

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,154

SHARON McKNIGHT,

Petitioner,

-vs.-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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CERTIFICATE OF FONT AND TYPE SIZE

Undersigned counsel for petitioner certifies that this brief was typed using 14 point proportionately spaced Times New Roman.

ARGUMENT

The State's Reliance on the 1999 Amendment is Misplaced

The offense for which Ms. McKnight was sentenced as a prison releasee reoffender occurred on July 27, 1997. (R. 1-3, 183). Accordingly, the applicable sentencing statute is that which was effective on that date, namely section 775.082(8), Florida Statutes (1997), not the amended statute which became effective July 1, 1999.

Although the state agrees that it is the 1997 statute which applies, it argues that the 1999 amendment can be viewed as a clarification of prior legislative intent, rather than as a substantive change, since the amendment was enacted after appellate courts arrived at conflicting interpretations of the 1997 statute. (Respondent's Amended Brief at 7-8, 16). The state relies on the rule of statutory interpretation that when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Lowry v. Parole & Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985); accord *Lincoln v. Florida Parole Comm'n*, 643 So. 2d 668, 672 (Fla. 1st DCA 1994); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. 4th DCA

1993). The state's reliance on this rule is misplaced, for several reasons.

First, assuming *arguendo* that there is an ambiguity to construe, application of the *Lowry* rule requires that it be unmistakably clear from the statutory language that the amendment is an expression of prior and continuing legislative intent, rather than a substantive change. *See Lowry* at 1250 (it was “unmistakable” from an examination of the various statutes that the amendments were expressions of prior and continuing legislative intent). Here, the opposite is unmistakably clear: The 1999 Legislature extensively rewrote the statute, making substantive changes (including expanding the scope of the statute, and eliminating two exceptions, while modifying another); it described the changes as involving redefinition and revision, not mere clarification; and its re-examination of the subject was based on information not available to the previous legislature.

The 1999 amendment expanded the definition of “prison releasee reoffender” contained in subsection (a), to include cases where the offense was committed in prison or on escape status, and also extensively rewrote subsection (d)1. Ch. 99-188, § 2, Laws of Fla. In rewriting subsection (d)1, the Legislature eliminated two of the specifically-listed exceptions to prison-releasee-reoffender sentencing. It also materially modified the exception for cases where the victim does not wish the defendant to receive such a sentence, by eliminating the requirement of a written statement. In addition, the

Legislature changed the expression of legislative intent. Previously, subsection (d)1 provided that prison-releasee-reoffender sentencing was intended unless certain circumstances “exist.” As amended, that subsection states that such sentencing is intended unless “the state attorney determines” that such circumstances exist. The changes to subsection (d)1 were as follows:

- (d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that ~~any of the following circumstances exist:~~
- ~~a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;~~
 - ~~b. The testimony of a material witness cannot be obtained;~~
 - ~~c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or~~
 - ~~d. —other~~ extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

Ch. 99-188, § 2, Laws of Fla.

Contrary to the state’s argument, the changes to the statute cannot be viewed as merely a clarification of previous legislative intent. The changes are not only substantial, they are obviously substantive. And, in fact, the preamble to the Act makes clear that the Legislature itself views these changes as something more than a mere clarification of intent. The Legislature describes the amendment to section 775.082 as “redefining the

term ‘prison releasee reoffender’” and “revising legislative intent.” (emphasis added). The “revision” of a statute implies a “re-examination,” for the purpose of improvement or correction, and, while it may or may not result in a material change, it is always more than a mere restatement of the same substance in different language. *See Black’s Law Dictionary* 1321 (6th ed. 1990) (“revision” of a statute “is more than a restatement of the substance thereof in different language, but implies a re-examination of them, and may constitute a restatement of the law in a corrected or improved form, in which case the statement may be with or without material change, and is substituted for and displaces and repeals the former law as it stood relating to the subjects within its purview”). Moreover, the “whereas” clauses show that the 1999 Legislature’s re-examination and rewriting of the statute was carried out based on information which became available after enactment of the 1997 prison-releasee-reoffender statute (which became effective May 29, 1997).

The result of the Legislature’s re-examination of the statute was to expand the definition of “prison releasee reoffender,” to eliminate or modify the statutory exceptions, and to rewrite the declaration of legislative intent. These changes make many more persons subject to enhanced sentences. The changes are substantive, not mere clarification.

Second, this rewriting took place after significant political change. In the 1998

elections the Republican party not only increased its majority in the Legislature but also obtained control of the Governor's office. These changes evidently had a substantial impact on the legislative agenda. The 1999 legislation -- which included the "10-20-Life" law (Chapter 99-12) and the "Three-Strike Violent Felony Offender Act" (Chapter 99-188) -- represents a significant policy shift toward far greater reliance on harsh, mandatory penalties and the elimination of judicial discretion.

Because of the substantial political change occurring between the 1997 and 1999 legislative sessions, the rewriting of the prison releasee reoffender statute (which was included in the "Three-Strike" Act) cannot be regarded as a clarification of prior legislative intent. *See State Farm Mutual Automobile Insurance Co. v. LaForet*, 658 So. 2d 55, 62 (Fla. 1995) ("absurd" to consider legislation enacted ten years after the original act as a clarification of intent; the membership of the two legislatures "substantially differed"); *see also Parole Comm'n v. Cooper*, 701 So. 2d 543, 544 (Fla. 1997) ("it is inappropriate to use an amendment enacted ten years after the original enactment to clarify original legislative intent").

Third, it is inappropriate to use the *Lowry* rule to give retroactive effect to harsher sentencing legislation. *See Kleparek v. State*, 634 So. 2d 1148 (Fla. 4th DCA 1994) (state's reliance on *Lowry* was misplaced where the state was seeking to enhance punishment after the fact). In *Lowry* itself, the amendment was favorable to the

defendant and viewing it as a clarification of the law evidently did not raise any *ex post facto* concerns. Similarly, in *Lincoln*, the court was careful to note that the controlling statutory provisions were all in effect at the time of the commission of the offenses, and their application raised no *ex post facto* question, 643 So. 2d at 669 n. 1, and since the clarifying amendment simply reiterated what the Legislature had already said in the existing statutes, it was appropriately used to buttress the conclusion derived from an examination of those statutes, *see id* at 671.

The 1999 amendment was enacted after the district courts of appeal had already construed the provisions of the 1997 statute. The Second and Fourth Districts had concluded that trial courts retain discretion in sentencing defendants under the 1997 statute. *State v. Cotton*, 728 So. 2d 251 (Fla. 2d DCA 1998); *State v. Wise*, 24 Fla. L. Weekly D657 (Fla. 4th DCA, March 10, 1999) (certifying conflict with *McKnight*); *see also Kelly v. State*, 727 So. 2d 1084, 1085 (Fla. 2d DCA 1999); *Coleman v. State*, 24 Fla. L. Weekly D1324 (Fla. 2d DCA June 4, 1999) (certifying conflict with *McKnight* and *Woods*).¹ Accordingly, assuming *arguendo* that the 1999 amendment precludes judicial determination of the applicability of the statutory exceptions, it clearly effects a substantive change in the law in those two jurisdictions, where the controlling judicial

¹The other district courts of appeal came to the opposite conclusion. *See McKnight; Speed v. State*, 732 So. 2d 17 (Fla. 5th DCA 1999); *Woods v. State*, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999).

construction is directly to the contrary. The amendment therefore cannot be viewed as involving merely a clarification of prior intent.

Under these circumstances, if there is any ambiguity in the language of the 1997 statute, the applicable rule of construction is not that of *Lowry* but that of section 775.021(1), Florida Statutes (1997). The ambiguity should be resolved most favorably to the defendant. § 775.021(1), Fla. Stat. (1997) (when language of code or offense is susceptible to differing constructions, “it shall be construed most favorably to the accused”); *Parole Comm’n v. Cooper*, 701 So. 2d 543, 544-45 (Fla. 1997) (rejecting argument that legislative intent should be construed based on amendment enacted several years later, and adding that “even were we to find the statute to be ambiguous, we would have to construe the statute in the manner most favorable to the inmate”).

Finally, as set forth below and in the initial brief, the plain language of the 1997 statute does not give rise to ambiguity regarding the role of the court. There is accordingly no need to resort to *Lowry* or other rules for construing ambiguity.

The State’s Argument is Contrary to the Plain Language of the 1997 Statute

The plain language of section 775.082(8), Fla. Stat. (1997), makes clear, first, that it is the judge who must impose the sentences provided by the statute, § 775.082(8)(a)2. (“the state may seek to have the court sentence the defendant as a prison releasee reoffender”) (emphasis added), and, second, that the Legislature intends that, if certain

circumstances exist, the mandatory sentences should not be imposed, even if a person qualifies under subsection (a) of the statute, § 775.082(8)(d)1 (“[i]t is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law as provided in this subsection, unless any of the following circumstances exist”) (emphasis added).

This much is not in dispute. There is no ambiguity here. (See Respondent’s Amended Brief at 8, 10, asserting that Legislature intended that defendants who qualify as prison releasee reoffenders be punished as such “unless certain criteria apply”).

It is also common ground that the Legislature has plenary authority to prescribe the punishment for crimes and that “the judiciary, in sentencing an individual, must remain within the parameters established by the Legislature.” (Respondent’s Amended Brief at 19-20, 31) (quoting *Bunting v. State*, 361 So. 2d 810, 811 (Fla. 4th DCA 1978)) (See Petitioner’s Initial Brief at 17).

The defendant and the state part company, however, with regard to the effect of the Legislature’s words.

The defendant submits that when the Legislature declares its “intent” that certain categories of offenders be “punished” with enhanced sentences “unless” certain circumstances exist, § 775.082(8)(d)1., Fla. Stat. (1997), that legislative declaration constitutes an exercise of the Legislature’s power to prescribe the punishment for crimes,

and must be given the consequent legal effect required by the doctrine of separation of powers. This statutory language must mean that the enhanced sentences are only authorized where (1) the defendant qualifies as a prison releasee reoffender under subsection (a) of the statute, and (2) none of the exceptional circumstances listed in the statute exist. In the absence of either of these statutory prerequisites, a prison-releasee-reoffender sentence is unauthorized and cannot legally be imposed. Since “[c]ourts have no authority to exceed the punishment for criminal conduct as provided by the Legislature,” *Bunting* at 811, it follows that the court must determine not only whether a person qualifies under subsection (a), but also whether any extenuating circumstances exist which would preclude enhanced sentencing, pursuant to the legislative intent declared in subsection (d). Both determinations are inherent in the sentencing function which the statute assigns to the court.

The state argues, nevertheless, that subsection (d) is not directed to the sentences which can be imposed by the court, but, rather, is intended to limit prosecutorial discretion. According to the state, “[s]ubsection (d) addresses the prosecution of a prison releasee reoffender, not the prison releasee reoffender’s sentence.” (Respondent’s Amended Brief at 13). The state emphasizes that the exception which is applicable here refers to extenuating circumstances “which preclude the just prosecution of the offender.” § 775.082(8)(d)(1)d., Fla. Stat. (1997). (Respondent’s Amended Brief at 9, 10, 12).

Because this subsection uses the term “prosecution” the state assumes that only the prosecutor can determine whether it applies. That assumption, however, is gratuitous, and the argument specious.

The argument is specious because, as the state apparently acknowledges, the reference to circumstances “which preclude the just prosecution of the offender” cannot be read literally, that is, to mean that the offender cannot be prosecuted at all. It would of course be absurd to talk about the applicability of an enhanced sentence, or any sentence at all, where prosecuting the defendant for the offense would be “unjust.” And, in fact, the state recognizes that what the statutory exception actually requires is a determination of whether extenuating circumstances exist “which would preclude sentencing the defendant under the Act” (Respondent’s Amended Brief at 16) (emphasis added). So, it appears, the statute is addressed to sentencing after all, which, everyone agrees, is the role of the court.

The state does not explain why the sentencing determination required by the statute -- whether circumstances exist “which would preclude sentencing the defendant under the Act” (Respondent’s Amended Brief at 16) -- cannot be made by the sentencing court. Instead, the state simply assumes that the court cannot decide whether the sentence it is being asked to impose is consistent with the Legislature’s intent. That assumption is gratuitous. Obviously, if an enhanced sentence is precluded it should

neither be sought nor imposed, but this gives rise to no inference that the sentencing court is excluded from the determination of whether extenuating circumstances exist. To the contrary, both the court and the prosecutor must determine whether such circumstances exist: the prosecutor before seeking the enhanced sentence, and the court before imposing it. This follows from the plain language of the statute and from the operation of the doctrine of separation of powers. If the Legislature intended something different, it would have said so “in unequivocal terms.” *State v. Cotton*, 728 So. 2d 251, 252 (Fla. 2d DCA 1998).

Constitutionality

Under the state’s interpretation of the statute, when an extenuating circumstance exists, sentencing as a prison releasee reoffender is not intended by the Legislature, and, therefore, the prosecutor “may elect” not to seek such a sentence. (Amended Brief of Respondent at 10, 25). If the prosecutor does ask for such a sentence, the court must determine whether the defendant qualifies under subsection (a), but cannot determine whether extenuating circumstances exist which preclude imposing the enhanced sentence under subsection (d)1. (Amended Brief of Respondent at 26-27).

As petitioner argued in her initial brief (see Brief of Petitioner at 35-40), if that is what the statute means, it violates the doctrine of separation of powers because it creates sentencing discretion but transfers that discretion to the prosecutor. It also violates the

constitutional guarantee of due process of law because defendants who, under the terms of the statute, have a substantive right not to receive an enhanced sentence, are denied the opportunity to vindicate that right before an impartial tribunal. (See Brief of Petitioner at 40-44).

The state argues that this statutory scheme does not remove sentencing discretion from the court to the prosecutor, because it is the court, rather than the prosecutor, who must impose the sentence, and since the court must find if the defendant qualifies as a prison releasee reoffender (under subsection (a)), “the last word belongs to the court.” (Amended Brief of Respondent at 11). According to the state, this is analogous to the habitual offender and habitual violent felony statutes. (Amended Brief of Respondent at 11, 26).

However, as set forth in petitioner’s initial brief, a comparison with the habitual offender statutes and the case law addressing their compatibility with the doctrine of separation of powers, shows why the prison-releasee-reoffender statute (as construed by the state and the Third District) is unique and unconstitutional. The habitual offender statutes give the court discretion not to impose the enhanced sentence upon qualified offenders, where the court finds that such sentencing is not necessary for the protection of the public. It is precisely because the court has this discretion that the habitual offender statutes have been found not to violate the doctrine of separation of powers.

London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998).

By contrast, in the prison-releasee-reoffender statute the Legislature explicitly states that it does not intend the enhanced sentence to be imposed under certain circumstances, yet (on the state's interpretation) it precludes the court from determining whether those circumstances exist and instead gives that responsibility exclusively to the prosecutor. This is not constitutionally possible. See *Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983); *State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981).

Contrary to the state's argument, both subsection (a) (establishing who qualifies for the enhanced sentence) and subsection (d)1 (declaring who should not receive such a sentence) involve the sentencing function, which subsection (a)(2) assigns to the judge. To determine whether a prison-releasee-reoffender sentence is authorized (that is, legislatively intended) in a particular case, it is necessary to make the factual determinations required by both subsection (a) and subsection (d)1.

Having declared its intent that enhanced sentencing should not be imposed in certain circumstances, the Legislature cannot constitutionally preclude the court from determining whether those circumstances exist, or prevent defendants from presenting their case of extenuating circumstances to an impartial tribunal. If the Legislature wishes to require the imposition of mandatory sentences upon all those who meet the

requirements of subsection (a), there is no constitutional impediment to doing so. However, that is not what the Legislature did. It clearly stated its intent that not everyone who qualifies should receive such a sentence. Where “extenuating circumstances” exist an enhanced sentence is not intended, and therefore not authorized. Since a defendant has a substantive right not to receive an unauthorized sentence, and the sentencing court has no authority to impose it, excluding the court from the determination of whether the exceptions apply violates both the doctrine of separation of powers and the defendant’s right to due process of law.

CONCLUSION

Based on the foregoing argument and authorities, and those contained in the initial brief, the petitioner requests this Court to quash the decision of the Third District, reverse the sentence, and remand 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 BARBARA A. ZAPPI, Office of the Attorney General, 9th Floor, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 22nd day of July, 1999.

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