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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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By _____
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JAMES B. GOODSON, JR.)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 81,051

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SOPHIA EHRINGER
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES BYRON GOODSON, JR.,)
 Petitioner,)
)
v.)
)
STATE OF FLORIDA,)
 Respondent.)
_____)

CASE NO. 81,051

SUMMARY OF THE ARGUMENT

This case comes to this Court on a question certified from the Fifth District Court of Appeal as being of great public importance, namely: 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?

Petitioner's offense date fell within the effective date of the unconstitutional amendments, and he therefore has standing to challenge the constitutionality of the amended statute as applied. Furthermore, Petitioner could not have been classified as a habitual offender but for the amendment to the habitual offender statute. Petitioner requests that this Honorable Court answer the question in the affirmative, vacate his sentence, and remand the case for resentencing within the guidelines.

ARGUMENT

AS THIS COURT HELD IN STATE V. JOHNSON, 18 FLA. L. WEEKLY S55, (Fla. Jan. 14, 1993), THE CHAPTER 89-280 AMENDMENTS TO THE HABITUAL OFFENDER STATUTE WERE UNCONSTITUTIONAL PRIOR TO THEIR REENACTMENT AND PETITIONER'S SENTENCE MUST BE VACATED BECAUSE PETITIONER COULD NOT HAVE BEEN HABITUALIZED HAD THE AMENDMENTS NOT BEEN INCLUDED IN THE APPLICABLE STATUTE.

The trial court erred in sentencing Petitioner as a habitual offender. The habitual offender statute, § 775.084, Florida Statutes (1989), as amended and applied to Petitioner's sentence, was found by this Court to be violative of the single subject requirement of article III, section 6, of the Florida Constitution. Ch. 89-280, § 12, Laws of Florida; State v. Johnson, 18 Fla. L. Weekly S55 (Fla. L. Weekly Jan. 14, 1993). In Johnson, this Court found that Chapter 89-280, which amended Florida Statutes § 775.084, violated the single subject rule. The decision required that those individuals sentenced as habitual felony offenders must be resentenced, provided that the amendments to section 775.084 contained in chapter 89-280 affected their classification under this statute. Johnson, 18 Fla. L. Weekly at 56. The "window" period in which the prohibited amendments were effective was from October 1, 1989, to May 2, 1991.

The offenses for which Petitioner was illegally sentenced occurred on October 11, 1990, after the October 1, 1989 effective date of Chapter 89-280, Laws of Florida, and before the effective date of Chapter 91-44, which reenacted the 1989 amendments to

Florida Statutes. This is within the period contemplated by Johnson, supra. Furthermore, the State relied on out-of-state convictions to classify Petitioner as a habitual offender, which could not have been used but for the unauthorized amendment to the habitual offender statute.

Respondent argues that Petitioner should not be resentenced because his sentencing hearing was held after May 2, 1991. In ascertaining the applicability of criminal statutes in sentencing a defendant, the courts have consistently found the date of the offense, and not the trial or sentencing date to be determinative. For example, in State v. McCloud, 577 So. 2d 939 (Fla. 1991), in examining the applicability of Florida Statutes § 775.021 (Supp. 1988) (which codified the test established in Blockburger v. United States, 284 U.S. 299 (1932), the date of the offense was controlling. Florida Statutes § 775.021(4), as amended by Chapter 88-131, Laws of Florida, did away with the doctrine of lenity in construing criminal statutes. After the effective date of this statute, a defendant could be both convicted and sentenced with possession and sale of the same quantity of cocaine. This changed the rule established in Carawan v. State, 515 So. 2d 161 (Fla. 1987). In determining whether Carawan or § 775.021(4) (Supp. 1988) (effective July 1, 1988) applied, this Court turned to the offense date, and not the plea and sentencing date.

Similarly in State v. Yost, 507 So. 2d 1099 (Fla. 1977), where this Court found that the application of penalty provisions

of a statute providing for additional court costs for crimes committed prior to the effective date of a certain statute violated the prohibition against ex post facto laws, the determinative date was the date in which the offense occurred. The statute in question was subsequently amended, curing the violation of the ex post facto clause of the constitution. As in the instant case, the statute declared unconstitutional dealt with sentencing penalties, and this Court found that those defendants whose "crimes were committed prior to the effective date of the statute" could challenge the illegal retroactive application of the statute. Yost, 507 So. 2d at 1100-1101. See also Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed 2d 351 (Supreme Court reversed ruling that sentencing judge could sentence a defendant pursuant to the guidelines in effect at the time of sentencing; Court found that Florida's revised guidelines law, Ch. 84-328, Laws of Florida, was void as applied to the defendant, whose crime occurred before the law's effective date).

Further support for Petitioner's position may be found in the case of Butler v. State, 18 Fla. L. Weekly S79 (Fla. Jan 21, 1993).¹ In Butler, this Court vacated the habitual offender sentence and remanded the case for resentencing based on the violation of the single subject rule, citing Johnson, supra. Mr.

¹ The case of Butler v. State was numbered in this Court's files as 80,060. Petitioner notes that the Court must take judicial notice of its own records. Fuller v. Williams, 393 So. 2d 651 (Fla. 5th DCA 1981).

Butler's offense fell within the window period of October 1, 1989, and May 2, 1991, but his sentencing hearing was held on August 27, 1991, after the closure of this window period. Nonetheless, this Court found Johnson to be applicable in invalidating Butler's sentence, as the date of the offense had occurred prior to May 2, 1991. Therefore, Respondent's argument that Petitioner Goodson does not have standing to challenge his sentence under Johnson, supra, is without merit.

Respondent also argues that the error is harmless because Petitioner was also sentenced in a separate case, numbered 90-3152. Petitioner reiterates that the convictions included in case numbered 90-3152 were entered after the offense date in the instant case, and were not final at the time Petitioner was being sentenced in the instant case. Convictions entered after the offense date for which a defendant is being sentenced cannot be considered in determining whether a defendant qualifies as a habitual offender. § 775.084, Fla. Stat. (1990); Brooks v. State, 578 So. 2d 893 (Fla. 1st DCA 1991); Palmore v. State, 584 So. 2d 135 (Fla. 1st DCA 1991).

Petitioner recognizes that this Court interpreted the habitual offender statute as containing no sequential conviction requirement. Barnes v. State, 595 So. 2d 22 (Fla. 1992). Even in light of this recent ruling however, Petitioner could still have not been classified as a habitual offender absent the amendments to Florida Statutes § 775.084 (1989). Other than the Oklahoma judgments, the only other judgment introduced was that

from a plea entered in July of 1976 in Florida, which is too remote to qualify as a predicate offense (unless the State had established that Petitioner was released from prison within five years of the date of the instant offense), and the judgment from case number 90-3152, which could not be considered for the reasons stated above, and which were the subject of an appeal.

Martin v. State, 592 So. 2d 1219 (Fla. 1st DCA 1992) (a conviction must be final before it can constitute a "prior conviction" for the purposes of the habitual offender statute; conviction subject to appeal could not be considered).

Respondent's claim that "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" is incorrect and misleading. (Respondent's Merit Brief, pg. 5).

Respondent also provided, "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," (90-3292 is the instant case on appeal to this Court, and lists three offenses), apparently suggesting that the offenses for which Petitioner was sentenced in the case sub judice may be used to habitualize him (Respondent's Merit Brief, pg. 5). It is clear, however, that Petitioner does not have the requisite "undisputed Florida convictions" and the convictions in 90-3292 cannot be considered, as the sentence imposed for these convictions are the subject of the instant appeal.


Petitioner Goodson could not have been habitualized prior to the effective date of the amendment to the habitual offender statute. The amendment, which was found to be unconstitutional prior to the statute's reenactment in Chapter 91-44, Laws of Florida, was specifically applied to Petitioner's case, in allowing Petitioner to be habitualized through the use of out-of-state convictions. Petitioner requests that this Honorable Court answer the question certified in the instant case in the affirmative, vacate Petitioner's habitual offender sentence, and remand this cause for resentencing within the guidelines.

CONCLUSION

BASED UPON the argument contained herein, and in Petitioner's Brief on the Merits, Petitioner requests that this Honorable Court answer the certified question in the affirmative, vacate Petitioner's sentence, and remand this cause for resentencing within the guidelines.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: James B. Goodson, Jr., No. A 055091, Central Florida Reception Center, P. O. Box 628040, Orlando, FL 32862-8040 on this 22nd day of March, 1993.



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