IN THE SUPREME COURT OF FLORIDA

LORENZO SPEED,

Petitioner,

v. CASE NO. 95,706

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF FACTS

The facts of this case, as set forth in the opinion below, are as follows:

> The defendant below, Lorenzo Speed, was convicted of strong armed robbery and was sentenced to fifteen years imprisonment pursuant to the Prisoner Releasee Reoffender Act, codified as section 775.082(8), Florida Statutes (1997).

Speed v. State, 24 Fla. L. Wkly. D1017 (Fla. 5th DCA April 23, 1999).

SUMMARY OF ARGUMENT

This Court does have the discretion to accept jurisdiction of this case. As a practical matter, however, it may be more prudent to hold this petition for review in abeyance until this same issue is resolved in other pending cases.

ARGUMENT

THIS COURT DOES HAVE THE DISCRETION TO ACCEPT JURISDICTION OF THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly declares valid a state statute." However, such jurisdiction is not mandatory, but rather discretionary.

The State acknowledges that this Court has the authority to accept jurisdiction of this case in light of the district court's express declaration that the Prison Releasee Reoffender Act is valid.

However, as Speed notes in his Jurisdictional Brief, this same issue -- the constitutionality of the Act -- is presently pending review in other cases in this Court. Accordingly, the State submits that the interests of judicial economy, as well as fairness to this defendant, can best be served by holding this petition for review in abeyance pending resolution of this issue in the other cases. Numerous cases involving this issue will be ripe for review by this Court in the near future, and little purpose would be served by full briefing in all of them.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully acknowledges that this Court does have the discretion to accept jurisdiction of this case.

Respectfully submitted,

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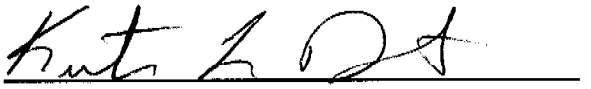

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by hand delivery to Leonard R. Ross, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 10th day of June, 1999.

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Assistant Attorney General

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v. CASE NO. 95,706

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S APPENDIX

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in this regard, we think he qualifies for this court's "Enough is Enough" rule. *See Davis v. State,* 705 So. 2d 133, 135 (Fla. 5th DCA 1998); *Isley v. State,* 652 So. 2d 409, 410-11 (Fla. 5th DCA 1995). Accordingly, we prohibit him from filing any additional *pro se* appeals, pleadings, motions and petitions relating to any issue raised in the proceedings described above, or any issue which could or should have been raised in those proceedings. Any further pleadings filed in this court relating to Rahymes' sentence and judgment in Orange County Case No: CR87-677 must be reviewed and signed by an attorney, licensed to practice law in this state.

AFFIRMED. (SHARP, W., and PETERSON, JJ, concur. GRIFFIN, C.J., concurs specially with opinion.)

(GRIFFIN, C.J., concurring specially.) *See Bradley v. State*, 703 So. 2d 1176 (Fla. 5th DCA 1997).

* * *

Criminal law—Sentencing—Separation of powers—Prison Releasee Reoffender Act is not unconstitutional because it requires trial court to impose a mandatory minimum sentence

LORENZO SPEED, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-1728. Opinion filed April 23, 1999. Appeal from the Circuit Court for Volusia County, S. James Foxman, Judge. Counsel: James B. Gibson, Public Defender, and Leonard R. Ross, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Alfred Washington, Jr., Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) The defendant below, Lorenzo Speed, was convicted of strong armed robbery and was sentenced to fifteen years imprisonment pursuant to the Prisoner Releasee Reoffender Act, codified as section 775.082(8), Florida Statutes (1997).[1] The Act provides:

(8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

a. Treason;
b. Murder;
c. Manslaughter;
d. Sexual battery;
e. Carjacking;
f. Home-invasion robbery;
g. Robbery;
h. Arson;
i. Kidnapping;
j. Aggravated assault;
k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb.
o. Any felony that involves the use or threat of physical force or violence against an individual;
p. Armed burglary;
q. Burglary of an occupied structure or dwelling; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within 3 years of being released from a state correction 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:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) to 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.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the president of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

On appeal, Speed contends that the challenged Act "is an unconstitutional delegation of power from the legislative branch to the executive branch (the State Attorney) to (a) determine what the maximum punishment for a given crime is to be and (b) then divest and usurp the power of the judicial branch with respect to the sentencing function, in violation of Article II, section 3 of the Florida Constitution." In other words, the Act violates the separation of powers doctrine because it divests the trial court of sentencing discretion. Speed observes that this court upheld the sentencing guidelines[2] and the habitual offender statute[3] because they preserved sufficient elements of judicial discretion in the sentencing function. He argues that the Prison Releasee Reoffender Act, on the other hand, divests the trial court of all discretion in sentencing and reposits that discretion in the State Attorney.

The constitutionality of this Act was recently considered by the Third District in *McKnight v. State*, 24 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999) and by the Second District in *Cotton v. State*, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998). The Act was also construed by the Fourth District in *State v. Wise*, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999). In *McKnight* Judge Sorondo's opinion disagrees with the analysis of Judge Blue in *Cotton*, who found that the four factors set forth in subsection (d) of the Act involve fact finding and the exercise of discretion by the trial court, thus saving the Act from any attack on the basis of separation of powers. The Fourth District is in agreement with the construction in *Cotton*. Based upon our reading of the Act, and its legislative history, we agree with the Third District that the factors in subsection (d) are intended by the legislature as considerations for the state attorney and not for the trial judge. Despite this interpretation of the Act, the Third District concluded that the Act does not contravene the separation of powers provision of the Florida Constitution—and we also agree with that conclusion. No appellate court to date has invalidated the Act.[4]

The legislature enacted the foregoing legislation because of its concern about the early release of violent felony offenders with the resulting toll upon Florida's residents and visitors. *See* Preamble, Ch. 97-239, Laws of Florida (1997). It is well established that setting penalties for crimes is a matter of substantive law within the power of the legislature. *McKendry v. State*, 641 So. 2d 45 (Fla. 1994); *Smith v. State*, 537 So. 2d 982 (Fla. 1989). Florida law contains mandatory minimum[5] statutes whereby the prosecutor, by

charging pursuant to the statute, can implement a required level of punishment. Arguments that mandatory sentences violate the separation of powers have been uniformly rejected by courts in this state. *See, e.g., Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984); *Scott v. State*, 369 So. 2d 330 (Fla. 1979); *Sowell v. State*, 342 So. 2d 969 (Fla. 1977). Accordingly, we reject the argument that the Act is unconstitutional because it requires the trial court to impose a mandatory minimum sentence.

We find no merit in the other issue raised by Speed in respect to the sufficiency of the evidence to support a conviction for strong armed robbery. *See Mahn v. State*, 714 So. 2d 391 (Fla. 1998); *Jones v. State*, 652 So. 2d 346 (Fla.), *cert. denied*, 516 U.S. 875 (1995).

AFFIRMED. (GOSHORN and ANTOON, JJ., concur.)

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[1]Now codified as section 775.082(9), Florida Statutes (1998).

[2]*See Ecenrode v. State*, 576 So. 2d 967 (Fla. 5th DCA 1991).

[3]*See Kirk v. State*, 663 So. 2d 1373 (Fla. 5th DCA 1975).

[4]We do have one profound reservation in regard to the Act, but it is not based on separation of powers but rather on substantive due process. Our concern is prompted by the provision in subsection (8)(d)1.c. of the Act which apparently gives the victim of the crime an absolute veto over imposition of the mandatory prison sentences prescribed by the Act, in this case a fifteen year sentence. Thus, the punishment of the offender will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the criminal's victim. Should an armed robber be punished less severely because his victim happens to be forgiving rather than somewhat vindictive? Moreover, this provision of the Act promotes harassment and intimidation of the victim. Apparently this due process argument in regard to a victim veto has not been raised in any other case involving the validity of the Prison Releasee Reoffender Act, nor has it been briefed or argued in the instant appeal. We therefore do not determine its viability here.

[5]*See* §§ 775.0823, 775.087, Fla. Stat.

* * *

Criminal law—Post conviction relief—Ineffectiveness of counsel—Defendant not prejudiced by counsel's failure to object to special condition of probation requiring attendance of HIV/AIDS awareness program because amended statute applicable to defendant's sentence allows that condition to be a standard condition which need not be orally pronounced—Failure of counsel to object to trial court's failure to orally pronounce special condition requiring drug testing does not rise to level of ineffectiveness of counsel—No merit to claim that counsel was ineffective in failing to object to amount of restitution—Restitution can be set in an amount greater than the maximum dollar value of the defining offense—Although original complaint filed by grand theft victim stated that value of jewelry stolen was less than restitution amount, defendant failed to establish that information filed against him was limited to the jewelry or that no additional damages were incurred— Argument that trial court erred in imposing the same restitution in 1996 grand theft cases as in 1994 grand theft case unsupported by any showing in the record that all of the grand thefts were not part of same criminal episode or committed as part of single criminal spree

TIMOTHY O'CONNELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 99-87. Opinion filed April 23, 1999. 3.850 Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: Timothy O'Connell, Brooksville, *pro se*. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) O'Connell appeals from the summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.850. He alleges he was denied effective assistance of trial counsel. We affirm.

In 1996, O'Connell pled guilty to three counts of grand theft in three cases,[1] and was found guilty of burglary of a dwelling in a fourth case.[2] He was sentenced in the latter case to 62 months in prison, followed by nine years probation, with consecutive five-year terms of probation in the other three cases. Restitution was imposed in the 1994 grand theft case, and also as a special condition of the probation in the two 1996 grand theft cases. A direct appeal was taken and this court per curiam affirmed. *See O'Connell v. State*, 708 So. 2d 284 (Fla. 5th DCA 1998).

O'Connell argues his trial counsel was ineffective because he failed to object to and preserve the following sentencing issues: 1) the trial court failed to orally announce the condition of probation (Condition 15) which requires him to attend an HIV/AIDS Awareness Program, as well as the condition (Condition 12), which requires him to pay for any urinalysis, breathalyzer or blood tests ordered by his probation officer; 2) the trial court erred in setting restitution at $18,058 because that amount was not established by the record or other evidence; and 3) the trial court erred in including the same restitution as a special condition of probation in the two 1996 grand theft cases because that amount was not related to the 1994 case.

As to the sentencing issues, they were in fact raised in O'Connell's *pro se* brief filed in his direct appeal. Thus, they cannot now be raised in a Rule 3.850 motion. *See generally Maharaj v. State*, 684 So. 2d 726 (Fla. 1996); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). However, O'Connell correctly points out that since trial counsel did not object to the alleged sentencing errors, these issues could not have been addressed on appeal. Thus, logically, the failure to preserve sentencing errors should be allowed to establish a claim for ineffective assistance of counsel. *See, e.g., Crumbley v. State*, 661 So. 2d 383 (Fla. 1st DCA 1995).

However, we agree with the state that O'Connell failed to establish the prejudice necessary to show ineffective assistance of counsel. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997); *Robinson v. State*, 707 So. 2d 688 (Fla. 1998). As to Condition 15, section 948.03(n), Florida Statutes, amended effective October 1, 1996, allows such a condition to be a standard condition of probation and one that therefore need not be orally pronounced. The record in the direct appeal indicates the sentences were rendered on March 26, 1997.

With regard to Condition 12, which requires O'Connell to pay for drug testing, this is a special condition which must be orally pronounced. *See Williams v. State*, 712 So. 2d 762 (Fla. 1998); *Porchia v. State*, 705 So. 2d 1050 (Fla. 5th DCA), *approved*, 716 So. 2d 766 (Fla. 1998). However, we have found no case which holds that failure of trial counsel to object to not orally pronouncing this condition amounts to ineffective assistance of trial counsel. In order to rise to this level, trial counsel's performance must be shown to have been so deficient that counsel failed to provide the defendant with a fair trial within the meaning of the Sixth Amendment. *See Rivera v. State*, 717 So. 2d 477 (Fla. 1998); *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997). As explained in *Waterhouse v. State*, 522 So. 2d 341 (Fla. 1998), a defendant is not entitled to perfect counsel, only reasonably effective counsel. Further, had the objection below been made by trial counsel, there is no indication the outcome would have been different.

With regard to the restitution issue, O'Connell is primarily arguing the merits of the award rather than trial counsel's performance. This proceeding should not serve as a second appeal. *See Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). However, if not procedurally barred, we find no merit to O'Connell's claim his trial counsel acted deficiently in this regard. Restitution may be ordered in an amount greater than the maximum dollar value of the defining offense. *J.O.S. v. State*, 689 So. 2d 1061 (Fla. 1997). And, although the original complaint filed by the victim in the grand theft case stated the amount of jewelry stolen was worth $3,650, O'Connell failed to establish that the information filed against him was limited to the jewelry or that no additional damages were incurred. Section 775.089 requires restitution for all direct and indirect damages. Further, O'Connell failed to allege specific facts detailing the victim's statements or the evidence presented; therefore his allegations to establish insufficient performance by trial counsel were conclusory and legally insufficient. *See Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

O'Connell also argues it was error for the trial court to impose the same restitution in the 1996 grand theft cases as in the 1994 case, since damages in the 1996 cases were not directly or indirectly caused by the grand theft in the 1994 case. Here O'Connell was sentenced at the same time for both the 1994 and 1996 cases. Section