IN THE SUPREME COURT OF FLORIDA

DONALD FRANK SWIHART,

Petitioner,

v. FSC CASE NO. 94,677
5TH DCA CASE NO. 98-645

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in 12 point Courier nonproportional space font.

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STATEMENT OF THE CASE

Petitioner was charged with having in his possession Hydrocodone or a mixture containing Hydrocodone in an amount of 4 grams or more but less than 14 grams contrary to Section 893.135(1)(c)1, Florida Statutes (1995), a first degree felony. (R. 68-69). Petitioner moved to dismiss the Information contending that Section 893.135(1)(c)1 was unconstitutional. (R. 148-149). For purposes of the argument on the motion to dismiss, the parties stipulated that Petitioner had 15 tablets of Lortab weighing 12.3 grams. The active ingredient in those tablets, hydrocodone, if it could have been separated out, would have weighed less than a gram. (R. 61-63). On September 19, 1997, the trial court judge held that, although he agreed with the decision of the First District Court of Appeal in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997), he was bound by the decision of this Court in State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), review denied 694 So. 2d 737 (Fla. 1997), and denied the motion to dismiss. (R. 63-64, 152).

On September 30, 1997, Petitioner entered a negotiated plea of no contest to the charge of trafficking in hydrocodone and specifically reserved his right to appeal the order of the trial court denying his motion to dismiss. (R. 3-21, 155-156). On February 20, 1998, Petitioner was adjudicated guilty and was sentenced pursuant to the guidelines to 129 months imprisonment.

(R. 25-46, 185-190). Petitioner timely filed his Notice of Appeal to the Fifth District Court of Appeal. (R. 191). That Court affirmed Petitioner's judgment and sentence *per curiam* citing State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996) review denied 694 So. 2d 737 (Fla. 1997), in an opinion filed in Swihart v. State, 23 Fla. L. Weekly D2353 (Fla. 5th DCA October 16, 1998). (Appendix I -- 5th DCA Opinion). On Motion for Rehearing, the District Court rescinded its prior opinion and again affirmed on the authority of Baxley, but certified conflict with State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998). (Appendix II -- 5th DCA Opinion on Rehearing). On January 13, 1999, this Court postponed its decision on jurisdiction and set the briefing schedule in this case.

SUMMARY OF ARGUMENT

The trial court properly denied Petitioner's motion to dismiss the trafficking in hydrocodone charge filed against him. 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 possesses or 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). See State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998).

Petitioner relied on the decisions of the First District Court of Appeal in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) and the Second District Court of Appeal in State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998). In those cases, the First and Second District Courts concluded that the defendant could not be convicted of trafficking regardless of the number of tablets possessed or sold, because each tablet contained only a relatively small amount of hydrocodone. That decision completely ignores the statutory language "any mixture containing [hydrocodone]".

This Court should approve the decisions of the Fourth and Fifth District Courts of Appeal in Baxley and Hayes. The legislature clearly intended to punish severely those who traffic in substantial quantities of narcotic pills. The decisions of the First and Second District Courts in Holland and Perry defeat that intent and should be disapproved.

ARGUMENT -- RESTATED

THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED PETITIONER'S JUDGMENT AND SENTENCE FOR TRAFFICKING IN BETWEEN FOUR AND FOURTEEN GRAMS OF A MIXTURE CONTAINING HYDROCODONE IN VIOLATION OF SECTION 893.135(1)(c)1, FLORIDA STATUTES(1995).

For purposes of the argument on the motion to dismiss, the parties stipulated that Petitioner had 15 tablets of Lortab weighing 12.3 grams. The active ingredient in those tablets was 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. Accord State v. Hayes, 720 So. 2d 1095 (Fla. 4th DCA 1998). Based upon the stipulation of the parties concerning the total weight of the tablets, and given the decision of the Fifth District Court of Appeal in Baxley, the trial court in the Eighteenth Judicial Circuit properly denied Petitioner's motion to dismiss. Petitioner argued that the decisions of the First and Second District Courts of Appeal in State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So. 2d 327 (Fla. 2d DCA 1998), were bettered reasoned. However, the trial court said it 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 (1995).

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 fifteen Lorcet tablets in his possession had a total weight of 12.3 grams. He 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 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, 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 possessed are included in Schedule III and

the sale of a Schedule III substance is only a third degree felony. In Holland, Supra, the First District Court agreed with Petitioner's position that a defendant who possesses or 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 absurd result argument and his mixture with water example, 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 possessed fifteen Lorcet tablets. The total weight of the tablets involved was less than 28 grams. The prosecutor exercised his discretion to charge Petitioner under the 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 motion to dismiss. This Court should approve the decisions of the Fourth and Fifth District Courts of Appeal in Baxley and Hayes and it should disapprove the decisions of the First and Second District Courts in Holland and Perry. Under Holland and Perry, a drug dealer could be caught selling a truckload of Vicodin tablets and would be subject only to third degree felony sanctions. This would truly be an absurd result and is clearly not what the legislature intended.

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), affirming Petitioner's judgment and sentence 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 Respondent's Brief on the Merits has been mailed to Rebecca M. Becker, Esquire, Office of the Public Defender, Counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this ____ day of March, 1999.

_____
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