ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ROLAND DOBSON,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

DCA CASE NO. 87,356

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

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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THE DECISION OF THE DISTRICT COURT WAS INCORRECT BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED THE TAPE RECORDING TO BE REPLAYED TO THE JURY DURING THE STATE'S CLOSING ARGUMENT AND TO BE TAKEN BACK INTO THE JURY ROOM DURING DELIBERATIONS.

Respondent initially contends in its answer brief that the trial court correctly permitted the prosecutor during her closing argument to replay, over defense objection, a tape recording, which had previously been admitted into evidence, while also offering her own interpretation as to the tape recording's content. Respondent's Brief pages 4-5) As support for this argument, Respondent cites to the trial testimony of a police confidential informant, Lionell Curry. According to the Respondent, the prosecutor's comments were merely a "summing up" of Curry's prior testimony concerning the audiotape's content. (Respondent'sBrief pages 4-5) Petitioner maintains, however, that the pertinent trial testimony as to his guilt or innocence boiled down to a swearing match between two opposing witnesses, namely, Curry and the Petitioner's girlfriend, Gail Morgan. Therefore, by replaying the audiotape and commenting on its content, the prosecutor created the real danger that the jury would unfairly give the audiotape and the prosecutor's statements more emphasis than other testimony.

More importantly, the record also demonstrates that the audiotape itself was difficult to listen to because it was at times "hard to hear", a fact that was conceded by the prosecutor

during her closing argument. (T 165-166) Consequently, Curry was asked to provide to the jury during his testimony his own interpretation of what was being said on the audiotape and by whom. (T 55-61) Thus, the prosecutor's subsequent replaying of the tape, colored by her own interpretation of the tape's content, amounted to her improperly conveying [testifying] to the jury the highly prejudicial message that she too heard the same things being said on the audiotape which had been testified to earlier by Curry. (T 165-166) Further, not only did such impermissible argument by the prosecutor allow the prosecutor to offer the jury her own testimony as to what the evidence presented in the case was, it also permitted her to improperly vouch for the credibility of a state witness, Mr. Curry, and was not just a "summing up" Curry's testimony by the prosecutor as Respondent maintains. Stone v. State, 626 So. 2d 295 (Fla. 5th DCA 1993). At the very least, the replaying of the audiotape placed undue prominence on a single piece of evidence, i.e., the audiotape. Further such error cannot be deemed to be harmless in light of Curry's testimony, in conjunction with the tape being played, comprising the center piece of the State's case. In fact, Petitioner would suggest to this Court. Respondent's argument that that the prosecutor's singled out for the jury "... only two breaks to play the tape in the [prosecutor's] approximately seventeen page closing argument", actually served to intensify, not lessen, the prejudicial effect of the prosecutor's improper replaying of the tape peppered with her

personal commentary. (Respondent's Brief page 5)

Respondent additionally argues that Judge Watson properly allowed the audiotape, along with a tape player, to be utilized by the jury , over defense objection, during its deliberations, totally unsupervised, and out of the presence of either counsel. (Respondent's Brief pages 5-8) Citing Young v. State, **645** So.2d **965** (Fla. **1994),** Respondent asserts that because the audiotape is a recording of a criminal act, it was not testimonial in nature and could properly be sent into the jury room. (Respondent's Brief pages 5-8). This argument appears to be at odds, however, with Respondent's other contention that the prosecutor's replaying portions of the audiotape amounted to a mere "summing up" of Curry's prior testimony. Clearly, the prosecutor's comments concerning the content of the audiotape made during her closing argument and the audiotape itself were both testimonial in nature. Id.; Stone, supra.

Respondent further cites to the Fifth District Court's decision in Crews v. State, **442** So.2d 432 (Fla. 5th DCA 1983). The videotape used during jury deliberations in Crews, however, is distinguishable from the audiotape at issue in the instant case. In Crews, an unsupervised jury utilized a videotape during its deliberations of "sufficient clarity to be able to identify persons appearing on the screen." Id. at **433.** The case at bar involves, instead, a poor quality tape recording of an alleged drug transaction, which, by itself, can not be said to constitute "substantial evidence against the Petitioner of a criminal act"

as the videotape did in Crews. In fact, the audiotape in the case sub iudice was comprised of such poor quality verbal content it had to be explained to the jury by the State's main witness, Curry, and the prosecutor which further lends the audiotape to being more fairly viewed as testimony. Young, supra; State v. Lewis, 543 So.2d 760, 767 (Fla. 2d DCA 1989). As pointed out recently by the Fourth District Court of Appeal in Blair v. State, 667 So.2d 834 (Fla. 4th DCA 1996), by allowing the jury to have access to several taped statements of the State witnesses in that case during the jury's deliberations, it "... may have had the prejudicial effect of placing undue emphasis on the substance of the taped statements as compared to other testimony. Id. at 840 citing Young supra. Because, however, there was no defense objection to the taped statements going back with the jury, the appellate court did not grant Blair a new trial. In the case iudice, there was not only an objection voiced by defense counsel to replaying the tape during closing argument, but also to allowing the tape to go back with the jury. Thus, there existed the real potential that the jurors may have placed undue emphasis on the tape's content, including the inaudible portions, apart from what was testified to by Curry, particularly due to the prosecutor's comments. Duggan v. State, 189 So.2d. 890, 891 (Fla. 1st DCA 1966); Young supra.

Finally, Respondent argues that any error which nay have occurred concerning how the prosecutor and jury utilized the audiotape during the trial was harmless. (Respondent'sBrief

pages 7-8) Notwithstanding Respondent's assertion that the other evidence presented at trial by the state overwhelmingly established Petitioner's guilt, a careful review of the record below yields a different conclusion. Specifically, there was no admission by the Petitioner to the instant offense which was entered into evidence by the state and the Petitioner's voice was not identified as being on the audiotape by any other witness apart from Curry and the prosecutor. In essence, the state's case depended solely on the jury believing in the credibility of Curry's testimony concerning the content of the audiotape and the identity of the persons who were speaking on the audiotape. As a result, having the audiotape replayed to the jury during closing argument, highlighted with the prosecutor's testimonial comments, and then sent back with the jury during its deliberations, only served to unfairly elevate Curry's credibility and overemphasize the audiotape's importance, in relation to other testimony, in the eyes of the jury. While the Respondent argues that nothing in the record even suggests that the jury consulted the tape during their deliberations, this too, only underscores the fact that the unsupervised access to the tape by the jury, not in open court with the attorneys and Mr. Dobson being present, prevented a complete on-the-record disclosure of the surrounding circumstances of the jury's consolation of the tape, if there was any, during their deliberations.

Accordingly, the prejudicial taint surrounding the utilization of the audiotape by both the prosecutor and the jury

cannot be said to have been overcome by other substantial untainted evidence which supports Petitioner's guilt beyond a reasonable doubt. A new trial is therefore required due to the petitioner being denied a fair trial during the previous trial proceeding.

ARGUMENT

POINT II

THE DECISION OF THE DISTRICT COURT WAS INCORRECT BECAUSE THE TRIAL COURT INITIATED HABITUAL OFFENDER PROCEEDINGS ON ITS OWN MOTION CONTRARY TO THE INTENT OF THE LEGISLATURE.

Respondent argues in part that trial courts continue to retain the authority to sua sponte initiate habitual offender sentencing proceedings against defendants in Florida. (Respondent's Brief pages 9-20) Specifically, Respondent interprets the legislature's enactment of Section 775.08401, Florida Statutes (1993), merely as a mechanism "...to provide uniformity within each judicial circuit as to the manner in which each individual circuit determine[s] a defendant's eligibility to be sentenced as [a] habitual offender." [emphasis added] (Respondent's Brief page 11) What Respondent fails to point out, however, is that by the legislature's enactment of Section 775.08401, effective June 17, 1993, the "manner" in which a defendant may lawfully be sentenced as a habitual felony offender has, in fact, been directly changed by the legislature.[1] Now, if habitual sentencing of a defendant is sought, it is contingent upon the state attorney's compliance with the requirements of Section 775.08401, namely, to adopt and implement uniform criteria within that particular judicial circuit in order to determine that defendant's eligibility to be sentenced as a

[1] See Chapter 93-406, Sections 3, 44, Laws of Florida, and Jackson v. State, 651 So.2d 242 (Fla. 5th DCA 1995).

habitual offender. Obviously, the legislature saw the need to expressly designate onlv the state attorney's office to determine a defendant's eligibility for habitual sentencing.

Respondent next cites to Section 775.084(3)(b), Florida Statutes, and argues that because the legislature did not amend this subsection of the habitual offender statute, dealing with providing written notice to defendants of habitual sentencing proceedings, trial courts still retain statutory authority to initiate habitual sentencing proceedings. (Respondent's Brief pages 12-14) It is true, as also pointed out by Respondent, that the Fifth District Court of Appeal did, in fact, state in Turcotte v. State, 617 So. 2d 1164, 1165 (Fla. 5th DCA 1993), citing Toliver v. State 605 So. 2d 477 (Fla. 5th DCA 1992), that there was nothing in the habitual offender statute, in effect at that time, which would indicate that the legislature did not intend habitual sentencing proceedings to be initiated by either the trial court or the state attorney. Both Toliver and Turcotte were decided, however, before the legislature enacted Section 775.08401. Further, Petitioner would also point out that this Court has not, as yet, squarely addressed the issue of whether or not a trial court ever possessed the authority to initiate habitual felony offender sentencing proceedings.

Moreover, with the enactment of Section 775.08401, as pointed out by this Court in Adams v. Culver, 111 So. 2d 665 (Fla. 1959), and more recently in State v. Riley, 638 So. 2d 507 (Fla. 1994), where a reviewing court is faced with interpreting

two entirely separate statutes, the more generally worded statute must yield to the more specifically worded statute. Certainly, the legislature was very specific in Section **775.08401** to confer solely to state attorneys the authority to initiate habitual sentencing proceedings in compliance with the particular judicial circuit's uniform criteria for determining whether a defendant is eligible to be sentenced as a habitual offender.

Additionally, Respondent relies on the language of Section 775.08401 in which the legislature limits a defendant from appealing his habitual sentencing when the state attorney deviates from the adopted "uniform criteria" for habitual sentencing within that particular judicial circuit. (Respondent'sBrief page **14-16)** This does not, however, obviate in any respect the clear and specific requirements of the statute that the state attorney shall in each case apply the adopted uniform criteria in that judicial circuit as to a defendant's eligibility to be sentenced as a habitual offender and to provide in writing the reasons for any deviation from such uniform criteria which must also be signed by the prosecutor and placed in the court file.

Neither does the language of Section **775.08401** indicate as contended by the Respondent, that the legislature intended to increase the number of person sentenced as habitual offenders by enacting the statute, The obvious intent of the statute is to "... ensure fair and impartial application of the habitual offender statute." s **775.08401,** Fla. Stat. **(1993).** Petitioner

submits that an intent to increase the number of persons sentenced as habitual offenders is not the same as, or congruent with, the fair and impartial application of the statute. Had the legislature intended to increase the number of persons sentenced as habitual offenders, it simply would have changed the statutory criteria such that more persons would be eligible to be so sentenced. Respondent's interpretation of the statute that the statute limits the discretion of the state attorney to not bring habitual offender proceedings by requiring criteria and an explanation when the state attorney does not habitualize is also incorrect. The statute clearly reads that the state attorney must provide a written reason when the state attorney does not follow the established criteria. The statute does not read, as Respondent asserts, that the written explanation must be made only when the state attorney chooses not to habitualize.

The legislature, by enacting Section 775.08401, has mandated the State Attorney's offices to establish uniform criteria to ensure that the State Attorney's offices fairly and impartially select persons to prosecute as habitual offenders. What is the point of such a requirement if the prosecution's mandated criteria can be circumvented simply by the trial court initiating the proceeding on its own? The goal of the state is to ensure the fair and impartial application of the habitual offender statute. This goal is severely hampered if a trial judge can initiate the proceedings and ignore the uniform criteria set up to ensure the fair and impartial application of

the habitual offender statute, as Justice Overton recently pointed out in his dissenting opinion in State v. Booth, 21 Fla. L. Weekly S166 (Fla. April 11, 1996).

Finally, Respondent argues that because the Petitioner was aware of the trial court's intention to hold a habitual sentencing hearing prior to the Petitioner actually being sentenced as such, any error which may have occurred was harmless. (Respondent's Brief pages 18-20) This argument, as applied to Petitioner's habitual sentence, is misplaced. Petitioner was certainly aware after the trial that the trial court had filed written notice that it would, sua sponte, be conducting habitualization proceedings as part of Petitioner's sentencing hearing. Petitioner is, however, challenging the legal authority of the trial court, particularly under Section 775.08401, to unilaterally initiate such habitualization proceedings. (R 62-63) Surely, if this Court agrees with the Petitioner that the trial court was not authorized under Section 775.08401 to initiate and impose a habitual sentence, then such error can not be deemed to be harmless since the Petitioner is entitled to be sentenced under the guidelines. More importantly, without any reference to the state attorney's "uniform criteria" by the trial court or prosecutor prior to sentencing Petitioner being sentenced as a habitual felony offender, Petitioner was clearly not properly sentenced as a habitual felony offender by the "fair and impartial application" of the habitual felony offender statute under Section 775.08401, Florida Statutes. Nor

should the State be provided a second opportunity, as Respondent argues, to initiate habitual felony offender sentencing against the Petitioner upon remand by this Court. See Ashley v. State, 614 So.2d 486 (Fla. 1993).

In sum, if the trial courts were authorized to initiate habitual sentencing in Florida under Section 775.08401, the legislature would have given prosecutors and trial judges the same authority to seek habitual sentencing upon complying with the statute's requirements. The legislature, however, specifically chose instead to give only the state attorney's office this authority and made it encumbent on the prosecutor to sign and explain in writing any deviation from such uniform criteria which is also to be placed in the case file maintained by the state attorney. Therefore, because the trial court improperly initiated the habitual felony sentencing of the Petitioner, desptie the requirements listed in Section 775.08401, Petitioner's habitual sentence, along with the trial court's written notice and findings of habitualization, should be vacated by this court and this cause remanded to the trial court for the imposition of a guidelines sentence.

CONCLUSION

BASED UPON the arguments and authorities presented herein, and in Petitioner's merit brief, the Petitioner requests that this Honorable Court remand this case for a new trial or, alternatively, if no reversible error is found by this Court, for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Robert A. Butterworth, Attorney General, **444** Seabreeze Blvd., **5th** FL Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal; and mailed to: Roland Dobson, Inmate #586729, Avon Park Correctional Institute, P.O. Box 1100, Avon Park, FL 33825-1100, on this 17th day of June, 1996.

SUSAN A. FAGAN
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