Double Jeopardy and *Ex Post Facto*

Omitted due to brevity of argument.

ISSUE II: Consecutive Minimum Sentences

This is an ancillary issue necessary to dispose of the case -- propriety of entire sentence -- after deciding the certified question. Factually, Penton's crimes were not committed in a single episode, but were a series of batteries with flight in between.

Assuming a single criminal episode, the trial court properly imposed consecutive sentences. Section 775.021(2), Florida Statutes, gives the trial court discretion to do so. By

overlooking this statute, Daniels v. State, 595 So.2d 952 (Fla. 1992), was wrongly decided. This court should recede from Daniels, and reverse the First District on this point.

ARGUMENT

ISSUE I

WHETHER THE HABITUAL VIOLENT FELONY OFFENDER STATUTE VIOLATES CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY OR *EX POST FACTO* LAWS

A. Double Jeopardy

This court recently declared that the habitual violent felony statute does not violate double jeopardy. Tillman v. State, 17 F.L.W. S707 (Fla. Nov. 19, 1992).

B. *Ex Post Facto* Laws

Penton, almost gratuitously, claims the statute violates constitutional prohibitions against *ex post facto* laws. He does so only in the last sentence of his argument. (initial brief, p. 6). He sets forth no argument other than that urged on the double jeopardy issue. He cites no additional authority. His *ex post facto* claim is insufficiently presented. *See*, Lynn v. City of Ft. Lauderdale, 81 So.2d 511, 513 (Fla. 1955)(duty on petition to make error "clearly appear," and reviewing court under no duty to answer a question that is merely posed without citation to authority or supporting argument); Henderson v. State, 569 So.2d 925, 927 (Fla.

1st DCA 199)(declining to consider due process challenge to habitual felon statute when argument consisted of one paragraph and no supportive authority).

Otherwise, the habitual violent felon statute was enacted in 1988, well before Penton's 1990 crimes. (R 226). It enhances Penton's punishment for his current crimes only. *See*, Perkins v. State, 583 So.2d 1103, 1105 (Fla. 1st DCA 1991)(habitual felon statute amended before petitioner's current offenses, therefore no *ex post facto* problem), *relying on*, Cross v. State, 92 Fla. 768, 119 So.2d 380 (1928); Reynolds v. Cochran, 130 So.2d 500 (Fla. 1962); and Washington v. Mayo, 91 So.2d 621 (Fla. 1956).

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DIRECTED THAT PETITIONER'S MINIMUM MANDATORY SENTENCES BE CONSECUTIVE

A. Multiple Episodes

The dispositive factual issue is whether Penton's offenses were part of a single episode. They were not. Penton was arrested for not having a valid driver's license. (R 56-7). He ran until he was tackled by the arresting officer; then he resisted. (R 58). He got loose, was apprehended a second time, and resisted with violence. (R 58). An auxiliary officer arrived and tried to handcuff Penton. He got free by biting the first officer. He was caught a third time. (R 59-61). Then he threatened to kill the first officer with a knife, which he held at the officer's throat. (R 61).

These facts clearly show that Penton's crimes were committed in a single "episode," only if the term is defined so generally as to apply a series of completed crimes with flight in-between. Penton attempted to escape or elude arrest between the incidents of battery. His circumstances are factually different from Daniels, which therefore does not apply. Since his crimes were not in the same episode, the trial court properly imposed consecutive sentences, including consecutive minimum mandatories.

B. Statutory Interpretation

Assuming all crimes were committed in a single episode does not help Penton. Relying solely on Daniels v. State, 595 So.2d 952, 953-4 (Fla. 1992), the First District vacated the minimum sentences imposed for two offenses, and directed that the sentences be imposed concurrently on remand. (slip op., p. 2).

Section 775.021, Florida Statutes, provides rules of construction for determining whether offenses are separate, whether separate offenses are separately sentenced, and whether separate sentences are imposed concurrently or consecutively. Because it is central to the certified question, it is important that its full content be kept firmly in mind.

> **775.021 Rules of construction.--**
>
> (1) 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.

(2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.

(3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

(4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitutes one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

It is clear from the plain meaning of subsection (4)(a) that separate offenses, as defined therein, shall be separately sentenced. Also, the trial court is given discretion to impose separate sentences either concurrently or consecutively.[1] That

[1] Section 921.16, Florida Statutes, also leaves it to the discretion of the trial court as to whether sentences are concurrent or consecutive.

being the case, no one can seriously suggest that the plain meaning of the statute requires any statutory interpretation.[2]

In Daniels, the issue was:

> DOES A TRIAL JUDGE HAVE THE DISCRETION UNDER SECTIONS 775.021(4) AND 775.084, FLORIDA STATUTES (1988), TO IMPOSE CONSECUTIVE FIFTEEN-YEAR MINIMUM MANDATORY SENTENCES FOR FIRST-DEGREE FELONIES COMMITTED BY AN HABITUAL VIOLENT FELONY OFFENDER ARISING FROM A SINGLE CRIMINAL EPISODE?

Daniels argued that the answer was no, relying primarily on Palmer v. State, 438 So.2d 1 (Fla. 1983). There, a sharply divided court held that a trial court did not have the discretion to impose consecutive minimum mandatory sentences on an armed robber who robbed the mourners at a funeral, even though separate consecutive sentences were permitted for each of the robberies. The Palmer majority reasoned that §775.087, Florida Statutes (1981), did not specifically authorize consecutive minimum mandatories and that §775.021(4), Florida Statutes (1981), was not applicable. The dissenters in Palmer relied on §775.021(4) as it existed in 1981. They concluded there was no reason why thirteen robberies committed in a single criminal transaction should be treated differently than thirteen robberies committed at separate times.

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[2] *See*, Carawan v. State, 515 So.2d 161, 165 (Fla. 1987): "As we have noted previously, rules of statutory construction 'are useful only in case of doubt and should never be used to create doubt, only to remove it.' *State v. Egan*, 287 So.2d 1, 4 (Fla. 1973). The courts never resort to rules of construction where the legislative intent is plain and unambiguous." [cites omitted].

Relying on Palmer, the Daniels court rejected the State's argument that §775.021(4), Florida Statutes (1988), controlled. Acknowledging that the Legislature had made substantial changes to §775.021(4) in 1988,[3] the Court held that the changes were only "designed to overrule this Court's decision in *Carawan v. State*, 515 So.2d 161 (Fla. 1987), pertaining to consecutive sentences for separate offenses committed at the same time, and had nothing to do with minimum mandatory sentences." *Id.*

Daniels and Palmer rest on the same proposition. They reason that language in §775.021(4), which mandates that separate sentences shall be imposed for separate offenses, is applicable to all statutory offenses; but the language granting unfettered discretion to the trial court, "the sentencing judge may order the sentences to be served concurrently or consecutively," is not applicable to penalty enhancement or reclassification of offenses. Consequently, §775.021(4) is applicable to §775.082 (penalties); but not to, e.g., §775.084 (habitual offender)(Daniels), or §775.087 (use of weapons)(Palmer).

The Court in Daniels acknowledged that it was a close call but concluded that Daniels fell closer to Palmer than Enmund[4] or State v. Boatwright, 559 So.2d 210 (Fla. 1990). It is noteworthy that section (4)(a) begins with the words: "[w]hoever, in the course of one criminal transaction or episode commits an act or acts . . . ." That is a very precise, inflexible mandate which is

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[3] Chapter 88-131, §7, Laws of Florida.

[4] State v. Enmund, 476 So.2d 165 (Fla. 1985).

on all-fours here.[5] The plain language of §775.021(4)(a)(granting the trial court discretion to sentence either consecutive or concurrently) is equally applicable to sentences imposed pursuant to §775.084 and §775.087.

The State's position, which the Court acknowledged as a close call in Daniels, is irrefutable if another, heretofore overlooked, provision of §775.021 is brought into play. Section 775.021 is titled Rules of Construction, suggesting that the rules therein should be applied to all criminal statutes. This implied suggestion is transformed into an explicit command by §775.021(2):

> The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides. (e.s.)

All of the rules of construction in §775.021 are applicable to all other sections of the criminal code unless specifically exempted by the particular section. The basis on which Daniels rests, that the statutes §775.084 and §775.087, do not expressly address consecutive minimum mandatories, actually prove the opposite proposition. Pursuant to §775.021(2), the trial court has unfettered discretion to impose minimum mandatory sentences either concurrently or consecutively pursuant to §775.021(4), unless the statute at issue explicitly provides otherwise.

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[5] Offenses in separate incidents are governed by §921.16, Florida Statutes, which also give the trial court unfettered discretion on concurrent or consecutive sentences.

The State acknowledges that it did not recognize the relevance of §775.021(2) to the certified question in Daniels and thus did not raise the point with the Court. This oversight by the State may be particularly explained by the terms of the question itself which focused narrowly on §775.021(4). If so, this would illustrate an adage of Justice Frankfurter: "[i]n law also the right answer usually depends on putting the right question."[6] In the same vein, and from the same source, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." Accordingly, despite the recency of Daniels, the State urges this Court to follow the plain meaning of subsections 775.021(2) and (4) and hold that trial courts have unfettered discretion to impose sentences, including minimum mandatories, either concurrently or consecutively unless some provision of the code otherwise provides. There is simply no rational basis in view of §775.021(2), for holding that §775.021(4) applies to some sentencing statutes of the criminal code but not to others.

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6 Estate of Rogers v. Helvering, 320 U.S. 410, 413 (1943). The following "wisdom" quote is from Henslee v. Union Planters National Bank & Trust Company, 335 U.S. 595, 600 (1949). Both were recently quoted in the Florida Bar Journal, March 1992, Legal Wit & Wisdom, Raymond T. Elligett, Jr., p. 19, 20.

CONCLUSION

The opinion below must be reversed as to the minimum mandatory sentences, and affirmed in all other respects. The certified question must be answered negatively.

Respectfully submitted,

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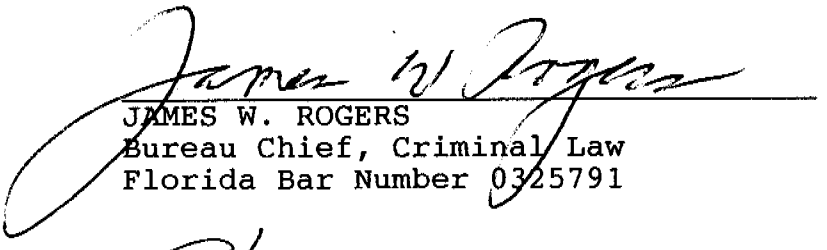

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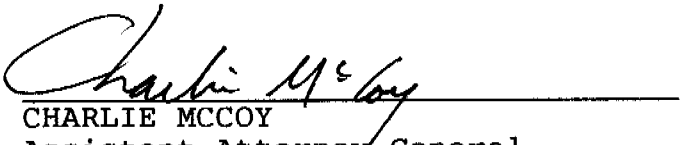

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON MERITS has been furnished by U.S. Mail to **MS. JOSEPHINE HOLLAND**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3d day of December, 1992.

Charlie McCoy

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