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FILED
SID J. WHITE
FEB 22 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ERIC ENNIS RHOADS, :

Petitioner, :

vs. : Case No. 80,851

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 351199

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On January 2, 1991, the Hillsborough County state attorney charged the appellant, ERIC ENNIS RHOADS, with battery on a law enforcement officer, obstructing an officer without violence, five traffic-related misdemeanors, and a violation of a city ordinance against possessing open containers. (R49-52) These offenses were committed on December 12, 1990. (R49) On March 4, 1991, he pleaded guilty as charged. (R42)

On April 5, 1991, a written notice of habitualization was filed. (R57) At a hearing on April 16, 1991, the State relied on a 1985 Illinois conviction for involuntary manslaughter. Rhoads had received a four-year sentence for that offense and was released on either October 28, 1987, or May 13, 1986. (R8-10, 18) Judge Mitcham found that the release from prison in 1986 or 1987 for the Illinois conviction satisfied the statutory habitual offender requirement that the defendant commit a prior offense or be released from prison for that offense within five years of the current offense. (R17) Judge Mitcham found Rhoads to be an habitual offender and sentenced him to five years in prison for the battery and time served for the remaining charges. (R18, 38) On September 26, 1991, Judge Allen granted Rhoads's motion for post-conviction relief for a belated appeal. (R74)

On appeal, the Second District Court of Appeal rejected the argument that the law authorizing the use of out-of-state convictions to habitualize the Petitioner violated the single subject

rule. Rhoads v. State, case no. 91-03570 (Fla. 2d DCA Nov. 25, 1992). This Court has now accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The prosecutor improperly relied on an out-of-state conviction to justify a finding of habitual offender status, even though the law authorizing the use of such convictions did not become effective until after the sentencing in this case.

ARGUMENT

ISSUE

THE LAW AUTHORIZING THE USE OF OUT-OF-STATE CONVICTIONS FOR HABITUAL OFFENDER SENTENCING VIOLATED THE SINGLE SUBJECT RULE.

In 1988, two Florida convictions were necessary predicates for a finding that a defendant was an habitual felony offender. In Chapter 89-280, Laws of Florida, at 1632-33, however, the Legislature amended section 775.084, Florida Statutes (Supp. 1988), in relevant part as follows to allow the use of out-of-state convictions as predicates (the amendments are underlined):

> (1)(a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment . . . if it finds that:
>
> 1. The defendant has previously been convicted of <u>any combination of</u> two or more felonies in this state <u>or qualified offenses</u>;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> . . .
>
> (1)(c) "Qualified offense" means any offense, <u>substantially similar in elements and penalties to an offense in this state, which is</u> in violation of a law of <u>any other jurisdiction, whether that of</u> another state, <u>the District of Columbia,</u> or ~~of~~ the United States <u>or any possession or territory thereof, or any foreign jurisdiction,</u> that was punishable under the law of such <u>jurisdiction</u> ~~state or the United States~~ at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

The addition of the words "or qualified offense" to subsection (1)(a)(1) is what now allows prosecutors to use out-of-state convictions as predicates for a finding of habitual offender status. In this case, the prosecutor relied on an out-of-state Illinois conviction. (R8-10, 18)

In Johnson v. State, 18 Fla. L. Weekly S55 (Fla. Jan. 14, 1993), this Court ruled that Chapter 89-280 violated the single subject rule and accordingly did not become effective until May 2, 1991. Johnson rejected claims that this issue had to be preserved at the trial level for appellate review. Johnson is unfortunately ambiguous on whether a offense committed before May 2, 1991, but sentenced afterward could be subject to Chapter 89-280. This question, however, does not arise in this case because both the offense and the sentencing occurred before May 2, 1991.

Because the authorization in Chapter 89-280 for using out-of-state convictions did not become effective until May 2, 1991, after the date of sentencing in this case, the prosecutor's reliance on the Illinois conviction was illegal, and remand is necessary for resentencing.

CONCLUSION

Rhoads asks for resentencing.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ERIC ENNIS RHOADS

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-03570

Opinion filed November 25, 1992.

Appeal from the Circuit Court for Hillsborough County; Bob Anderson Mitcham, Judge.

James Marion Moorman, Public Defender, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ann P. Corcoran, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See State v. Sheppard, 17 F.L.W. D1960 (Fla. 2d DCA Aug. 21, 1992).

RYDER, A.C.J., HALL and BLUE, JJ., Concur.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann C. Corcoran, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of February, 1993.

Respectfully submitted,

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