

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,097

RICKY COOPER MCGOWAN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Ricky McGowan, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, the symbol "TR" will be used to designate the transcripts of hearings, and the symbol "A" will be used to designate the appendix attached to this brief.

STATEMENT OF THE CASE AND FACTS

The State of Florida charged Ricky Cooper McGowan with possession of a firearm by a violent career criminal, a violation of section 790.235, Florida Statutes. (R. 1). The information alleged that Mr. McGowan committed the offense on December 11, 1995. After trial by jury, the lower tribunal adjudicated Mr. McGowan guilty as charged. (R. 31). Pursuant to section 775.084, Florida Statutes, the trial judge sentenced Mr. McGowan to life in prison as violent career criminal. (R. 36-38).

Mr. McGowan appealed his conviction and sentence. On February 17, 1999, the Third District Court of Appeal affirmed. *See McGowan v. State*, 725 So. 2d 470 (Fla. 3d DCA 1999). (A-1). The court certified direct conflict with the Second District Court of Appeal's decision in *Thompson v. State*, 708 So.2d 315 (Fla. 2d DCA), review granted, 717 So.2d 538 (Fla.1998) concerning the constitutionality of the "Officer Evelyn Gort and all Fallen Officers Career Criminal Act of 1995," Chapter 95-192, Laws of Florida.

SUMMARY OF ARGUMENT

The “Officer Evelyn Gort and all Fallen Officers Career Criminal Act of 1995” (Gort Act) is unconstitutional because the session law that created it, chapter 95-182, Laws of Florida, violates the single subject provisions of the Florida Constitution. Chapter 95-182 addresses two distinct subjects: career criminal sentencing and civil remedies for victims of domestic violence. Since these two subjects are not reasonably related, chapter 95-182 addresses more than one subject and is therefore violates article III, section 6 of the Florida Constitution.

The Appellant’s conviction and sentence must be reversed. Mr. McGowan was convicted of possession of a firearm by a violent career criminal and sentenced to life in prison as a violent career criminal. Both the offense and the sentence were created by the Gort Act. Since the offense was committed between the date the Gort Act took effect on October 1, 1995, and May 24, 1997, when the legislature reenacted it, Mr. McGowan’s conviction and sentence must be reversed.

This precise issue is presently pending in this Court in *State v. Thompson*, Case No. 92,831, and the defendant fully adopts the defense brief filed in this Court in *Thompson* for the initial brief in this case.

ARGUMENT

THE APPELLANT'S CONVICTION AND SENTENCE PURSUANT TO THE "GORT ACT" MUST BE REVERSED BECAUSE CHAPTER 95-182 VIOLATES THE SINGLE SUBJECT REQUIREMENT OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION.

The "Officer Evelyn Gort and all Fallen Officers Career Criminal Act of 1995" (Gort Act) is unconstitutional. The legislature enacted the Gort Act as chapter 95-182, Florida Statutes. Chapter 95-182 embraces more than one subject, in violation of the "single subject" clause of article III, section 6 of the Florida Constitution.

This precise issue 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 does violate the single subject requirement of article III, section 6. The effect of the Second District's ruling in *Thompson* is to invalidate the Gort Act for crimes committed between its enactment on October 1, 1995, and its reenactment on May 24, 1997.

The Third District Court of Appeal has concluded that the Gort Act does not violate article III, section 6. See *Higgs v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997). The Third District decided *Higgs* before the Second District's decision in *Thompson*. In *Linder v. State*, 711 So. 2d 1340 (Fla. 3d DCA 1998), the Third District considered

the effect of *Thompson* and reaffirmed its own holding in *Higgs*, certifying the conflict. Thereafter, the Third District has repeatedly certified the conflict, as it has in this case. (A-1).¹

The defendant has reviewed the arguments made by the defense in the *Thompson* case and has determined they are fully applicable to this case. In the interest of judicial economy, the defendant therefore fully adopts the arguments made in the defense answer brief on the merits filed in this Court in *State v. Thompson* for the initial brief in this case. A copy of that brief is attached as Appendix 2.

In this case, Mr. McGowan was both convicted and sentenced pursuant to the Gort Act. The trial court adjudicated Mr. McGowan of possession of a firearm by a career violent criminal in violation of section 790.235, Florida Statutes, and sentenced him to life imprisonment as a violent career criminal pursuant to section 775.084(1)(c), 775.084(4)(c). (R. 31, 36-38). Both section 790.235 and the violent

¹See *Russell v. State*, 24 Fla. L. Weekly D442 (Fla. 3d DCA Feb. 17, 1999); *Waldo v. State*, 24 Fla. L. Weekly D395 (Fla. 3d DCA Feb. 10, 1999); *Robbins v. State*, 24 Fla. L. Weekly D328 (Fla. 3d DCA Feb. 3, 1999); *Gonzalez v. State*, 724 So.2d 1271 (Fla. 3d DCA 1999); *John v. State*, 724 So.2d at 708; *Marshall v. State*, 723 So.2d 923 (Fla. 3d DCA 1999); *English*, 721 So.2d at 1250; *Spann v. State*, 719 So.2d 1031 (Fla. 3d DCA 1998); *Tillman v. State*, 718 So.2d 944 (Fla. 3d DCA 1998); *Cyrus v. State*, 717 So.2d 619 (Fla. 3d DCA 1998); *Almanza v. State*, 716 So.2d 351 (Fla. 3d DCA 1998); *Elliard v. State*, 714 So.2d at 1218; *Holloway v. State*, 712 So.2d 439 (Fla. 3d DCA 1998); *Dupree v. State*, 711 So.2d 647 (Fla. 3d DCA 1998).

career criminal provisions of section 775.084 were created by the Gort Act. *See* ch. 95-182, §§ 7, 8, Laws of Fla. Since the alleged offense occurred on December 11, 1995, during the “window” period before the Gort Act provisions were constitutionally reenacted effective May 24, 1997, neither the conviction nor sentence can stand.

CONCLUSION

The "Officer Evelyn Gort and all Fallen Officers Career Criminal Act of 1995" violates the single subject provision of the Florida Constitution. Since the crime the defendant committed in this case occurred during the window period during which the Gort Act was unconstitutional, the defendant's conviction of possession of a firearm by a violent career criminal, as well as his sentencing as a violent career criminal under the Gort Act were illegal and must be reversed.

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 the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 14th day of April, 1999.

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

Andrew Stanton
Assistant Public Defender