IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: 95,266

4th DCA Case No.: 99-0998

KEN JENNE, SHERIFF,
etc.,
Petitioner,

vs.

BRIAN RIX,
Respondent.

ON CERTIFICATION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998,after Rule 28-2(d), Rules of the United States Court of Appeals for Eleventh Circuit, counsel for the Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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STEVEN J. HAMMER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

PRELIMINARY STATEMENT

The Respondent, Brian Rix, is a Defendant in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida,[1] and was the Petitioner in the Fourth District Court of Appeals. The parties will be referred to as they appear before this Honorable Court.

References to the Respondent's Appendix will be designated by the symbol "APP" followed by the appropriate page number. References to Respondent's Initial Answer Brief will be designated by the symbol "IB."

[1]Respondent's criminal case, 98-25356CF10A, wherein Respondent was charged with possession of cocaine, DUI and driving with an expired license tag resulted in a not guilty finding by a jury on June 30, 1999. These charges were used by the State to request a revocation of Respondent's bond.

ISSUES ON APPEAL

WHETHER, CHAPTER 2000-178 ALLOWS THE COURT TO REVOKE RESPONDENT'S BOND WHEN THERE HAS BEEN NO COMPLIANCE WITH FLORIDA STATUTE 907.041 AND RESPONDENT HAS BEEN FOUND NOT GUILTY OF THE CHARGES USED FOR REVOCATION.

WHETHER NEWLY ENACTED FLORIDA STATUTE 903.0471 IS CONSTITUTIONAL, AND, IF SO, WHETHER IT CAN BE ENFORCED RETROACTIVELY.

STATEMENT OF THE CASE AND FACTS

Other than the following additions, Respondent, Rix, adopts the Statement of the Case and Facts originally set forth in his Initial Answer Brief on the Merits (IB 1-3), except to note that he was found not guilty by a jury on the charges upon which the State sought to revoke his bond.

This case initially came before the Court on the State's Application for Discretionary Review of the Fourth District Court of Appeals decision granting Respondent's requested Petition for Habeas Corpus and certifying conflict with the Third District's decision in Houser v. Manning, 719 So.2d 307 (Fla. 3d DCA 1998); See, Rix v. Jenne, 728 So.2d 827 (Fla. 4th DCA 1999).

Original briefs were filed by both parties, however, during the pendency of this Court's review, the legislature enacted Chapter 2000-178 which purported to amend several Florida Statutes. (Florida Statute 903.046, purpose and criteria for bail determination; Florida Statute 903.26 revising time period for bond forfeiture and notice; and Florida Statute 907.041 pretrial detention and release.)

This Chapter also created new Florida Statute 903.0471 which drastically altered the pretrial detention statute currently in place in Florida by allowing a defendant to be detained upon a minimal finding of probable cause that the individual committed an offense while on bond. This Chapter also repealed Florida

Rules of Criminal Procedure 3.131 and 3.132 to the extent that they are inconsistent with new Florida Statute 903.0471.

As a result of the legislative enactment, this Court ordered that the parties address the following question:

> How the recent enactment of act effective June 2, 2000, Chapter 2000-178, affects the issue presented by this case, and whether his appeal is moot by virtue of this recent amendment.

SUMMARY OF THE ARGUMENT

A criminal defendant is constitutionally entitled to pretrial release. A defendant may only be denied bond when a person is accused of a capital crime or a crime punishable by life imprisonment, and the proof of guilt is evident and the presumption great, and/or when no condition of release can reasonably protect the community, assure the presence of the accused, or assure the integrity of the judicial process. A trial court cannot deny bond to a criminal defendant unless these two exceptions exist.

Respondent submits that Chapter 2000-178, and specifically Florida Statute 903.0471 is unconstitutional as a violation of Article 1, Section 14 of the Florida Constitution. Further, Chapter 2000-178 is an unlawful exercise of legislative authority in that the statute allows an insufficient standard of proof to be used to deny a defendant bail, violates procedural due process, and does not provide for the right to counsel or a hearing on the matter. Additionally, the statute fails to provide reasonable notice to a defendant, a hearing with an attorney or any further protection to insure the integrity of the judicial process.

Even if the chapter law is determined by this Court to be constitutional, there is no evidence to suggest that the legislature intended that the law be applied retroactively. Therefore, this appeal has not been mooted by the passage of

Chapter law 2000-178. However, Respondent would contend that a not guilty finding by a jury on all the charges for which the State requested bond revocation requires that the State’s revocation motion be denied.

ARGUMENT I

WHETHER CHAPTER 2000-178 IS AN INVALID EXPRESSION OF LEGISLATIVE AUTHORITY SINCE IT CONFLICTS WITH THE FLORIDA CONSTITUTION AND FLORIDA STATUTE 907.041.

In Florida, criminal defendants have a substantive constitutional right to pretrial release guaranteed by Article 1, Section 14 of the Florida Constitution which states:

> Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable condition. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

The right to pretrial release can be denied only in those circumstances enumerated in Article 1, Section 14 of the Florida Constitution. See also, State v. Arthur, 390 So.2d 717 (Fla. 1980).

Florida Statute 907.041 implements Article 1, Section 14 and sets forth the constitutional criteria for determining whether a defendant may be detained without bond. Subsection (4)(b), entitled Pretrial Detention, provides that a court may order pretrial detention if it finds by a "substantial probability," based on a defendant's past and present patterns of behavior that: (1) a defendant has previously violated conditions of release, and no other conditions of release are likely to assure

his appearance at subsequent proceedings, (2) that a defendant has threatened, intimidated or injured a victim, potential witness, juror or judicial officer, and no conditions of release will reasonably prevent the obstruction of the judicial process, (3) that the defendant is charged with trafficking in controlled substances or (4) that the defendant poses the threat of harm to the community and there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.

As part of the fourth consideration, a court must find that at least one of the following conditions is present: (1) the defendant has previously been convicted of a crime punishable by death or life imprisonment, (2) that he has been convicted of a dangerous crime within the last ten years preceding the date of his arrest for the crime presently charged or, (3) that he is presently on probation, parole or other release pending completion of sentence or on pretrial release for a dangerous crime at the time of the current arrest.

Florida Statute 907.041 complies with the Florida Constitution, and the Fourth District Court of Appeals in its ruling found that the State did not satisfy its burden of proving the requirements for pre-trial detention in accordance with Section 907.041 in the instant case. Rix at 828.

Chapter 2000-178, and specifically Florida Statute 903.0471, authorizes the denial of pretrial bond if there is probable cause

to believe that a defendant commits an offense while on bond. The statute, in its entirety, states:

> 903.0471 Violation of Condition of Pretrial Release – Notwithstanding s. 907.041, a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release.

In violation of Florida's Constitution, the statute does not require a finding that no condition of bond can protect the community from physical harm, assure the attendance of the defendant or assure the integrity of the judicial process.

The constitutional right to bail has been long recognized by this Court. Ex parte McDaniel, 97 So. 317 (Fla. 1923) (right to bail is organic). The Constitution permits the denial of bail only under two specific circumstances. First, when a person is accused of a capital crime or a crime punishable by life imprisonment and the State presents evidence that the proof of guilt is evident and the presumption great. State v. Arthur, 390 So.2d 717 (Fla. 1980) As opposed to newly enacted Florida Statute 903.0471, the standard of proof is a greater degree of proof than that establishing guilt merely to the exclusion of a reasonable doubt. Elderbroom v. Knowles, 621 So.2d 518 (Fla. 1st DCA 1993). The second constitutional exception to the right to bond requires findings based on a "substantial probability" that no condition of release will protect the community from physical harm or assure the integrity of the judicial process. While Florida

Statute 907.041 codifies these constitutional requirements for pretrial detention, Florida Statute 903.0471 provides for the denial of bond if “probable cause” exists that a defendant committed a new offense while on bond. The statute does not require any of the findings in the Constitution, narrows the constitutional right to pretrial release and is thereby facially unconstitutional.

This disparity between standards in the two statutes simply confirms that a probable cause standard violates due process.

In Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991), this Court recognized that the burden or standard of proof in a criminal case is subject to a substantive due process under the Florida Constitution.

In Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), the Court enunciated a three part balancing test for determining the constitutionality of a standard of proof; the private interest affected by the proceedings; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting the use of the challenge procedure.

Respondent Rix contends that Section 903.0471 fails miserably the Eldridge test. Section 903.0471 violates due process by requiring only a finding of probabl cause before detaining a defendant. Utilizing a probable cause standard causes a high risk of error, as shown in the instant case, where

a jury found the defendant not guilty of all the charges with which the State sought to revoke his bond. By allowing a court to simply make a finding of probable cause, a defendant is being denied his constitutional right to confront his accusers, his right to counsel and his right to be heard at the revocation hearing. While a defendant who commits a capital crime or a crime punishable by life will be entitled to an evidentiary hearing, counsel, the right to be heard and the right to confront his accusers, a person who violates the most minor of crimes may have his bail revoked simply upon a finding of probable cause.

While the current statutory scheme in Florida provides strict constraints for filing a motion for pretrial detention, holding a hearing, rendering a ruling, and, if pretrial detention is ordered, for trying the underlying case, the newly enacted statute provides none of these protections.[2] The statute violates procedural due process because it does not provide for adequate and meaningful notice to a defendant, nor does it provide for a fair opportunity to be heard.[3]

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[2]Respondent Rix is aware that this Court has ordered the parties in State of Florida v. Jean David Paul, Case No. 95, 265 to respond to the same question posed to the parties in this case. To the extent allowable, Respondent Rix would join in the arguments of the Respondent in Paul. Respondent Rix agrees with Respondent Paul that this Court should consider the constitutionality of Chapter 2000-178 since a defendant's arrest while on bond is an issue raised often in trial courts of this State.

[3]Florida Rule of Criminal Procedure 3.131(d)(2) requires a three hour notice to a defendant before a court hears an application to increase bond. This chapter repeals this rule and other protections provided by Rule 3.132 if they are inconsistent with the provisions of 903.0471.

ARGUMENT II

EVEN IF NEWLY ENACTED CHAPTER 2000-178 IS CONSTITUTIONAL, IT CANNOT BE ENFORCED RETROACTIVELY.

In Florida, it is clear that in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only. Bates v. State, 750 So.2d 6,10 (Fla. 1999); Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) This rule mandates that statutes that interfere with vested rights will not be given retroactive effect. On the other hand, statutes which relate only the procedure or remedy are generally held applicable to all pending cases. Altenhaus at 1154.

Retroactive application of the law is generally disfavored. Bates, Supra quoting Herbert Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principal that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."); and any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent. Broom, supra, at 25 ("it is a general principal of our law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction.")

While a retrospective provision of a legislative act is not necessarily invalid, it is so only in those cases wherein ... a new obligation or duty is created or imposed ... in connection with transactions or considerations previously had or expiated. McCord v. Smith, 43 So.2d 704 (Fla. 1949); Gaston v. Department of Revenue, 742 So.2d 517, 520 (1st DCA 1999).

Chapter 2000-178 is silent as to the time frame of its application. Absent an express command that a statute apply retroactively, and this one does not, legislative intent is determined from the clear terms of the statute and the purpose of the enactment. In order to determine the legislative intent, one could examine the staff analysis of the legislation. White v. State, 714 So.2d 440fn5 (Fla. 1998) citing Sunbank/South Florida NA v. Baker, 632 So.2d 669 (Fla. 4th DCA 1994) While the committee on crime and punishment's final analysis notes the conflict between the Court's decision in Paul and the Third District Court of Appeals decision in Houser v. Manning, 719 So.2d 307 (Fla. 3d DCA 1998) it is silent as to the purpose or intent behind the enactment. Interestingly enough, the comment section indicates that the chapter law raises no constitutional issues.

Since the statute itself gives no indication that it is to be applied retroactively, and the legislative intent cannot be gleaned by examining the legislative record, this Court must apply the prevailing rule that this new statute is to be given

prospective effect only.

As a result of the prospective effect of this statute, Respondent’s bond could not be revoked as a result of the enactment of Chapter law 2000-178.

CONCLUSION

Respondent has been found not guilty of the charges upon which the State relied in seeking to revoke his bond. Since Florida Statute 907.041 was not complied with in the trial court, the Fourth District Court of Appeals decision must be affirmed. The arguments presented by Respondent support the District Court's decision, and Respondent would respectfully urge this Court to affirm the Fourth District's opinion.

Chapter law 2000-178 is facially unconstitutional and should be struck down. The new enactment, even if found constitutional, cannot be applied retroactively, and would therefore, not moot this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to Leslie T. Campbell, Assistant Attorney General and Celia Terenzio, Assistant Attorney General, Bureau Chief, Office of the Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401-2299 this 25th day of July, 2000.

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STEVEN J. HAMMER