FILED
SID J. WHITE
MAR 11 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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.

_____/

REPLY/CROSS-ANSWER
BRIEF BY THE STATE

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PRELIMINARY STATEMENT

Issues I and II comprise the State's reply brief on the jurisdictional issue (certified question), and correspond to part A of McCray's "answer brief." Issues III and IV comprise the state's cross-answer brief, and correspond to parts B and C of McCray's brief.

STATEMENT OF THE CASE AND FACTS

The State relies on the statement in its initial brief. It strongly objects to McCray's statement. In his statement (answer brief, p. 5) McCray improperly argues, based on this court's decision in State v. Johnson, 18 Fla.L.Weekly S55 (Fla. Jan. 14, 1993), rehearing pending.

Even more improperly, McCray speculates as to why the First DCA did not address two other sentencing issues. He argues for the consideration by this court. The State objects to counsel's use of the statement of the case and facts as a vehicle for argument.

SUMMARY OF ARGUMENT

ISSUES I and II: One Subject Challenge to Ch. 89-180, Laws of Florida.

These issues were decided against the State in Johnson, supra. The State's motion for rehearing is pending. No decision on this issue should be issued until disposition of that motion.

ISSUE III: Acquittal of Highest Offense Charged

Appellant's past felony conviction for aggravated battery and his present felony conviction under Count II properly substantiate his sentencing as an habitual, violent felon. His acquittal of a felony under Count I is irrelevant.

ISSUE IV: Qualification as an Habitual, Violent Felon

Appellant qualified as an habitual, violent felon. Defense counsel conceded this. The colloquy between Appellant and the trial court at sentencing is irrelevant. At most it reveals harmless error.

ARGUMENT

ISSUE I

WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS CAN BE DENIED MERELY BY THE NUMBER OF SUBJECTS IN A LEGISLATURE ACT.

This issue was decided against the State in Johnson, supra. The State's pending motion for rehearing asks for reconsideration of this point. Whether a defendant is affected by ch. 89-280, Laws of Florida, is a case-specific matter that must be preserved by presentation to the trial court. McCray's failure to do so precludes consideration of this issue on direct appeal. The First DCA's opinion must be vacated. The State respectfully requests that the court not decide this issue (and Issue II) until it has disposed of the State's motion for rehearing in Johnson.

ISSUE II

WHETHER ALL THE PROVISIONS OF CHAPTER 89-280, LAWS OF FLORIDA, RELATE TO CONTROLLING CRIME

This issue was decided against the State in Johnson, supra.

ISSUE III

WHETHER ACQUITTAL OF ONE FELONY COUNT PRECLUDES CLASSIFICATION AS AN HABITUAL FELON UPON CONVICTION FOR A FELONY ON A DIFFERENT COUNT

A. Jurisdictional Considerations

The court should not reach the essence on the merits. The First DCA's opinion did not even acknowledge that McCray had raised this point. That court certainly did not pass upon the merits. McCray, in effect, seeks review of an implicit affirmance. See Randall v. State, case nos. 80,320 and 80,358 (Fla. March 4, 1993) at p. 2: "We note that none of the remaining issues raised by Randall were discussed by the district court and we decline to address those issues in this opinion."

There is a second reason for not reaching this issue on the merits. If Johnson, supra, does not change on rehearing, McCray will be entitled to resentencing. Since resentencing is the relief sought under this issue, the question raised will be moot.

B. Merits

McCray was convicted, under Count I, of a lesser-included misdemeanor. (R 16). He was also convicted of a felony under Count II. (R 17). Simply because Count I was the highest felony

charged, McCray now claims he was improperly classified as a habitual, violent felon.

McCray then argues that the State was bound by plea negotiations[1] -- which McCray declined -- not to seek habitualization. He speculates that the State penalized him for going to trial. (answer brief, p. 9).

There is nothing in the record to indicate such. To the contrary, McCray was convicted for three crimes against another person; the jury pardoned him down only on Count I.

As the trial court noted, there was no plea agreement. (S 9). There was no representation by the State that it would not seek habitual felon sentencing. There was no threat by the prosecutor to seek habitual felon sentencing if McCray refused the plea offer. None of the authority cited by McCray is applicable. The State declines to dignify McCray's frivolous argument with further response.

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[1] Unsuccessful plea negotiations and declined offers are not admissible in criminal proceedings. §90.410, Fla. Stat.; Fla.R.Crim.P. 3.172(h).

ISSUE IV

WHETHER APPELLANT'S CRIMINAL RECORD QUALIFIED HIM AS AN HABITUAL VIOLENT FELON

A. Jurisdictional Considerations

The court should decline to reach this issue on the merits for the reasons stated in part A of Issue III.

B. Merits

In its notice to seek habitual violent felony sentencing of McCray, the State expressly cited to his 1989 conviction for aggravated battery. (R 19). That offense was specifically mentioned by the judge. (S 6).

The colloquy between the judge and defendant -- over who shot the victim -- had nothing to do with McCray's sentencing. McCray denied the shooting; the trial court asked him who did, in light of the victim's clear testimony. (T 42-4).

Even if the colloquy can be read as McCray speculates, the trial court's error was harmless. Defense counsel, at sentencing, conceded that McCray "technically" qualified as an habitual, violent felon. (S 4, lines 6-7).

McCray qualified because of his unchallenged past felony conviction and his present felony conviction under Count II. That is all that is necessary. To the extent the trial court's comments can be read as grounding McCray's sentence on anything else, such interpretation reveals only harmless error. McCray's argument is totally without merit.

CONCLUSION

The one-subject challenge to ch. 89-280 was not preserved, and cannot be fundamental error. The First DCA was without authority to reach that issue on the merits. This court must decline to address the certified question (and the superfluous issues raised by McCray), and vacate the opinion below; thereby affirming McCray's sentence.

Respectfully submitted,

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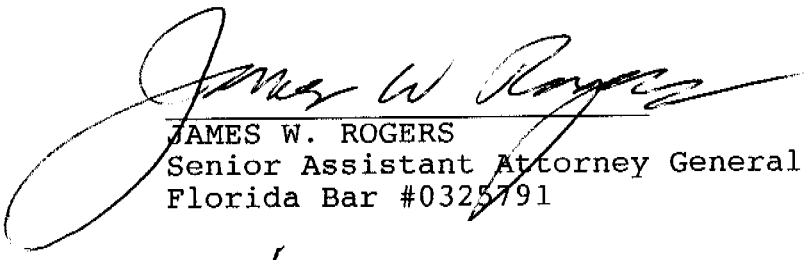
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Lynn Williams, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of March, 1992.

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