IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM POTTS,

Petitioner,

v. FSC CASE NO. 93,546
5TH DCA CASE NO. 98-114

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner was charged by Information in Marion County Circuit Court Case No. 96-3877-Cf-A-W with two counts of trafficking in hydrocodone in violation of Sections 893.135(1)(c) and 893.03(2), Florida Statutes (Supp. 1996). (R. 22). Petitioner moved to dismiss those charges, relying on the rationale of State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), but noting that the issue had already been resolved in this District in State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), review denied 694 So. 2d 737 (Fla. 1997). On October 10, 1997, during the hearing on Petitioner's Motions to Dismiss, the State, the defense and the trial court entered into plea discussions to dispose of all of the pending charges against Petitioner including Marion County Circuit Court Case Nos. 95-2290CF, 95-2294CF, 95-2296CF, 95-2297CF, 95-2298CF, 95-2373CF as well as Case No. 96-3877CF. In Case No. 95-2290, Petitioner agreed to plead no contest to a reduced charge of solicitation to commit home invasion robbery. In Case No. 96-3877, Petitioner pled no contest to two counts of trafficking in hydrocodone. In Case No. 96-10446, Petitioner pled no contest to possession of cannabis and paraphernalia. In Case Nos. 95-2294, 95-2296, 95-2297, 95-2298, Petitioner pled no contest to sale and possession of alprazolam, commonly known as Xanax. Petitioner agreed that he was reserving his right to appeal only as to his motions to dismiss in the hydrocodone trafficking case. (R. 155-

164, 223).

On December 9, 1997, these cases came before the trial court for sentencing. At that time, defense counsel conceded to the trial court judge that the drug trafficking mandatory minimum sentence must be imposed unless there has been substantial assistance. Otherwise, the sentence would be illegal. (R. 206-207, 210). Defense counsel pointed out to the court that the prosecutor does not have the authority to waive the mandatory minimum. (R. 214). In any event, the trial court imposed concurrent sentences of seven and one-half years incarceration to be followed by four years of probation and a fine of $2000 on the trafficking in hydrocodone counts. These sentences were to be served concurrently with the other sentences imposed in Petitioner's 1995 cases. (R. 192-193, 197, 233-234). The parties further agreed that, if those drug trafficking sentences were found to be illegal, they would amend the scoresheet to reduce the charges to Level 7 offenses on remand. (R.122-123, 238).

In an opinion filed on June 19, 1998, the Fifth District Court of Appeal affirmed Petitioner's convictions and sentences based upon Baxley, but certified conflict with the First District Court of Appeal in Holland. (See Appendix I -- 5th DCA Opinion). Petitioner sought discretionary review in this Court on July 20, 1998 and, on July 30, 1998, this Court issued its order postponing

a decision on jurisdiction and establishing a briefing schedule.

SUMMARY OF ARGUMENT

The trial court properly denied Petitioner's motions to dismiss the trafficking in hydrocodone charges filed against him in the Fifth District. In State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), review denied 694 So. 2d 737 (Fla. 1997), the Fifth District Court of Appeal concluded that one who sells four grams or more of a mixture containing hydrocodone can be prosecuted for trafficking pursuant to Section 893.135(1)(c)1, Florida Statutes (1995).

Petitioner relied on the decision of the First District Court of Appeal in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997). In that case, the First District Court concluded that the defendant could not be convicted of trafficking "regardless of the number of tablets sold", because each tablet only contained a relatively small amount of hydrocodone. That decision completely ignores the statutory language "any mixture containing [hydrocodone]".

This Court should approve the decision of the Fifth District Court of Appeal in Baxley. The legislature clearly intended to punish severely those who traffic in substantial quantities of narcotic pills. The decision of the First District Court in Holland defeats that intent and should be disapproved.

In any event, the plea agreement in the instant case was illegal. The trial court has in effect asked this Court to issue an advisory opinion. Despite denying Petitioner's motions to

dismiss the trafficking charges, the trial court ignored the mandatory minimum sentencing requirements of Section 893.135(1)(c)1c, Florida Statutes (1995). Further, the parties agreed to modify the plea agreement to avoid the mandatory minimum sentence if the case is remanded with directions to impose the statutorily mandated minimum sentence and fine. This cause should be remanded for further proceedings or trial.

ARGUMENT

POINTS I AND II -- RESTATED

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTIONS TO DISMISS AND THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED PETITIONER'S JUDGMENTS AND SENTENCES FOR TRAFFICKING IN HYDROCODONE.

For purposes of the hearing on Petitioner's motions to dismiss, the parties stipulated that Petitioner sold more than 28 grams of pills containing hydrocodone. In State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), review denied 694 So. 2d 737 (Fla. 1997), the Fifth District Court of Appeal held that if the amount involved is "4 grams or more of a mixture containing hydrocodone", then the defendant may be prosecuted for trafficking in that substance pursuant to Section 893.135(1)(c)1. Based upon the stipulation of the parties concerning the total weight of the 70 and 73 "Lorcet Plus" tablets sold during the two transactions, and given the decision of the Fifth District Court of appeal in Baxley, the trial court properly denied Petitioner's motions to dismiss. Petitioner argued that the First District Court of Appeal's decision in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) was the better reasoned. However, all parties agreed that the trial court was bound by the law in its District.

Petitioner's position before this court is that since each Lorcet tablet contains only a relatively small amount of the controlled substance, hydrocodone, and since hydrocodone is listed

as a Schedule III substance under Section 893.03(3)(c)4, he can only be prosecuted under Section 893.13(1)(a)2, for a third degree felony offense and cannot be prosecuted under the trafficking statute, Section 893.135, Florida Statutes (Supp. 1996).

Effective July 1, 1995, the trafficking statute, Section 893.135(1)(c)1, was amended to include hydrocodone "or 4 grams or more of any mixture containing any such substance". Petitioner stipulated that the Lorcet tablets that he sold had a total weight well in excess of 28 grams. (R. 99). Petitioner admitted that the tablets contained hydrocodone. The 1995 legislation adding hydrocodone (among other substances) or any mixture containing hydrocodone to the trafficking statute clearly demonstrated the intent of the state legislature to target and punish severely those who would traffic in substantial quantities of narcotic pills containing these substances. Chapter 95-415, Laws of Florida.

Despite this clear expression of legislative intent, Petitioner argues that he could not be convicted under the trafficking statute regardless of how many tablets containing hydrocodone he possessed and sold because each tablet only contained a relatively small amount of the controlled substance. He argues that, under Sections 893.03(3)(c)4 and 893.13(1)(a), Florida Statutes, the tablets he sold are included in Schedule III and the sale of a Schedule III substance is only a third degree felony. In Holland, the First District Court agreed with

Petitioner's position that a defendant who sells Lorcets or Vicodins could not be charged under the trafficking statute "regardless of the number of tablets sold." This interpretation of these statutes completely ignores the legislature's intent in amending Section 893.135 to provide the alternative of more serious sanctions than those provided for mere possession or sale under Sections 893.03(3) and 893.13(1)(a).

As for Petitioner's "mixture motion to dismiss", this Court has already addressed the issue of enhanced penalties for mixtures containing controlled substances. In State v. Yu, 400 So. 2d 762 (Fla. 1981), this Court noted that dangerous drugs are often marketed in a diluted or impure state. Therefore, it would not be unreasonable for the legislature to deal with the mixture or compound rather than the pure drug. This Court went on to state that the legislature has broad discretion in determining measures necessary for the protection of the public health, safety and welfare and the trafficking statute bears a reasonable relationship to that legitimate state objective. The possession of one or two acetaminophen tablets containing a few milligrams of hydrocodone would have relatively minimal potential for abuse and could be prosecuted under the third degree felony statute. However, possession and sale of a larger number of Lorcet or Vicodin tablets could have just as great a potential for abuse as possession and sale of cocaine or any other Schedule II substance and should be

prosecuted under the trafficking statute. See Ankiel v. State, 479 So. 2d 263 (Fla. 5th DCA 1985); State v. Garcia, 596 So. 2d 1237, 1238 (Fla. 3rd DCA 1992).

By adding mixtures containing hydrocodone to the trafficking statute without removing them from the third degree possession statute, the legislature has left prosecutors discretion to choose under which statutory provision to charge such drug offenders. In Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed. 2d 604 (1978), the United States Supreme Court said:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Likewise, this Court has held that the prosecutor should have the discretion to decide under which statute to charge an offender. See State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1988), citing United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 775 (1979). See also State v. Bonsignore, 522 So. 2d 420 (Fla. 5th DCA 1988). In the instant case, Petitioner made two sales to undercover agents involving 70 or more Lorcet tablets each. In each case, the total weight of the tablets involved was substantially more than 28 grams. The prosecutor properly exercised his discretion in charging Petitioner under the first degree trafficking statute, Section 893.135(1)(c),rather than the third degree possession or sale statute, Section 893.13(1) and the

trial court properly denied Petitioner's motions to dismiss. This Court should approve the decision of the Fifth District Court of Appeal in Baxley and it should disapprove that in Holland. Under Holland, a drug dealer could be caught selling a truckload of Vicodin tablets and would be subject only to third degree felony sanctions. This is clearly not what the legislature intended.

POINT III -- RESTATED

THE TRIAL COURT ERRED IN FAILING TO IMPOSE THE MANDATORY MINIMUM SENTENCE AND FINE REQUIRED PURSUANT TO SECTION 893.135(1)(c)1c, FLORIDA STATUTES (SUPP. 1996).

Petitioner entered into a negotiated disposition of all of his pending cases including a plea of no contest to two counts of trafficking in hydrocodone in excess of 28 grams. Pursuant to Section 893.135(1)(c)1c, the trial court should have imposed a mandatory minimum sentence of 25 years imprisonment and a fine of $500,000. See Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983), citing Sowell v. State, 342 So. 2d 969 (Fla. 1977). Instead, the parties agreed to concurrent sentences of seven and one-half years imprisonment to be followed by four years of probation and a fine of $2000. Those sentences were to run concurrently with Petitioner's other sentences in his 1995 cases.

At the time of sentencing, defense counsel admitted that the drug trafficking mandatory minimum sentence must be imposed unless there had been substantial assistance. Otherwise, the sentence

would be illegal. Defense counsel also admitted that the prosecutor did not have the authority to waive the mandatory minimum. Despite these admissions, the trial court ignored the mandatory minimums in the statute and went ahead and imposed the agreed upon sentences of seven and one-half years imprisonment to be followed by probation. The parties went even further agreeing that, if the appellate courts reversed and remanded the cause for imposition of the mandatory minimum sentences, they would "amend the scoresheet" to reduce the charges to Level 7 offenses.

Now, on discretionary review, Petitioner has taken this extraordinarily generous, albeit illegal, plea agreement one step further and argues that, because the trial court did not impose the mandatory minimum sentences, the 90 month sentences of imprisonment to which he agreed and which were imposed, should be reduced to guidelines sentences of any non-state prison sanction. The State would suggest that this cause be remanded for further plea discussions or trial.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the Fifth District Court of Appeal in State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), and remand this cause for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been mailed to Ronald E. Fox, Esquire, Counsel for Petitioner, P. O. Box 319, Umatilla, Florida 32784, this ____ day of September, 1998.

_____
Anthony J. Golden
Assistant Attorney General