047

IN THE SUPREME COURT OF FLORIDA

JAMES B. GOODSON, JR.,

Petitioner,

v. CASE NO. 81,051

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM A
QUESTION CERTIFIED TO BE OF GREAT PUBLIC
IMPORTANCE BY THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts with the following additions.

Petitioner appeared before the court at sentencing for two cases consolidated on one scoresheet, lower court case numbers 90-3152 and 90-3292. (R 680-685).[1] Goodson was found to be an habitual offender in both cases. The first case charged one count of burglary with an assault, and three counts of sexual battery. The court imposed life on count one and three concurrent thirty year sentences on the remaining three counts in this case. Consecutive to these four sentences were the sentences imposed in case number 90-3292. The charges were the same-burglary with an assault and two counts of sexual battery. The trial court imposed incarceration for life for count one, and concurrent thirty year sentences on the remaining counts. The sentences for case number 90-3292 were consecutive to the sentences imposed in 90-3152 (R 680-685; 812-819).

The offenses charged in 90-3152 occurred on October 1, 1989. The crimes in the other case occurred on October 11, 1990.

The sentencing guidelines scoresheet totaled 639 points. (R 820, 662). This corresponded to a recommended guidelines sanction of life in prison.

Both the trial and sentencing occurred after May 2, 1991, the effective date of the statute reenacting 89-280, Laws of Florida.

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[1] (R) refers to the record on appeal.

SUMMARY OF ARGUMENT

Respondent agrees that the certified question presented in this case was recently resolved in State v. Johnson, 18 Fla. L. Weekly S55 (Jan. 14, 1993). Between October 1, 1989 and May 2, 1991, the amendments to the habitual offender act embodied in 89-280 were ineffective as violative of the single subject rule. However, the sentence imposed in this case should nevertheless be affirmed for several reasons.

Goodson is not entitled to benefit of the Johnson decision because he was sentenced after the effective date of the statute reenacting the offending section of the habitual offender act. Indeed, the trial in this case was after May 2, 1991. The sentencing in this case on July 26, 1991 was after the "window" closed. Even if Johnson is applicable to the cases before the court in this appeal, any error is harmless. Goodson has one prior felony conviction in Florida and two prior felony convictions outside of Florida. Either set of convictions for which Goodson was being sentenced are qualified offenses for the other set of convictions. In other words, the convictions in 90-3152 can serve as the second qualified Florida offense for the 90-3292 case. This renders harmless the use of out of state convictions to impose enhanced sentences.

Another reason why error was harmless in this case is because the recommended sentence under the guidelines is life. A sentence of incarceration for natural life under the guidelines is not less than an habitual offender life sentence with consecutive terms of years. Incarceration for life is just that; barring reincarnation, further sentences are superfluous.

Although the question certified to this court has been answered, this sentence should still be affirmed as Goodson was sentenced after the reenactment of the 1989 amendment to the habitual offender act and so is not entitled to benefit of the Johnson case.

ARGUMENT

EVEN THOUGH THE CERTIFIED QUESTION HAS BEEN ANSWERED THIS SENTENCE SHOULD BE AFFIRMED. THE SENTENCING IN THIS CASE OCCURRED AFTER THE REENACTMENT OF THE 1989 AMENDMENT TO THE HABITUAL OFFENDER ACT.

The district court's decision below certified to this court the following question:

> WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084(1)(A)1, FLORIDA STATUTES, (1989), WERE UNCONSTITUTIONAL PRIOR TO THEIR REENACTMENT AS PART OF THE FLORIDA STATUTES, BECAUSE THEY WERE IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION?

This Court answered this question in the affirmative in State v. Johnson, 18 Fla. L. Weekly S55 (Fla. January 14, 1993). This court held that persons sentenced between October 1, 1989 and May 2, 1991 have standing to assert this challenge. Persons adversely affected by the amendments are entitled to resentencing.

Goodson is not entitled to benefit of the Johnson decision because he was sentenced on July 26, 1991, after the reenactment of the offending statute. The "window period" closed before Goodson's trial began. This court predicated Johnson's standing on the fact that he was sentenced during the window period.

> Johnson was sentenced before the reenactment of Chapter 89-280 and during the window period in which that chapter was subject to attack as being violative of the constitution's single subject requirement. The window period in this instance ran from October 1, 1989, the effective date of chapter 89-280, to May 2, 1991, the date on which chapter 89-280 was reenacted. Consequently,

> Johnson had standing ... Id. at 56. (emphasis added).

Goodson was sentenced after the reenactment of the statute and hence has no standing to raise this issue.

Assuming for sake of argument that Goodson has standing, no reversible error is presented. An habitual offender sentence was properly imposed in both sets of cases.

The state notes that one of the cases for which an habitual offender sentence was imposed was committed on October 1, 1989, hours after the amendments in Chapter 89-280 became effective. Even without reliance upon the Oklahoma convictions, the state contends that an enhanced sentence could nevertheless be imposed using the undisputed prior Florida conviction and the convictions in 90-3292. See Smith v. State, 584 So. 2d 1107 (2nd DCA, 1991), rev. denied, 595 So. 2d 557 (Fla. 1991).

Petitioner may argue that qualified offenses must precede those offenses they enhance. He may suggest that the offenses which occurred on October 11, 1990 cannot be used to enhance a sentence for crimes occurring October 1, 1989. The underlying purpose of the habitual offender act is to prevent recividism. However, this court has approved enhanced sentences where both prior convictions were entered on the same day. State v. Barnes, 595 So. 2d (Fla. 1992). Moreover, "prior convictions" for the aggravating factor in the capitol sentencing statute includes crimes committed temporally after the capital murder, so long as the judgments of conviction is entered prior to the sentencing for the capital felony. See Pardo v. State, 563 So. 2d 77 (1990). By analogy, the same reasoning applies in this instance.

Goodson may also respond that the only sentence before this court is that imposed in 90-3292.[2] The cases were undoubtedly consolidated for sentencing as they were both pending before the court. The cases were consolidated on appeal and one record prepared. The appellant then moved to sever, but permitted the cases to travel together with one record. The other case, 90-3152, continued separately, and resulted in a per curiam: affirmed decision. The state submits that the two cases are intertwined and cannot be viewed in isolation, even though they parted paths just before reaching their destination.

Even if Goodson is correct that crimes committed in 1990 cannot enhance sentences for crimes committed in 1989 due to the underlying purpose of the habitual offender act, the reverse is not true. Namely, the 1989 crimes embodied in 90-3152 can be used to enhance the sentence for crimes committed on October 11, 1990, as charged in 90-3292. See Smith v. State, supra. Therefore, even without relying on the Oklahoma convictions, the second set of cases before the court for sentencing can be used as qualified offenses for enhanced sentence under the habitual offender act. Any error in using the Oklahoma convictions is harmless given the fact that there are several Florida convictions which may be used as qualified offenses.

Another reason why any error is harmless is that either way he is sentenced, Goodson will spend his life in prison. In Johnson, the habitual offender sentence was twenty-five years,

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[2] If this argument prevails, then the habitual offender sentence in 90-3152 is completely unaffected by the decision in this case as it is not before this Court.

while the maximum guidelines sentence was three and one half years. Clearly, this affected Johnson's liberty interest. However, Goodson's prior record amasses a total of 639 points, which corresponds to a recommended guidelines sanction of incarceration for natural life. The habitual offender life sentence has a consecutive thirty year term of incarceration. To find the enhanced sentence to be greater, this court must find that a guidelines sentence of natural life, without parole, is less than habitual offender life plus thirty years. The state suggests that as to Goodson, no "fundamental 'liberty' due process interests" are implicated. State v. Johnson, 18 Fla. L. Weekly at S56.

Even though this court found that the certified question presented here should be answered in the affirmative, the sentence in this case should nevertheless be affirmed. The state established below that Goodson had one prior Florida felony conviction and two prior Oklahoma felony convictions. Goodson was before the court for sentencing in two separate cases, each involving a burglary and several counts of sexual battery. Goodson is not entitled to benefit of the Johnson decision for several reasons. First, he was sentenced after the window period closed. His July, 1991 sentencing was subsequent to the reenactment of Chapter 89-280. Therefore, he lacks standing to raise this claim. Second, he cannot demonstrate that he is adversely affected by the amendment because the additional qualifying offense can be the convictions for burglary or sexual battery in case 90-3152 which occurred prior to the offenses in

90-3292. (R 607). Any error is harmless for this reason. The sentences imposed should be affirmed in all respects.

CONCLUSION

Based upon the foregoing argument and authorities, respondent respectfully requests this honorable court to find that the certified question has been answered affirmatively, but find that the facts of this case are distinguishable and affirm in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery to Sophia B. Ehringer, Office of the Public Defender, 112A Orange Avenue, Daytona Beach, FL 32114, this 1st day of March, 1993.

Belle B. Turner
Of Counsel