IN THE SUPREME COURT OF FLORIDA

HARRIET BATES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO: 94,741
4th DCA NO: 98-2584

PETITIONER'S BRIEF ON THE MERITS
Petition for Conflict Jurisdiction,
as certified by the Fourth District Court of Appeals

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CERTIFICATE OF INTERESTED PARTIES

COMES NOW the undersigned attorney, and lists the following persons or entities who may have an interest in the outcome of this case:

1. Peter D. Aiken, trial/appellate counsel for Petitioner Bates
2. Harriet Bates, Defendant/Petitioner
3. Robert Butterworth, Attorney General, State of Florida
4. Leslie P. Campbell, Esquire, Assistant Attorney General (appellate counsel for State of Florida)
5. Ryan Feldman, Co-Defendant
6. Michael D. Gelety, appellate counsel for Petitioner
7. Honorable Bobby Gunther, appellate judge, Fourth District Court of Appeals
8. Honorable Joyce Julian, trial Judge, Seventeenth Judicial Circuit
9. Elliott J. Lupkin, trial and appellate attorney for Co-Defendant Feldman
10. Edward Pyers, Assistant State Attorney, Seventeenth Judicial Circuit
11. Debra Rescigno, Assistant Attorney General, appellate counsel for the State
12. Michael J. Satz, State Attorney, Seventeenth Judicial Circuit
13. Honorable W. Matthew Stevenson, Judge, Fourth District Court of Appeals
14. Honorable Martha Warner, Judge, Fourth District Court of Appeals

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court administrative order issued July 13, 1998, the Petitioner hereby certifies that the type size and style used in this brief are within the requirements of this court's internal operating type, specifically, 10 point Courier.

PRELIMINARY STATEMENT

The Petitioner, Harriet Bates, was the Defendant in the trial court in the Seventeenth Judicial Circuit, Broward County, Florida, Case No: 98-2596 CF 10B, Judge Joyce Julian, and became the Appellee in the Fourth District Court of Appeals, Case Number 98-2584. She will be referred to in this Brief as Petitioner or Bates.

The State of Florida was the Plaintiff in the trial court in the Seventeenth Judicial Circuit, and became the Appellant in the Fourth District Court of Appeals. The State of Florida, now the Respondent in this court, will be referred to as the Respondent or State.

Citations to transcripts or pleadings and orders will be as follows: R., Tr. vol. I, p. 23, or R., p. 6 when referring only to documents or pleadings. For clarity, all record citations will be by the original citation and page numbers, as set forth in the record on appeal before the Fourth District Court of Appeals, Case Number 98-2584, which has been forwarded to this court.

STATEMENT OF THE CASE

The case before this court originated with the Petitioner's arrest on February 5, 1998, with a five-count Information being returned, charging the Petitioner and Co-Defendant Feldman with trafficking in Hydrocodone, in an amount of twenty-eight (28) grams or more, but less than thirty (30) kilograms, in violation of Florida Statute §893.135(1)(c)(1)(c) and Florida Statute §893.03(2)(a)(1)(j). [R., p. 12-14]. The Petitioner Bates, along with Co-Defendant Feldman, was prosecuted before the Honorable Judge Joyce Julian of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case Number 98-2596 CF 10B.

On February 12, 1998, the Petitioner Bates filed an initial Motion to Dismiss, attacking the statute, charging the trafficking in Hydrocodone (Count I) [R., p. 15-16]. A Supplemental Motion to Dismiss was filed on May 7, 1998, setting forth greater detail of the Petitioner's attack [R., p.20-23]. After a hearing, the trial court, Judge Julian, entered her order granting the Petitioner's Motion to Dismiss and dismissing the matter on July 8, 1998 [R., p. 29-34], with an amended order being filed the following day, simply correcting an typographical error [R., p. 35-40].

Upon the State's timely notice of appeal (with an appropriate motion for an extension of speedy trial for the purposes of litigating such appeal), Judge Julian's Order of Dismissal was appealed to the Fourth District Court of Appeals in Case Number 98-2584. On December 23, 1998, the Fourth District Court of Appeals issued their opinion, summarily reversing the dismissal, per

curiam, and, specifically, certifying conflict between the Fourth District Court of Appeal and the First District Court of Appeal in State v. Holland, 689 So.2d 1260 (Fla. 1st DCA 1997), as well as conflict with the second District Court of Appeals in State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998).

On January 20, 1999, the Fourth District Court of Appeal granted the Petitioner's Motion to Stay the Mandate, and the Petitioner initiated the current review of the issue, invoking the discretionary jurisdiction of this court on January 14, 1999.

This court has already accepted, and has pending before it other cases raising virtually the identical issue: i.e., the attack on the hydrocodone trafficking statute, Florida Statute §893.135(1)(c)(1)(c), including Potts v. State, S.Ct. No. 93,546 (5th DCA 98-114); State v. Alleman, S.Ct. No. 93,883 (12/28/98), 23 F.L.W. D2000c (Fla. 2d DCA 1998); State v. Wells, S.Ct. No. 93, 882 (23 F.L.W. D2000b (Fla. 2d DCA 998).

SUMMARY OF THE ARGUMENT

§893.03(3)(c)4 Florida Statutes, which defines "dosage unit" of Hydrocodone deals with and controls the scientifically devised and medically critical proportions of Hydrocodone to Acetaminophen (a recognized therapeutic), as such combination is found in the commercially produced and marketed Vicodin ES tablets involved in this matter. As a result, such tablets can not be interpreted as a "mixture" of Hydrocodone as such term was contemplated by the Trafficking Statute, §893.135(1)(c)1 Florida Statutes. The careful manufacture of these dosage units, in a medically recognized fashion, including the fixed proportion of substances which are combined precisely to form a distinct and useful medicine, can not be considered a simple "mixture" which contemplates a "cutting agent". There is no logical parallel for the random "mixture" of a controlled substance with a diluting or "cutting" agent, which are combined to promote the illegal use of the controlled substance, as opposed to the recognized and acceptable medical use of commercial grade Vicodin ES tablets.

The clear language and meaning of the statutes, along with the Rules of Statutory Instruction including §775.021(1) (the capital Rule of Lenity) are all consistent with the logic and legislative intent, and should lead to the conclusion that the gross weight of dosage unit tablets should not be aggregated to artificially inflate the possession of such "dosage units" to trafficking amounts of Hydrocodone.

This court is respectfully requested to resolve the conflict certified in this case between the Fourth and Fifth District Courts of Appeal and the First and Second District Courts of Appeal. Specifically, this court is requested to uphold and approve the rulings and logic found in State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998), and to overrule the rulings in State v. Hayes, 720 So.2d 1095 (Fla. 4th DCA 1998) and State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1986), review denied 694 So.2d 737 (Fla. 1997).

Finally, this court is requested to reinstate the trial court's order in the instant case which dismissed the trafficking charges against the Petitioner Bates.

POINT I

COMMERCIALLY MANUFACTURED TABLETS, SUCH AS VICODIN ES, WHICH CONTAIN MEDICINALLY RECOGNIZED AND REGULATED PRECISE, FIXED PROPORTIONS OF HYDROCODONE, ARE SCHEDULE III DRUGS UNDER §893.03(3)(C)4 F.S., AND THE GROSS WEIGHT OF SUCH PILLS CANNOT BE CONSIDERED FOR PURPOSES OF PROSECUTION UNDER §893.135(C) (TRAFFICKING).

The Petitioner, Harriet Bates, was charged with trafficking in Hydrocodone, under §893.135(c) Florida Statutes, a charge which carries a twenty-five (25) year mandatory minimum sentence, for the possession of approximately forty-nine (49) Vicodin ES under one prescription (R., Tr., p. 2). It was undisputed at the trial level, and for purposes of the instant appeal, that the Vicodin ES pills were commercially manufactured tablets, distributed by prescription, and that each of the pills possessed by Bates contained 7.5 milligrams of Hydrocodone, and 650 milligrams of Acetaminophen (commonly known as and marketed as Tylenol pain reliever).

This court is faced with a dramatic split in the appellate districts throughout the State regarding the interpretation and classification of this type of commercial tablet containing Hydrocodone, specifically, as the tablets relate to criminal prosecution for their possession. Florida Statute 893.03(3)(c)4 of the Florida Statutes defines a "dosage unit" of Hydrocodone as:

> .... Not more than three hundred milligrams of Hydrocodone per one hundred milliliters, or not more than fifteen milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

By contrast, §893.03(2)(a)1.j of the Florida Statutes includes Hydrocodone generally, and without amount, dosage or proportion specifications, as a Schedule II drug. Of course, the conflict between these two sections arises throughout the state over the application of §893.135(1)(c)1 F.S., which deals with the trafficking designation and, most critically, the twenty-five year mandatory minimum sentence:

> Any person who ... is knowingly in ... possession of four grams or more of any ... Hydrocodone ... as described in §893.03(1)(b) or (2)(a), or four 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.

The First and Second District Courts of Appeal have specifically ruled that the tablets are dosage units, and the gross weight should not be aggregated for the purpose of the trafficking charges. State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997); State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998). Taking the totally opposite position are the Fourth and Fifth District Courts of Appeal, that is, that the aggregate weight of the tablets, and not the amount of Hydrocodone per dosage unit, is the determinative weight for prosecution under the trafficking statute. State v. Hayes, 720 So.2d 1095 (Fla. 4th DCA 1998); State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1986), review denied 694 So.2d 737 (Fla. 1997).

A clear reading of the various sections of the Statutes, tempered by the application of §775.021(1) F.S. (the Rule of

Lenity) and the logical interpretation of the legislative intent, show that the position of the First and Second District Courts of Appeal is correct, and that the gross weight of the commercially manufactured and regulated tablets cannot be aggregated to determine a trafficking prosecution. As a result, the trial court's order dismissing the trafficking charges against the Petitioner Bates must be reinstated.

A. BACKGROUND REGARDING MEDICINAL HYDROCODONE

As was conceded by the State in the trial court, and accepted by the trial judge, Petitioner Bates was being charged for her possession of forty-nine commercially manufactured Vicodin ES pills, which contained 7.5 milligrams of Hydrocodone and 650 milligrams of Acetaminophen. See Amended Order (R., p. 35, note 2). According to the manufacturer's specifications, which were attached to the original Motion to Dismiss (R., Tr., p. 4), and as verified by the Physicians' Desk Reference (Fifty-First Edition 1997) by Medical Economics Company, Inc., Vicodin ES is one of several brand names of pain relievers which contain Hydrocodone - a semi-synthetic narcotic pain reliever and cough suppressant, which is similar to Codeine. Id., p. 1016. The Vicodin ES tablets in question are the chemical equivalent of Lorcet tablets, as both have the identical Hydrocodone/Acetaminophen proportion. The 7.5 milligrams of Hydrocodone found in the Vicodin ES tablets are half of the statutory limit of "not more than fifteen milligrams per dosage unit", as set forth in §893.03(3)(c)4 F.S. Consistent with this statutory classification, the Physicians' Desk Reference

consistently lists the various Hydrocodone pain tablets as a Schedule III drug, which has a recommended or appropriate adult dosage of one tablet every four to six hours, not to exceed six tablets in a twenty-four hour period. Id., p. 1017. There are also Hydrocodone pain tablets which are manufactured with Aspirin or Homatropine Menthylbromide in place of the Acetaminophen. Id., p. 808, 946. These all retain their classification as Schedule III drugs.

It is the combination of the strictly calculated and followed ratio of Hydrocodone and Acetaminophen found in the tablets in question, as well as their accepted and recognized medical usefulness, which distinguish these commercially manufactured dosage units from the generic "mixture", as is anticipated under the trafficking statute, §893.135(c), and in Hayes and Baxley. The Hydrocodone/Acetaminophen calculation can certainly not be equated with the contemplated attempts to "dilute" or "expand" the controlled substance for the simple purpose of maximizing profits in illegal resales and transactions. Certainly, this approved ratio of substances does not qualify as a mixture as defined by the United States Supreme Court as:

> ... A portion of matter consisting of two or more components that do not bear a fixed proportion to one another, and that however thoroughly co-mingled, are regarded as retaining a separate existence. (emphasis added) Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919 (1991).

Unlike the blotter paper in Chapman, which was used to facilitate the transportation and sale of LSD, the Acetaminophen in

these Vicodin tablets does not facilitate the illegal use of the controlled substance, does not act as a dilutant, "cutting agent or carrier medium", but rather, it facilitates the legal and legitimate medical use of the resultant prescription drug. The gross weight of these tablets cannot be aggregated to artificially support a trafficking prosecution.

B. THE LANGUAGE OF THE STATUTES INVOLVED DOES NOT SUPPORT THE AGGREGATION OF THE GROSS WEIGHT OF COMMERCIALLY MANUFACTURED UNIT DOSAGE TABLETS.

Controlled substances are generally divided into five Schedules in the state of Florida, specifically, under §893.03, and these divisions are based upon the potential for abuse, as well as their currently accepted medical use. Obviously and logically, the unlawful possession of controlled substances with high potential for abuse is dealt with more severely than drugs with less potential. The most dangerous drugs, and those most susceptible to being abused, are described in Schedule I, as defined in §893.03(1)(b) and in Schedule II, as per §893.03(2)(a). Not surprisingly, it is the Schedule I and Schedule II drugs which are the subject of trafficking prosecutions (with trafficking penalties) under §893.135(c):

> Any person who ... is knowingly in ... possession of four grams or more of any Morphine, Opium, Oxycodone, Hydrocodone, Hydromophone ... including Heroin, AS DESCRIBED IN §893.03(1)(B) OR (2)(a), or four 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).

Schedule III drugs, specifically, the dosage units of Hydrocodone such as Vicodin ES, as described in §893.03(3)(c)4, is excluded from the definition of trafficking.

Under §893.03(2) F.S., 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 dependence.

A Schedule III substance, by contrast, is defined under §893.03(3) F.S. as one that:

> ... 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 dependence or high psychological dependence.

It would be unreasonable and improper for this court, or any other, to assume that the legislature accidentally or mistakenly listed Hydrocodone in both Schedule II and Schedule III; instead, the only logical and legally acceptable conclusion is that the legislature clearly recognized the difference between a commercially prepared and medically accepted dosage unit, which is strictly prepared in a strict ratio or proportion for medical purposes, versus a controlled substance which is simply diluted, cut or combined with a "mixture" to foster resale for profit. There is sound medical and logical reasoning to support the legislative intent to make this differentiation.

Additionally, it would be equally improper and legally unsound to assume that the legislature mistakenly omitted Schedule III dosage units of Hydrocodone from the inclusive definition of trafficking substances in §893.135(c)(1) F.S. It is the "four grams or more of ... Hydrocodone" or "four grams or more of any mixture containing any such substance" which the legislature intended to punish as trafficking. Certainly, the microscopic amount of Hydrocodone found in a 657.5 milligram tablet is not meant to be the subject of trafficking. This court must note, most respectfully, that the "dosage unit" designation does not confer a legal carte blanche regarding Hydrocodone. §893.03(3)(c)4 specifically sets an outer limit of fifteen milligrams per dosage unit of Hydrocodone to qualify as a Schedule III drug. Parenthetically, this court will note, in the Physicians' Desk Reference previously cited, that the highest concentration of Hydrocodone in a commercially manufactured tablet would be 10 milligrams in conjunction with 660 milligrams of Acetaminophen commercially sold as Vicodin HP, and Lorcet HD. Id., p. 1016. It must be recognized that the legislature was aware of the acceptable limits on the dosage unit tablets, and recognized that any such tablets beyond fifteen milligrams per unit would necessarily be outside of any medically accepted ratio - artificially embellished by the trafficker. Logically, when the trafficker adds more Hydrocodone to the tablet, he tampers with the unit dose and violates the medically accepted ratio. The "bootleg" tablet now becomes a random "mixture", as contemplated by the trafficking

statute. This artificially strengthened pill no longer has its accepted medical use, and the unit dose now created is necessarily reclassified as a Schedule II drug under §893.03(2)(a) for prosecution and punishment purposes.

Being more fact-specific to the Petitioner Bates, she had only an eight (8) day supply of Vicodin ES (per the appropriate adult dosage of six (6) tablets per day under the Physicians' Desk Reference at page 1017). This type of situation had to be considered by the legislature, and the carefully and clearly drawn definitions of §893.03(3)(c)4 F.S. must have been excluded from the trafficking definition, to avoid such a Draconian scenario as a twenty-five year mandatory minimum prison sentence for a forty-year old woman with a week's supply of commercially manufactured and distributed medicine.

This logical conclusion is borne out when this court considers other sections, prohibitions and penalties under the trafficking statute, §893.135. As an example, the possession of over three hundred (300) pounds of cocaine, a Schedule I substance, carries only a fifteen year mandatory minimum sentence under §893.135(1)(b)(1)(c) F.S. Under §893.135(1)(a)3 F.S., the possession of ten thousand (10,000) pounds or more of marijuana carries a mandatory minimum sentence of ten years less than that called for for the possession of the forty-nine Vicodin ES tablets by Petitioner Bates. These comparisons show that an interpretation which would include dosage units under the trafficking statute would be logically and legally unacceptable.

C. THE DOCTRINE OF LENITY, UNDER §775.021(1) FLORIDA STATUTES DICTATES THAT THE GROSS WEIGHT OF DOSAGE UNITS CONTAINING HYDROCODONE CANNOT BE AGGREGATED TO EXCEED FOUR GRAMS OR MORE FOR TRAFFICKING PROSECUTION.

§775.021(1) F.S. provides in pertinent part that:

> The provisions of this Code (Governing Crimes) and defenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This section of the Florida Statutes is simply a codification of the basic rule of statutory construction known as the Rule of Lenity, that is, that a criminal statute must be "strictly construed", and when a statute is "susceptible of differing construction, it shall be construed most favorably to the accused". Mays v. State, __So.2d__; 1998 WL 394091 (Fla. 1998); Cabal v. State, 678 So.2d 315 (Fla. 1996); Johnson v. State, 602 So.2d 1288 (Fla. 1992); State v. Jackson, 526 So.2d 58 (Fla. 1988). There can be no serious argument denying that the statutes in question, §893.03(3)(c)4 and §893.03(2)(a)(1)j, are susceptible of differing constructions and interpretations. As was pointed out by Judge Julian in her Order dismissing the trafficking charge (R., p. 39) and as acknowledged by the various District Courts of Appeal in certifying conflict within the Districts, there have been many interpretations dealing with Hydrocodone. It is beyond question that there are two equally plausible readings of the statutes in question, as is reflected by the various opinions, and when there are two equally plausible readings, the courts are obliged, most

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respectfully, to employ the one of the two constructions that favors the Defendant. State v. Robertson, 614 So.2d 1155 (Fla. 4th DCA 1993). The interpretations of the sections in the question in the case at bar determine the penalties to be imposed - twenty-five year mandatory minimum sentence or a maximum five years in prison. In this regard, the Lenity statute applies not only to interpretations of substantive criminal prohibitions, but also to the penalties. Logan v. State, 666 So.2d 260 (Fla. 4th DCA 1996).

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CONCLUSION

The rules of statutory construction, including §775.021(1), as well as the clear language and meaning of the statutes, are consistent with logic and legislative intent, and lead to the conclusion that the gross weight of dosage unit tablets should not be aggregated to artificially inflate possession of such units to trafficking amounts. The scientifically devised and medically critical proportions of Hydrocodone to Acetaminophen found in commercially produced Vicodin ES tablets do not constitute a "mixture" of Hydrocodone, as was contemplated by the trafficking statute, §893.135(1)(c) F.S. The careful manufacture of these dosage units with their fixed proportion of substances are combined precisely in order to form a distinct useful and recognized medicine. There is no logical parallel for the random "mixture" of a controlled substance with a diluting or "cutting" agent, which are combined to promote the illegal use of the substance - as opposed to the acceptable medical use.

As a result, this court is respectfully requested to resolve the conflict certified in this case by the Fourth District of Appeal between the Fourth and Fifth District Courts of Appeal and the First and Second Districts, specifically, upholding and approving State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 716 So.2d 327 (Fla. 2d DCA 1998), and thereby reinstating the trial court's Order dismissing the trafficking charges against the Petitioner Bates.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of March, 1999 to Assistant Attorney General Deborah Rescigno, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299.

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