IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA
Petitioner,

vs.

Case No. 95,541

TYRONE COWART
Respondent
_____/

BRIEF OF THE RESPONDENT

JUDITH ELLIS, ESQUIRE
556 First Avenue North
St. Petersburg, FL 33701
(813) 895-7800
FLA. BAR #325155

COUNSEL FOR RESPONDENT

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SUMMARY

The trial court did not err in refusing to sentence Respondent to a prison term of 15 years pursuant to the Prison Releasee Reoffender statute because the statute provides for the court's discretion in certain circumstances enumerated in the statute.

STATEMENT OF THE CASE AND FACTS

Appellant's Statement of the Case and Facts is substantially correct for purposes of this appeal and is incorporated by reference by Respondent.

ARGUMENT

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

The trial court did not err in refusing to sentence Respondent to a prison term of 15 years pursuant to the Prison Releasee Reoffender statute. Section 775.082(8)(a) Fla. Stat. (1997) which set out the criteria for sentencing under the Prison Releasee Reoffender which provides in 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 established by a preponderance of the evidence that 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. If 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;** (emphasis added) or

d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

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

The state has the discretion whether or not to "seek to have the court sentence as a Prison Releasee Reoffender under s. 775.082(8) and if the state does "seek" the Prison Releasee Reoffender sentencing it must then prove to the court by a preponderance of the evidence that the offender is a Prison Releasee Reoffender. Once this is established, then the court must sentence the offender as outlined in (2)(a-d), in this case to 15 years for the second degree felony of burglary to a dwelling. However, the legislature has provided for leniency and judge's discretion under those circumstances enumerated under (d)l.(a-d). In those cases, the offender need not be "punished to the fullest extent of the law" (d)1. and it is reasonable to assume that the legislature must mean that the court has discretion under those enumerated circumstances to sentence the offender to a lessor punishment than to the "fullest extent of the law."

Any other interpretation of this section of the statute would subject the offender's punishment to the whim of the state and would have inequitable, arbitrary and capricious results for

offenders sentenced under this statute. A good example for this is provided in the instant case. One of the extenuating circumstances which the statute provides for leniency is outlined in (d)1.(c): "The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to the effect."

In this case the victim, who did not even know the Respondent, was in court and testified that she did not wish Respondent to serve the 15 years for stealing her bike (R99) and she signed a written statement to this effect. (R23) In spite of this, the state continued to insist that Respondent be sentenced to the 15 year minimum mandatory. (R105) It is difficult to read the facts of this case and believe that a 15 year minimum mandatory sentence is appropriate, no matter what the prior record is. The court should still retain some discretion to intervene with mercy and common sense in cases in which extended prison time is not appropriate. Many of these cases will involve domestic quarrels where the victim does not wish for extended prison time for boyfriend, girlfriend, husband, wife, son or daughter. Surely some humane application of the law is called for here and the legislature provided for it when it enumerated those extenuating circumstances in (d)1.(a-d).

Had the legislature intended that the state would have the option to decide when the enumerated circumstances would be applied it would have said so clearly. The legislature intended to provide longer sentences for Prison Releasee Reoffenders but left some discretion to the court for sentencing when those special enumerated circumstances arose.

The Supreme Court in Seabrook v. State 629 So.2d 129 (Fla 1993) held that the habitual offender statute Section 775.084 did not violate the doctrine of separation of powers as set forth in Art. V. s.3(b)(4) Fla. Const., because the court had discretion not to sentence the offender as a habitual offender. (775.084(4)(a)(d) If the Prison Releasee Reoffender statute leaves no discretion to the court in sentencing, it would be argued that this statute would violate that doctrine and be therefore unconstitutional. The second district court in King v. State, 597 So.2d 309 (Fla 2nd DCA 1992) declared that the habitual offender statute provides that the trial court does retain discretion to exercise leniency and to sentence an offender to a less severe penalty than the maximum. p.316.

Obviously the legislature in the Prison Releasee Reoffender statute has cut away much of the court's discretion in sentencing offenders who commit certain crimes within three years of release from prison. It is clear though that some discretion is still left to the court with the provisions of (d)1(a-d) and the judge in this case, who decided there "should be some leniency in this case" (R108) was correct in refusing to sentence Respondent to 15 years in prison. Two District Courts have concluded that the statute allows the trial judge to exercise sentencing discretion. Jurisdictional briefs have been filed in State v. Cotton, 24 Fla. L. Weekly (D) 18 (Fla. 2d DCA Dec 18, 1998) and are pending before this Court in Case Number 94,996. The Second District in Cotton held that the trial court, not the prosecutor, has the

responsibility to determine the facts and exercise the discretion permitted by the statute. The Fourth District in State v. Wise , 24 Fla. L. Weekly (D) 657 (Fla. 4th DCA March 10, 1999) agreed with the Second District's opinion in Cotton, and concluded that the trial judge may exercise sentencing discretion. Wise is pending before this Court in case number 95, 230. The Third District in McKnight,24 Fla. L. Weekly (D) 439 (Fla. 3d DCA Feb. 17, 1999) held that the statute does not afford the trial court discretion in sentencing. McKnight was followed by the First District in Woods v. State, Fla. L. Weekly (d) 831 (Fla. 1st DCA March 21, 1999) and the Fifth District in Speed v. State, 24 Fla. L. Weekly (D) 1017 (1017 (Fla. 5th DCA April 23, 1999)

For the above stated reasons, Respondent petitions this court to affirm the sentencing of the lower court.

If this court decides that the lower court should have sentenced Respondent to the 15 year maximum the case should be remanded and Respondent be permitted to withdraw his plea, which was offered the day of trial in response to the lessor sentence offered by the court. (R97,106)

CONCLUSION

For the above reasons, Appellant respectfully petitions this court to affirm the decision of the lower court with respect to Respondent's sentencing, approve the Second District's opinion in State v. Cotton and the Fourth District's opinion in State v. Wise. and disapprove the Third District opinion in McKnight v. State.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to the Attorney General's Office, Tampa, Florida 33602, and to the Appellant, Tyrone Cowart, #048532, K2-1-39S Liberty Correctional Work Camp, HCR 2 Box 144, Bristol, Fl 32321-9711, on this _____ day of June, 1999.

Respectfully submitted,

JUDITH ELLIS, ESQUIRE
Attorney at Law

556 First Avenue North
St. Petersburg, FL 33701
(813) 895-7800
FLA. BAR #325155
COUNSEL FOR RESPONDENT