IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross Respondent,

v. CASE NO. 80,966 & 81,035

CURTIS LEE McCRAY,

Respondent/Cross Petitioner.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent/Cross-Petitioner in this case shall be referred to as McCray. Petitioner/Cross-Respondent shall be referred to as the State.

References to the record, trial transcript, and sentencing transcript will be made by "R", "T", and "S" respectively, followed by the page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

McCray was charged by a three count amended information with Aggravated Battery with a Firearm, Aggravated Assault with a Firearm, and Battery. The victim in all three counts was alleged to be DeMarcus Sailor (R 10-11).

The case proceeded to jury trial.

Sailor testified that on November 11, 1990, after sitting around drinking with his friends Jeffery Moore and Ronnie Cooper, the three decided to visit a friend, Demetria, at her trailer. Sailor was sitting in Demetria's living room when McCray walked out from another room of the trailer. McCray pushed Sailor and then McCray and Sailor got into a fist fight. Sailor and McCray were pulled apart by others present. Sailor stood there after it was broken up waiting to fight some more. Sailor and McCray then went outside (T 34-42). Sailor observed that McCray was holding a gun at this side saying, "Do you want to fight some more" (T 43).

Sailor testified that McCray then shot one time down on the ground and then shot again. Sailor stated the second shot hit him in the hand. Sailor stated he did not realize he had been hit with the bullet until after he had started walking off. As Sailor was walking away, McCray picked up a stick and hit Sailor, scratching Sailor's ear (T 44-50).

Mr. Ronnie Cooper and Mr. Moore testified similarly, except that Mr. Moore stated the gun was fired two or three times, and that he observed Curtis Jones give McCray the gun inside the trailer (T 56-68; T 68-77).

Dr. George Whiddon, a family practitioner, testified that he examined Sailor's hand and that there was an injury between the forefinger and the thumb of the Sailor's right hand that went through the webbed space. It was consistent with a small caliber gunshot wound. Sailor was treated and released that evening (T 79-81). On cross-examination Whiddon was asked if the wound could have been consistent with other things besides a gunshot wound. Whiddon replied, "I'm not a forensic pathologist. I assume you could have put some type of object into the hand and back out that possibly could have done the same thing" (T 81).

Curtis McCray testified he went to Demetria's trailer and that he and Sailor got into a fight. McCray testified that during the fight he was hit by Sailor while Moore was holding McCray (T 82-97).

McCray said they got pushed outside and he saw a pistol on the ground. He picked up the pistol and was telling the others to let him alone. McCray said he shot the pistol once at the ground, at which point Sailor said Sailor was through with it, and walked off. On cross-examination McCray agreed he hit Sailor with a stick as Sailor was walking off (T 95-96).

Prior to sentencing, but after McCray's trial where McCray was convicted of the lesser included offense of Discharging a Firearm in Public, as well as Aggravated Assault and Battery, the prosecutor filed a "Notice of Intent to Seek Enhanced Penalty as Habitual Violent Felony Offender" (R 19-20). The notice alleged a prior conviction entered on May 25, 1989 as

the prior enumerated felony. The aggravated assault for which McCray was being sentenced occurred November 11, 1990.

McCray filed a written objection to the state's seeking classification of McCray as a habitual violent felony offender (R 21-22). In the motion, McCray noted that there had been extensive plea negotiations between the state and defense prior to trial and at no time during those negotiations had the state mentioned the possibility of seeking habitual violent felony offender treatment. McCray further noted in the motion that if there was no need for the state seeking such treatment before trial, there was no evidence that a substantially higher sentence was now necessary. McCray's trial had resulted in a finding that McCray was guilty only of a misdemeanor on the most serious count originally charged.

The trial judge found McCray to be a habitual violent felony offender and sentenced McCray on Count II, aggravated assault, to eight years in prison with a five year minimum mandatory. McCray was sentenced on Counts I and III to one year in the county jail to run concurrent with the sentence imposed on Count II (R 23-26).

The predicate felony which formed the basis of the trial court's finding that McCray was a habitual violent felony offender was McCray's previous aggravated battery conviction.

The case was appealed to the First District Court of Appeal.

The First District issued an opinion in McCray's case finding Chapter 89-280 to be unconstitutional on the basis of

their previous decision issued in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991). (See Appendix for opinion issued in the case at bar). McCrae does not contest this portion of the opinion.

McCray notes that State v. Johnson, 18 F.L.W. S55 (Fla. January 14, 1993) involved the identical issue as that raised in the case at bar. This court recently decided Johnson holding that the Chapter 89-280 amendments to Section 775.084(1)([b])(1), Florida Statutes (1989), were unconstitutional, prior to their reenactment as part of the Florida Statutes, because the amendments were in violation of the single subject rule of the Florida Constitution.

The First District Court of Appeal did not address two other sentencing issues raised by McCrae, perhaps because they considered that their holding finding the habitual offender statute to be unconstitutional on the one-subject argument made it unnecessary for them to reach the other two arguments, which also attacked McCrae's being sentenced as an habitual violent felony offender.

McCray brings these issues before this Court because this Court has jurisdiction based on the certified question, and because Johnson is on rehearing and therefore not final.

SUMMARY OF ARGUMENT

McCray submits the trial court erred in sentencing McCray as an habitual violent felony offender.

The habitual violent felony offender statute has been found to be unconstitutional in circumstances identical to the case at bar. See State v. Johnson, 18 F.L.W. S55 (Fla. January 14, 1993).

McCray further that his right to due process of law under Article I, Sections 9 and 16 of the Florida Constitution and Amendment XIV of the United States Constitution was contravened when the state sought habitual violent felony offender sentencing only after McCray went to trial and was convicted of a less serious charge under Count I of the information.

McCray's state and federal constitutional rights to due process of law were further violated when the trial judge partly based his decision on sentencing McCray as a habitual violent felony offender on conduct which McCray had been acquitted of at trial.

If this Court recedes from its present holding in Johnson v. State, supra, McCray's sentence should still be reversed and remanded for imposition of a guideline sentence.

ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT IMPROPERLY SENTENCED MCCRAY AS AN HABITUAL VIOLENT FELONY OFFENDER.

A) Section 775.084, Florida Statutes (1989), Chapter 89-280, Laws of Florida, violated the one subject rule of the Florida Constitution and thus Appellant's sentence as an habitual violent felony offender was improper.

McCray submits that Section 775.084, Florida Statutes (1989), Chapter 89-280, Laws of Florida, violated the one subject rule of the Florida Constitution and thus McCray's sentence as an habitual violent felony offender was improper.

In State v. Johnson, 18 F.L.W. S55 (Fla. January 14, 1993) this Court reversed Johnson's sentence, finding that the habitual violent felony offender statute, as amended in Ch 89-280, violated the single subject rule of Article III, Section 6, of the Florida Constitution. This court further found the error to be fundamental.

In so doing, this Court noted that the offense for which Johnson was convicted and Johnson's sentencing occurred between October 1, 1989 and May 2, 1991, the interim period between the effective date of the 1989 amendment and its re-enactment as part of the Florida Statutes. The predicate felony utilized by the state to habitualize Johnson was aggravated battery, which was not included in the pre-amendment statute.

McCray's case is indistinguishable from Johnson.

In the case at bar, the offense for which McCray was convicted occurred on November 11, 1990.

Furthermore, McCray could not have been habitualized under the pre-amendment statute. The enumerated felony which formed the basis for the trial court's finding that McCray was a habitual violent felony offender was McCray's previous conviction for aggravated battery. However, the pre-amendment statute did not contain aggravated battery as an enumerated felony.

Based on the foregoing argument and citation of authority, McCray's submits that the First District Court of Appeal's reversal of his sentence as an habitual violent felony offender should be upheld.

B) McCray's state and federal constitutional rights to due process of law were violated when the prosecutor successfully sought to have McCray sentenced as a habitual violent felony offender only after the jury acquitted McCray of the highest felony charged.

McCray was charged with aggravated battery, aggravated assault, and battery.

Prior to McCray choosing to exercise his right to a trial by jury, McCray and the state engaged in extensive plea negotiations. The state did not controvert the following statement made by defense counsel made in support of McCray's objection to being sentenced as a violent felony habitual offender:

> Defense attorney: ... The point is that we entered into these agreements. At no time -- or excuse me, into these negotiations. At no time was the question of habitual or violent habitual felony offender raised. It was not part of the negotiations. ...The point is that we might well have taken the earlier plea offer which was to higher charges than he has now been found

> guilty of by the jury. If we're going to have any kind of faith in our plea negotiations, we need to know what we're dealing with. And it just seems to me that here the State came in, they had three charges on the table, that the jury did not find him guilty of one of the major charges so now they're trying to up the ante, so to speak at sentencing.
>
> I would have no problem if it's part of the negotiations, if it's even eluded [alluded] to that we might habitualize him, his record calls for it, that kind of thing. At least that way we've got it on the table. In this case it was not. We bargained in good faith, rejected it, went to trial and now the State is seeking the enhanced penalty (S 5).

McCray submits that the state's seeking of habitual violent felony offender treatment, only after McCray turned down plea negotiations which did not reference such treatment, and only after McCray exercised his right to a jury trial and received a not guilty verdict as to the highest felony charged, constituted a penalty for McCray's exercising his fundamental right to a jury trial.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978) the United States Supreme Court considered whether a due process violation existed where a prosecutor followed through on threats made, during the plea bargaining process, to up the charges by obtaining a recidivist indictment against the defendant. In holding that the defendant's due process rights were not violated the Court was careful to note the exact facts before the court:

> It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until

> after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. [Emphasis supplied].

Id. at 360.

In the case at bar, the prosecutor did bring an additional penalty only after the defendant insisted on pleading not guilty, went to trial, and on the most serious count, was convicted of a misdemeanor offense.

The result was to deny McCray his right to due process of law in contravention of Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution.

McCray's sentence as an habitual violent felony offender should be reversed and the case remanded for re-sentencing.

C) McCray's state and federal constitutional rights to due process of law were violated when the trial judge considered conduct for which McCray had been acquitted at trial in finding McCray to be a habitual violent felony offender.

McCray was charged with aggravated battery, aggravated assault, and battery.

The state based the aggravated battery charge on the fact that DeMarcus Sailor stated he had been shot in the hand. This

was clear from the outset of the trial where in opening statement the prosecutor stated:

> And the evidence will show you that by the acts this defendant chose to do on November 11th of 1990, he committed three different crimes, the crime of battery, which is the offensive touching, the crime of aggravated assault which was the threat with the gun, and then the crime of aggravated battery which was the actual shooting of Mr. Sailor with the gun (T 30).

In closing argument, the prosecutor stated: "I would submit to you that the testimony and the evidence from the witnesses shows the intentional touching of another individual, the shooting of the gun several times and one of those rounds hitting the man in the hand. That's the touching there. And it is with a deadly weapon. The charge is aggravated battery with a deadly weapon. ... So the deadly weapon we're talking about is the firearm." (T 117).

It is also clear from the prosecutor's closing statement and the record that the aggravated assault and simple battery were based on other incidents which occurred in the encounter between McCray and DeMarcus Sailor.

The jury acquitted appellant of the aggravated battery, convicting McCray of the lesser included offense of discharging a firearm in public.

Nonetheless, the trial judge assumed the aggravated battery had occurred in choosing to sentence McCray as an habitual violent felony offender.

This is apparent in the following colloquy between the trial judge and McCray at sentencing:

> The defendant: Yes, sir. Your Honor, all I wish to say is that at the time that myself and DeMarcus, you know, was having disagreements and everything and I did admit to the fact that I did pick up the gun and everything but I didn't shoot DeMarcus, and I can say that, you know. Like my lawyer said, I have learned my lesson from all of this and all I just ask is that I be given a chance at life.
>
> The Court: Well who shot DeMarcus if you didn't?
>
> The Defendant: Your Honor, that's something I have yet to know.
>
> The Court: Did you hear what he said?
>
> The Defendant: DeMarcus?
>
> The Court: Yeah.
>
> The Defendant: Yes, sir; I was here at trial, I heard what he had said.
>
> The Court: Seems like I recall that he said you shot him.
>
> The Defendant: Well that's what he said, Your Honor, but I didn't shoot him (S 10-11).

The jury was also present at McCray's trial and concluded that McCray did not commit aggravated battery against Sailor. Thus, in reaching the conclusion that McCray qualified as a habitual violent felony offender, it was a violation of McCray's right to due process of law for the trial judge to assume that in fact McCray did commit the aggravated battery.

An analogous situation is where the trial judge impermissibly departs from the guidelines relying on factors relating to offenses for which convictions were not obtained. See

Pendleton v. State, 493 So.2d 1111 (Fla. 1st DCA 1986); State v. Tyner, 506 So.2d 405 (Fla. 1987).

In Pendleton v. State, supra, this Court reversed the trial judge's imposition of a departure sentence on a defendant where the trial judge departed, among other reasons, because the trial judge was convinced the jury verdict of aggravated battery in a case where the victim died was "illogical" and that the defendant was actually guilty of second degree murder.

In State v. Tyner, supra, the Florida Supreme Court found departure on a burglary sentence, based on murders committed during the burglary to be improper, where the trial judge had granted a motion to dismiss the murder charges against Tyner. In so ruling, the Court stated:

> In this case, consideration of the murders in sentencing for the armed burglary would result in an egregious violation of due process because the defendant has already been acquitted of the murders. It is well settled that dismissal of a criminal charge based on stipulated facts reflects a conclusion by the judge that the evidence is insufficient to convict the defendant of that charge. ... Moreover, a determination of guilt by the judge at this stage impermissibly denies the defendant his right to a jury trial.

Id. at 406.

Another analogous situation arises in guideline sentencing where victim injury is scored on an offense for which the accused is acquitted.

In Morgan v. State, 534 So.2d 1239 (Fla. 5th DCA 1988) the appellate court reversed the scoring of victim injury points. Morgan was tried for aggravated battery and battery on a law

enforcement officer. The battery charge arose as a consequence of Morgan punching the officer in the chest. However, Morgan was also charged with aggravated battery as the same officer received severe injury when a companion of Morgan's hit the officer with a flashlight as the officer was attempting to subdue Morgan. Morgan was convicted of the battery but acquitted of the aggravated battery. The appellate court held that victim injury points could not be assessed because it was clear Morgan's battery caused no injury and Morgan was acquitted of the aggravated battery charged.

The decision whether or not to sentence an individual as a habitual violent felony offender is discretionary. However, due process requires that the trial judge not consider in his decision conduct of which the defendant was acquitted. The fact that the judge impermissibly weighed the aggravated battery in his sentencing decision requires a new sentencing hearing. See Rosier v. State, 586 So.2d 516 (Fla. 1st DCA 1991).

McCray's sentence should be reversed and the case remanded for resentencing.

CONCLUSION

Based on the foregoing argument and citation of authority, McCray submits his sentence as a violent felony habitual offender should be reversed and the case remanded for resentencing within the guidelines not only under the authority of Johnson, supra, but also because of the additional arguments presented in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by ~~delivery~~ U.S. Mail to Charlie McCoy, Assistant Attorney General, Criminal Appeals Division, The Capital, Plaza Level, Florida, 32301; and a copy has been mailed to respondent/cross petitioner, Mr. Curtis McCray, on this 19th day of March, 1993.

LYNN A. WILLIAMS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross Respondent,

v. CASE NO. 80,966 & 81,035

CURTIS LEE McCRAY,

Respondent/Cross Petitioner.

_____/

A P P E N D I X

TO

RESPONDENT'S ANSWER BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CURTIS LEE McCRAY,	* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.
Appellant,	*
v.	* CASE NO. 91-2828
STATE OF FLORIDA,	*
Appellee.	*

Opinion filed December 7, 1992.

Appeal from the Circuit Court for Gadsden County, Charles D. McClure, Judge.

Nancy A. Daniels, Public Defender, and Lynn A. Williams, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

The appellant challenges a habitual violent felony offender sentence, asserting that chapter 89-280, Laws of Florida, violates the single subject requirement of article III, section 6, Florida Constitution. We found chapter 89-280 to be unconstitutional on this basis in Johnson v. State, 589 So.2d

1370 (Fla. 1st DCA 1991), juris. accepted, Nos. 79,150 and 79,204 (Fla. May 19, 1992). In accordance with Johnson and Claybourne v. State, 600 So.2d 516 (Fla. 1st DCA 1992), petition for review filed, No. 80,157 (Fla. July 10, 1992), we therefore vacate the sentence and remand for resentencing. However, we acknowledge conflict with decisions such as State v. Sheppard, 17 FLW D1960 (Fla. 2d DCA August 21, 1992); Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992) juris. accepted, No. 79,669 (Fla. September 18, 1992); and McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), juris. accepted, 593 So.2d 1052 (Fla. 1992). We also certify the same question of great public importance as was certified in Johnson and Claybourne.

ALLEN, WOLF and WEBSTER, JJ., CONCUR.