

IN THE SUPREME COURT OF FLORIDA

DONALD F. SWIHART,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 94,677

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF
THE PROPOSITION THAT THE FIFTH DISTRICT
COURT OF APPEAL IMPROPERLY RULED THAT
FOR PURPOSES OF THE TRAFFICKING STATUTE,
THE AGGREGATE WEIGHT OF HYDROCODONE
PLUS ITS PACKAGING CAN BE CONSIDERED.

Appellee argues that the statute in question correctly penalizes any mixture which weighs four grams or more regardless of the actual amount of hydrocodone present. In support of this, Appellee cites *State v. Yu*, 400 So. 2d 762 (Fla. 1981) for the proposition that the legislature can properly punish more harshly the possession of mixtures containing controlled substances. However, *State v. Yu* is easily distinguishable from the instant case. In *State v. Yu*, the court was dealing with the controlled substance of cocaine. This Court held that the legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people as the same amount of undiluted cocaine and therefore could pose a greater potential for harm to the public. Thus, this Court reasoned, the statute was not arbitrary or unreasonable. In the instant case, the controlled substance is hydrocodone. Hydrocodone is not readily available except in a diluted form in such pills as Lortab, Lorcet or Vicodin. The potential for distribution is not the same as for the distribution of cocaine or even marijuana.

Thus, the applicability of *State v. Yu*, to the instant case is doubtful at best.

A little background information on hydrocodone will prove helpful to the Court in analyzing the issue presented. Petitioner was charged with possessing 15 tablets of Lortab. (R 68-69) Lortab is one of several brand names of pain relievers which contain hydrocodone. Hydrocodone is a semisynthetic narcotic pain reliever and cough suppressant and is similar to codeine. *Medical Economics Company, Inc., Physician's Desk Reference* 1016 (51st ed. 1997)(hereinafter, PDR). It is prescribed for the relief of moderate to moderately severe pain. *id.* Hydrocodone is commonly combined with acetaminophen (Tylenol) and in such combination forms a Schedule III drug, if the amount of hydrocodone is less than 15 milligrams per dosage unit. §893.03(3)(c)4, Fla. Stat. The Lortab tablets possessed by Petitioner contained no more than 10 milligrams of hydrocodone. (R 62-63) Hydrocodone is consistently listed in the PDR as a Schedule III drug.

There are three principal statutes that affect the issue before the Court: §§893.03, 893.13, and 893.135, Florida Statutes. Section 893.03 divides all controlled substances into five schedules based upon potential for abuse and currently accepted medical use. Section 893.13 provides the penalties for drug offenses, with the exception of those offenses that the legislature defines as

“trafficking” offenses, which are defined by §893.135. It is §893.135 that is of primary concern. The legislature has logically differentiated between mere possession of a controlled substance for personal use and possession of controlled substances in such quantities that exceed personal use and which are reasonably possessed only for purposes of trafficking.

The relevant section is §893.135(c); it discusses the penalties for trafficking in drugs belonging in the opium family, one such drug being hydrocodone. In part the statute provides:

Any person who...is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromophone, or any salt, derivative, isomer, or salt or isomer thereof, including heron, *as described in s. 893.03(1)(b) or 2(a)*, or 4 grams or more of any mixture containing any such substance... commits a felony of the first degree, which felony shall be known as “trafficking in illegal drugs.” (emphasis added).

One can only traffic in 4 grams or more of hydrocodone *as described in* §893.03(2)(a) or any mixture of hydrocodone *as described in 893.03(2)(a)*. The hydrocodone described in §893.03(3)(c)4 (Schedule III) is specifically and conspicuously absent. The trafficking statute only applies to drugs described in Schedule I [§893.03(1)(b)], and Schedule II [§893.03(2)(a)], but not those listed in Schedule III [§893.03(3)]. The key question is what converts Schedule III

hydrocodone into Schedule II. The answer lies in the definition of Schedules II and III.

A Schedule II substance has “a high potential for abuse and has currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to *severe psychological or physical dependance.*” §893.03(2), Florida Statutes. A Schedule III substance, on the other hand, has a potential for abuse less than those substances listed in Schedules I and II, has currently accepted use in the United States, and “abuse of the substance *may lead to moderate or low physical dependance high psychological dependance...*” §893.03(3), Florida Statutes. (emphasis added).

If a citizen possesses a number of Lortab tablets in which the total weight is 3 grams, it is a Schedule III substance. The tablets would have accepted medical use in the United States, and their consumption may lead to moderate or low physical dependance. If a couple of tablets are added to the amount, and the total weight increases to 4 grams, the *same* drug still exists. It would still have accepted medical use in the United States, and it may still lead to moderate or low physical dependance. All that has changed is the number of pills.

However, if the amount of hydrocodone is increased from 7.5 milligrams to

15 or more milligrams in each tablet, a much different drug is created, whether a citizen possesses 5 such pills or 200 such pills. The added hydrocodone per dosage unit increases the risk of physical and/or psychological dependence and necessarily restricts its accepted medical use, not the number of pills. Therefore, the amount of hydrocodone in each tablet defines whether the tablet is classified as a Schedule II or III drug and, thus, whether it is subject to the trafficking statute.

The state's argument that the language "any mixture containing any such substance" somehow converts the Schedule III hydrocodone into Schedule II hydrocodone is not supported by the plain, black and white language of the statute. Nor is the above plain reading inconsistent with appropriate objectives of the legislature to curb drug abuse and punish more severely those who traffic in large amounts of dangerous drugs. Because the trafficking statute was developed to impose more severe sanctions on those who deal in large amounts of various controlled substances, it doesn't make sense that the legislature intended that such a relatively small amount of hydrocodone/ acetaminophen be subject to the trafficking statute. It certainly does not make sense that 15 tablets of Lortab would subject a citizen to a minimum/mandatory 25 year prison sentence. This fact is borne out in dramatic fashion when §893.135 is examined as a whole. The decision of the Fifth District Court of Appeal below must be quashed.

CONCLUSION

Based on the reasons and authority cited herein as well as in the initial brief, Petitioner respectfully requests this Court to adopt the reasoning of the First and the Second District Courts of Appeal in interpreting the trafficking and hydrocodone offense. Petitioner further requests this Honorable Court to quash the decision below, thereby disapproving of the Fifth Districts interpretation of the statutes in question and to remand the cause with instructions to discharge petitioner.

Respectfully submitted,

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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, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Donald F. Swihart, DC#702964, Hardee Correctional Institution, 6901 State Rd. 62, Bowling Green, FL. 33834, this 25th day of March, 1999. .

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I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14 pt.

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