IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

PETITIONER,

v.

TYRONE COWART,

RESPONDENT.

Case No. 95,541

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

MERITS BRIEF OF PETITIONER

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The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE

The state invokes this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A) (vi), Fla. R. App. P. (1999), of the Second District Court of Appeal opinion issued in this case certifying its decision is in direct conflict with McKnight v. State, 727 So.2d 314 (Fla. 3rd DCA 1999)[1] and Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999). Additionally, the instant opinion is in direct conflict with the Fifth District's recently issued opinion in Speed v. State, 24 Fla. L. Weekly (D) 1017 (Fla. 5th DCA April 23, 1999).

STATEMENT OF THE FACTS

In an information filed April 27, 1998, the state charged Respondent with burglary. (R8-9) These charges arose from Respondent's cutting the screen on an apartment porch and stealing a bicycle on April 5, 1998. (R8-9; 101-104) He was observed by a police officer who lived in this apartment complex pushing the bike through the complex. (R101-102) The officer made a suspicious person report and Respondent was questioned as to what he was doing. (R101-102) He explained he was trying to cut through the complex. The officer told him his story was not believable and to

[1]McKnight is pending before this Court in case number 95,154.

sit down until the officers were through with what they were doing.(R102)

After a couple of minutes, Respondent spontaneously admitted to stealing the bicycle. (R102) When asked from where he had stolen it, Respondent stated that he would show the officers if they took him back to the apartment so he could apologize to the woman. (R102) They returned to the apartment, woke the woman and confirmed it was her bike which was stolen. (R103) The screen on the back of the porch had been cut. (R103) There was no attempt to get into the house. (R103) After being arrested, Respondent advised the officers that despite their search of him, he had a sharp object in his pocket. (R103) They removed it. (R103)[2]

Respondent's sentencing guidelines range was between 39.33 and 65.5 months in prison. (R105) The state recited that Respondent qualified as a prison releasee reoffender (15 years)[3] and a violent career criminal (40 years with a mandatory minimum of 30 years unless the court found Respondent was not a danger to the community) and recited his prior criminal history. (R104-105) The state maintained the court was required to impose the prison releasee reoffender mandatory 15 year sentence and it was only the

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[2]The state agreed with this factual recitation of events by the defense. (R104)

[3]The state filed a notice Respondent qualified as a prison releasee reoffender and required sentencing under s. 775.082, Fla. Stat. (1997). (R11) The Department of Corrections certificate reflecting Respondent's release from prison as January 12, 1998, appears in the record at R33.

state, not the court, who could decline to seek imposition of this sentence. (R105) The state asked for a violent career criminal sentence and objected to anything below the mandatory 15 years as a prison releasee reoffender. (R105)

The victim testified she had no relationship with Respondent and did not know him before he stole her bike. (R98-99) She did not wish Respondent to serve the 15 years for stealing her bike. (R99) She signed a written statement to this effect. (R23)

Respondent's boss, Martin Bird, spoke on Respondent's behalf. (R100) Respondent had worked for Bird at his furniture manufacturing factory for about a year to a year and a half. (R100) Bird described Respondent as an honest, trustworthy, hardworking employee. (R100) Bird wanted him back at work. (R101)

Respondent spoke in his own behalf and admitted to taking the bicycle. He felt bad about it and had apologized to the bicycle's owner for it. (R106) He acknowledged he had a bad prior record but was trying to be honest and turn his life around. (R106) He had no intention of going into the woman's home and only took the bike. (R106) He had been honest with everyone about taking the bike. (R106) He asked for a chance to prove himself on probation. (R106) Respondent pointed out he had been previously tried for a crime which was reversed on appeal based on the insufficiency of the

evidence after serving 3 ½ years of his sentence.[4] (R108) In the instant case, Respondent was giving the state all the evidence they needed by admitting to the crime but they were showing no leniency. (R108)

The trial court stated it would not offer Respondent probation (R107) but disagreed with the state's contention the court had no discretion in refusing to impose the 15 year prison releasee reoffender sentence stating it is the court who makes the sentencing decision. (R105-106) The trial court found it had the discretion to impose or not impose the mandatory 15 year sentence taking into account the mitigating factors set forth in the statute. (R106) The court stated:

> Well, no, I agree with you, there should be leniency in this case. What they're saying is they don't have any choice in the matter, you qualify as the law has been written by the legislature for a minimum mandatory 15 years. It's not that they're not showing you any leniency, they don't have any leniency to show you.
>
> The law says that's the way it should be and they're simply following what the law says. That's where things changed in the criminal justice system. Now, the legislature apparently, in responding to the will of the people, so to speak, feels that habitual offenders should be put away for a long time and so they have taken all the discretion away from the Court.
>
> What they're saying is they could be asking for 30 years plus another 10 and

[4]See R22 for a copy of this Court's opinion in Cowart v. State, 582 So.2d 90 (Fla. 2d DCA 1991).

> they're only looking for 15 because that's the minimum they feel the law allows in your case. They don't feel the law allows anything less than that. Not that they want you to serve 15; that's what they think the law says. And that's where we have a disagreement.

(R108-109)

The trial court agreed the facts of the case did not seem like a serious crime as crimes go but pointed out it was Respondent's past record which put him in his present situation. (R110) The court commended Respondent for cooperating with the state and apologizing to the victim. (R110) The court offered Respondent a four year sentence as a habitual felony offender.(R107; 111)

Respondent plead guilty to the charge. (R112; 24-25) The court sentenced Respondent to four years incarceration as a habitual felony offender. (R114; 26-30) After imposing sentence, the court directed Respondent to inform the guys in prison that under the current law, there isn't any room for mercy. (R115)

The state appealed the trial court's refusal to impose the mandatory Prison Releasee Re-offender sentence. On February 24, 1999, the Second District Court of Appeal per curiam affirmed Respondent's conviction and sentence. (See Exhibit A, attached.) On April 28, 1999, the Second District Court of Appeal granted the state's motion for rehearing and though affirming Respondent's judgment and sentence based on State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), certified its opinion was in conflict with McKnight v. State,727 So.2d 314 (Fla. 3rd DCA 1999) and Woods v.

State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999). (See Exhibit B, attached.) On May 3, 1999, the state filed its timely notice to invoke the discretionary review of this Court.

SUMMARY OF THE ARGUMENT

The trial court erred in failing to sentence Appellee to a mandatory 15 years in prison as a prison releasee reoffender because the statute gives the trial court no discretion in sentencing such defendants.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SENTENCE APPELLEE TO THE MANDATORY 15 YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER WHERE HE QUALIFIED AS SUCH.

The trial court erred in failing to sentence Appellee to a prison term of 15 years pursuant to the Prison Releasee Reoffender statute. Section 775.082(8)(a), Fla. Stat. (1997), which sets out the criteria for sentencing under the Prison Releasee Reoffender Act, provides in pertinent part:

> "(8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit: ...q. burglary of an occupied structure or dwelling ...within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.
>
> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a

> defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and **must** be sentenced as follows:
>
> ...
>
> c. For a felony of the second degree, by a term of imprisonment of 15 years;
>
> ...
>
> (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 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.

Section 775.082(8), Fla. Stat.(1997).

In the instant case, Respondent was charged with and plead guilty to burglary. (R8-9; 112; 24-25)) The state filed a notice Respondent qualified as a prison releasee reoffender and required sentencing under s. 775.082, Fla. Stat. (1997). (R11) The court erred in failing to sentence Respondent to the mandatory fifteen years as a Prison Releasee Reoffender where he qualified as such. It is the state, not the trial court, who has discretion (though that discretion is also limited by the statute) not to seek an enhanced sentence under s. 775.082(8) as evidenced by the language in (8)(a)2., "... *the state attorney may* seek to have the court

sentence the defendant as a prison releasee reoffender." However, once the state seeks this sentencing and the defendant qualifies as such an offender, the court *must* sentence him to the enhanced sentence unless the provisions of (d)1. are met.

In this case, pursuant to (d)1.c., the victim did not want the Respondent to serve the mandatory prison term. However, because the statute refers to circumstances affecting the *prosecution* of the offense and prosecution is not a judicial function, it was the state's choice, not the trial judge's choice, as to whether to seek the mandatory sentence based on the victim's wishes. The trial court did not have the discretion to refuse to impose the enhanced sentence where the state sought its imposition.

The fact subsection (d) does not bestow discretion upon the trial court to not impose the enhanced sentence is further evidenced by the language of (d) 2. which requires the state attorney to keep statistics on cases wherein the defendant qualified as a prison releasee reoffender but was not sentenced to the enhanced sentence. Since it is the state who must keep these statistics (seemingly as a justification for why such sentencing was not sought), it is the state which has the discretion as limited by the statute in seeking imposition of these enhanced sentences.[5]

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[5]This provision supports the trial court's statement that the state likewise felt they had no discretion in not seeking the mandatory prison term.

Additionally, the Senate Staff Analysis and Economic Impact Statement (Staff Analysis) prepared for this statute supports the state's claim it is the state which bears all the discretion in deciding whether to seek enhanced sentencing. See Exhibit C, attached, at pages 6, 7 and 10. See page 6:

> A distinction between the prison releasee provision and the current habitualization provision is that, when the state attorney does pursue sentencing of the defendant as a prison releasee reoffender and proves that the defendant is a prison releasee reoffender, the court must impose the appropriate mandatory minimum term of imprisonment.

See page 7:

> The CS provides legislative intent to prohibit plea bargaining in prison releasee reoffender cases unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides a written objection to such sentencing; or there are other extenuating circumstances precluding prosecution.

See page 10:

> This CS gives the state attorney the total discretion to pursue prison releasee reoffender sentencing. If the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum allowable for the offense.

The Staff Analysis clarifies that subsection (d) is directed at the state attorney and expresses an intent to prohibit plea bargaining except in these situations. (See Exhibit C, attached, at page 7.) This interpretation explains why the language in

subsection (d) refers to factors affecting the prosection of the offense as opposed to reasons to mitigate the sentence. The staff analysis reflects the Second District's opinion in Cotton[6], followed in the instant case, was wrongly decided.

By contrast, the Third District in McKnight, in a lengthy, well-reasoned opinion, held that the statute does not afford the trial court discretion in imposing the Prison Releasee Re-offender sentence when the state seeks its imposition and the defendant qualifies for such sentencing. The Third District based its holding on the plain language of the statute and the legislative history as set forth in the Staff Analysis and the House Committee on Criminal Justice Appropriations, Committee Substitute for House Bill 1371 (1997) Bill Research and Economic Impact Statement 11 (April 2,

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[6]In Cotton, the Second District summarily concluded, "... applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the responsibility to determine the facts and exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms." Jurisdictional briefs have been filed in State v. Cotton, pending before this Court in Case Number 94,996.

Subsequently, the Fourth District in State v. Wise, 24 Fla. L. Weekly(D) 657 (Fla. 4th DCA March 10, 1999) aligned itself with the Second District's opinion Cotton in concluding the statute allows the trial judge to exercise sentencing discretion. The Wise court noted it was the trial judge who determined the appropriate penalty after conviction and because the statute is "not a model of clarity", the court was required to construe its provisions most favorably to the accused. The Wise court certified conflict with McKnight. Wise is pending before this Court in case number 95,230.

1997).

The McKnight court noted that the exceptions set forth in subsection (d) (except for the provision regarding the victim's desire the defendant not be subject to the Prison Releasee Re-offender sentence) make no sense if applied to the trial court's discretion. For example, how can a sentencing judge apply (d) 1. a.: "The prosecuting attorney does not have sufficient evidence to prove the highest charge available;" (d) 1. b.: "The testimony of a material witness cannot be obtained;" or (d) 1. d. "Other extenuating circumstances exist which preclude the just *prosecution* of the offender." ? (Emphasis added.) These exceptions make no sense when applied to a judge's sentencing discretion. They make perfect sense when applied to a prosecutor's exercise of discretion in determining whether to charge a crime which will bring the defendant within the realm of the Prison Releasee Re-offender statute (in this case burglary), or to charge a lesser crime (such as theft), which would not invoke the statute.

The reasoning of McKnight based on the legislative history and plain language of the statute is the more sound analysis of the instant issue. McKnight was followed by the First District in Woods[7] and the Fifth District in Speed[8]. Based on the plain lan

[7]Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999) (based on plain language of the statute, statute does not afford trial judge discretion to not impose mandatory sentence; no need to resort to legislative history for this conclusion because of the plain language of the statute; however, legislative history

guage of the statute and as clarified through the Staff Analysis, the trial court had no discretion not to impose the enhanced sentence in this case once the state sought enhanced sentencing and Respondent qualified for sentencing as a Prison Releasee Re-offender.

Because the language of the statute is mandatory and does not give the trial court discretion not to impose the mandatory sentence, the instant sentence should be reversed.[9]

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additionally supports this conclusion; no violation of separation of powers/due process or equal protection; certified question to this Court:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

Accord Moore v. State, 729 So.2d 541 (Fla. 1st DCA 1999) and Bland v. State, 729 So.2d 539 (Fla. 1st DCA 1999).

[8]Speed v. State, 24 Fla. L. Weekly (D) 1017 (Fla. 5th DCA April 23, 1999) (based upon plain language of the Act, and its legislative history, the state, not the trial judge, has discretion under subsection (d) as to whether to seek the mandatory prison term; no violation of separation of powers doctrine; raises issue but does not address possible due process violation based on victim's "veto" power.)

[9]Because Respondent plead to this charge based on the court's offer of a four year habitual offender sentence, he should be given the opportunity to withdraw his plea.

CONCLUSION

Based on the foregoing, Petitioner asks this Court to reverse the instant sentence; disapprove the Second District's opinion in State v. Cotton (and the Fourth District's opinion in State v. Wise,) and approve the Third District opinion in McKnight v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Judith Ellis, Esq., 556 First Avenue North, St. Petersburg, Florida 33701, this 3rd day of June, 1999.

COUNSEL FOR PETITIONER