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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,719

BOOKER T. ELLIARD,

Petitioner,

-vs.-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is a petition for discretionary review based on certified conflict with Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), which is presently pending in this Court on petition for discretionary review in State v. Thompson, Case No. 92,831.

In this brief the symbols "T." and "R." designate the transcript of the proceedings in the trial court and the remainder of the record on appeal. The symbols "S.R." and "S.T." designate the supplemental record, consisting, respectively, of the trial court's order correcting Mr. Elliard's sentence and the transcript of the sentencing proceedings. The appendix, consisting of a copy of the decision of the Third District Court of Appeal, is designated as "A."

CERTIFICATE OF FONT AND TYPE SIZE

Undersigned counsel for petitioner certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

Petitioner Booker T. Elliard was convicted after a jury trial of the offense of strong-arm robbery, a second degree felony defined by section 812.13(2)(c), Florida Statutes. (R. 33-34). The offense was committed on February 28, 1996. (R. 2; S.T. 15-16).

On July 14, 1997, after a sentencing hearing, the trial court sentenced Mr. Elliard as a violent career criminal, under sections 775.084(3)(b) & (4)(c), Florida Statutes (1995) (the "Gort Act") to

serve 30 years in prison, with a minimum mandatory term of 30 years. (R. 41; S.R. 1; S.T. 29-30). (The original sentencing order stated that Mr. Elliard was being sentenced as an habitual violent felony offender. (R. 41). The court subsequently entered an order correcting the sentence to reflect that Mr. Elliard was sentenced as a violent career criminal under the Gort Act, rather than as an habitual violent felony offender. (S.R. 1).)

On August 12, 1998, the Third District Court of Appeal affirmed Mr. Elliard's conviction and sentence, but certified direct conflict with the Second District Court of Appeal's opinion in Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998) on the issue of violent-career-criminal sentencing. (A. 1-3).

SUMMARY OF THE ARGUMENT

Sentencing the defendant as a violent career criminal was fundamental error because chapter 95-182, which created the sentencing category of violent career criminal was enacted in violation of the single subject requirement of Article III, section 6, of the Florida Constitution. Chapter 95-182 embraces two separate subjects -- career criminal sentencing and civil remedies for victims of domestic violence -- which have no logical or natural connection, and accordingly could not constitutionally be joined in the same act. Because the appellant's sentence was imposed for an offense committed before the reenactment of the amendments contained in chapter 95-182, his sentencing as a violent career criminal was unconstitutional. The decision of the Third District must be quashed, and the defendant's sentence reversed with directions to remand to the trial court for resentencing.

The same issue -- whether Chapter 95-182 (the Gort Act), which created the violent-career-criminal provisions under which petitioner was sentenced, violates the single subject requirement of Article III, section 6, of the Florida Constitution -- is presently pending before this Court in State v. Thompson, Case No 92,831. The petitioner fully adopts the defense answer brief filed in this Court in Thompson for the initial brief in this case.

ARGUMENT

CHAPTER 95-182, LAWS OF FLORIDA, WHICH CREATED THE SENTENCING CATEGORY OF VIOLENT CAREER CRIMINAL, VIOLATES THE SINGLE SUBJECT REQUIREMENT OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION.

Mr. Elliard was sentenced as a violent career criminal to serve 30 years in prison with a minimum mandatory term of 30 years, pursuant to sections 775.084(1)(c), (3)(b) &(4)(c), Florida Statutes (1995). (R. 41; S.R. 1). His sentencing as a violent career criminal is unconstitutional because chapter 95-182 (the Gort Act), which created the violent-career-criminal provisions under which he was sentenced, was enacted in violation of the single subject requirement of Article III, section 6 of the Florida Constitution. Chapter 95-182 embraces two distinct and unrelated subjects -- career criminal sentencing and civil remedies for victims of domestic violence -- which have no logical or natural connection, and accordingly could not constitutionally be joined in the same act. Because Mr. Elliard's offense occurred on February 26, 1996, before the reenactment of the amendments made by chapter 95-182, his sentencing as a violent career criminal was unconstitutional.

The same issue -- whether chapter 95-182 (the Gort Act), which created the violent-career-criminal provisions, was passed in violation of the single subject requirement of Article III, section 6, of the Florida Constitution -- is presently pending before this

Court in State v. Thompson, Case No 92,831. In Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), the Second District Court of Appeal held that chapter 95-182 was unconstitutional because it violated the single subject requirement, and invalidated a violent-career-criminal sentence on that basis. In the present case, the Third District Court of Appeal affirmed Mr. Elliard's 30-year violent-career-criminal sentence, based on its previous decision in Higgs v. State, 695 So. 2d 872 (Fla. 3d DCA 1997), but certified direct conflict with the Second District's opinion in Thompson (A. 1-3).

As noted above, the Thompson case is now pending before this Court on petition for discretionary review. Undersigned counsel for petitioner has reviewed the arguments made by the defense in the Thompson case and has determined that they are fully applicable to this case. In the interests of judicial economy, petitioner therefore fully adopts the arguments made in the defense brief (Answer Brief of Respondent on the Merits) filed in this Court in State v. Thompson for the initial brief in this case.

Because Mr. Elliard's violent-career-criminal sentence was imposed for an offense committed on February 28, 1996, before the reenactment of the amendments made by chapter 95-182, it fell within the window period to challenge chapter 95-182 on the basis that it violates the single subject provision. The effective date of chapter 95-182 is October 1, 1995. On May 24, 1997, the

Legislature reenacted the 1995 amendments contained in chapter 95-182 as part of the biennial adoption of the Florida Statutes. Ch. 97-97, Laws of Fla. Thus, sentences imposed pursuant to the provisions of 95-182 are subject to attack as violative of the single-subject requirement if the offenses were committed during the window period running from October 1, 1995 to May 24, 1997. Thompson, 708 So. 2d at 317 n. 1; see State v. Johnson, 616 So. 2d 1, 2-3 (Fla. 1993).

Although the issue was not raised in the trial court, it presents fundamental error and accordingly may be reviewed on appeal from the sentence. See Johnson, 616 So. 2d at 3-4 (claim that act amending habitual offender statute violated the single subject rule raised a fundamental error and was reviewable on appeal despite failure to raise the claim before the trial court).

Because the offense in this case was committed during the window period during which the Gort Act was unconstitutional, the defendant's 30-year sentence as a violent career criminal was illegal and must be reversed.

CONCLUSION

Based on the foregoing, the petitioner requests that this Court quash the decision of the Third District Court of Appeal and reverse his violent career criminal sentence with directions to remand the case to the lower court for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General CHRISTINE E. ZAHRALBAN, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 15th day of September 1998.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, 1998

BOOKER T. ELLIARD,

**

Appellant,

**

vs.

**

CASE NO. 97-2402

THE STATE OF FLORIDA,

**

LOWER

Appellee.

**

TRIBUNAL NO. 96-6588

Opinion filed August 12, 1998.

An Appeal from the Circuit Court of Dade County, Maxine Cohen Lando, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Christine E. Zahralban, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and GODERICH and GREEN, JJ.

PER CURIAM.

We affirm the defendant's conviction finding no reversible error. Additionally, we affirm the defendant's sentence as a violent career criminal, Higgs v. State, 695 So. 2d 872 (Fla. 3d

GREEN, J. (specially concurring)

By virtue of this court's decisions in Dupree v. State, 711 So. 2d 647 (Fla. 3d DCA 1998) and Higgs v. State, 695 So. 2d 872 (Fla. 3d DCA 1977), I am compelled to vote for an affirmance of the appellant's enhanced sentence entered pursuant to the "Officer Evelyn Gort and All Fallen Officers Career Criminal Act of 1995", chapter 95-182, Laws of Florida ("Gort Act"). However, for the reasons expressed by the second district in Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), review granted, No. 92-831 (Fla. May 26, 1998), I am persuaded that the "Gort Act" is unconstitutional because it was enacted in violation of the single subject requirement of article III, section 6 of the Florida Constitution. I would therefore prefer to recede from Dupree and Higgs.