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

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #618550

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER:

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.

SUMMARY OF ARGUMENT

The Prison Releasee Reoffender Act is constitutional. The Act does not violate the separation of powers doctrine. Setting mandatory sentences is a proper matter for the legislature, and enforcing such a statute is a proper matter for the executive. Contrary to Speed's argument, the statutory scheme does not make the prosecutor a judge. The trial court still fulfills its proper role -- deciding whether the defendant is eligible for this sentencing enhancement and imposing the sentence itself.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL.

Concerned about the early release of felony offenders and the resulting impact on Florida's residents and visitors when such offenders continue to prey upon society, the legislature determined that public safety could best be ensured by providing for lengthy mandatory sentences for those who commit new serious felonies upon their release from prison. Accordingly, the Prison Releasee Reoffender Punishment Act was enacted, effective May 30, 1997. Ch. 97-239, Laws of Florida.

Under this statute, an individual who commits certain enumerated violent felonies within three years of being released from prison must be sentenced to the statutory maximum term of imprisonment. § 775.082(8), Fla. Stat. (1997).

Speed contends that the Prison Releasee Reoffender Act is unconstitutional, as it violates the separation of powers doctrine. According to Speed, the legislature has infringed on the power of the executive, which has the exclusive authority to charge and prosecute.

This claim is without merit. The mere fact that the legislature specifically set out its intent that repeat offenders be punished to the full extent of the law does not infringe on the

executive's duty to decide how to prosecute. The prosecutor's authority to proceed against the defendant as he or she so chooses is not limited in any manner by the Act.

In a related separation of powers argument, Speed contends that the legislature has improperly delegated the sentencing power of the judiciary to the executive. In other words, by invoking the mandatory penalties required by the statute, the executive has become the sentencing entity. This claim must also be rejected.

First of all, 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, 47 (Fla. 1994); Smith v. State, 537 So. 2d 982, 985 (Fla. 1989). Accordingly, arguments that mandatory sentences violate the separation of powers doctrine have been uniformly rejected by this Court. See, e.g., Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Scott v. State, 369 So. 2d 330, 331 (Fla. 1979); Sowell v. State, 342 So. 2d 969 (Fla. 1977).

Speed's argument that the mandatory sentences for repeat offenders infringes on the power of the judiciary should likewise be rejected. The legislature acted well within its authority in setting these mandatory sentences.

The statute also sets forth a procedure whereby the executive initiates the sentence enhancement process. Contrary to Speed's

argument, this procedure does not mean that the executive has usurped the power of the judiciary, and it does not make the prosecutor a judge, as Speed asserts. While the executive *initiates* the process, it is the court which decides whether the defendant qualifies under the statute, and it is the court which imposes the sentence itself. Cf. Young v. State, 699 So. 2d 624, 625-27 (Fla. 1997) (state attorney has sole authority to initiate habitual offender proceedings).

Speed argues that the sentencing procedure here violates due process because there is no requirement of a jury finding of the underlying basis for the mandatory sentence. To the contrary, the statute does in fact require such a finding -- the jury must find the defendant has committed a qualifying felony on a certain date. The trial court then applies this finding to the provisions of the statute -- examining, for example, whether the defendant had been released from prison within three years of the date the jury found the crime had been committed.

The Prison Releasee Reoffender Act gives the State Attorney no greater power than that traditionally exercised in the charging decision, and it in no way infringes upon the sentencing power of the judiciary -- which still has to evaluate whether the State has proven that the defendant qualifies for sentencing under the statute and still has to impose the sentence itself. McKnight v.

State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, case #95,154 (Fla. Aug. 19, 1999).

This Court should adopt the well-reasoned decision of the district court in McKnight, and Speed's separation of powers argument should be rejected. See also Woods v. State, 24 Fla. L. Wkly. D831 (Fla. 1st DCA March 26) (agreeing with McKnight, rejecting separation of powers challenge to PRR statute), rev. granted, case #95,281 (Fla. Aug. 23, 1999); Speed v. State, 732 So. 2d 17 (Fla. 5th DCA) (same), rev. granted, case # 95,706 (Fla. Sept. 16, 1999).

In a related claim, Speed contends that the legislature has delegated sentencing authority to the victim of the crime, violating the separation of powers doctrine as well as substantive due process. Speed bases his argument on a footnote in the opinion below, which expressed reservations about whether the Act violated substantive due process. Specifically, the court stated that the Act "apparently gives the victim of the crime an absolute veto over imposition of the mandatory prison sentences prescribed by the Act." Speed, 732 So. 2d at 20 n. 4.

Speed neglects to mention, however, that the district court declined to address the merits of this argument because it was never briefed or argued by the defendant -- at trial or on appeal. Id.; (R. 27-29). Accordingly, Speed should not be allowed to raise

this claim for the first time before this Court, where it was never preserved or addressed below.

Even if this Court chooses to address this claim, it should still be rejected. The district court's premise is clearly based on a misreading of the statute.

The statute provides that its intent is to punish applicable defendants to the fullest extent of the law, unless certain circumstances are present. § 775.082(8)(d)(1), Fla. Stat. One of the listed circumstances is the victim's written desire that the defendant not be given the mandatory sentence.

However, this provision does not give the victim veto power over the court's sentencing decision. Reading the statute in context, it is clear that the victim's input is something for the prosecutor to consider in making his determination as to whether to seek a sentence under this statute. See McKnight, 727 So. 2d at 316-17.

Contrary to Speed's argument on appeal, this provision does not delegate sentencing authority to the victims of crime. The sentence is still imposed by the court, after the court determines whether the statutory criteria has been established. Specifically allowing for input from the victim does not violate the separation of powers doctrine; in fact, such input is already provided for in Florida's Constitution. Art. I, § 16(b), Fla. Const.

The First District Court of Appeal has recently considered and rejected the same substantive due process argument Speed makes here. See Turner v. State, 24 Fla. L. Weekly D2074 (Fla. 1st DCA September 9, 1999). In Turner, the court held that the Act does not prohibit the prosecutor from seeking to apply the mandatory sentences to a given defendant even if such forbearance is specifically requested by the victim. Id. at 2075. Rather, the Act "merely expresses the legislative intent that the prosecution give consideration to the preference of victims when considering application of the Act." Id.

A recent statutory amendment further supports the above rationale, clarifying that the victim does not have veto power over sentencing. Subsection (d) of the Act previously stated that the legislature's intent was to punish reoffenders to the fullest extent of the law, "unless ... the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect." §775.082(8)(d), Fla Stat. (1997). The Act was recently amended, however, to provide that the intent of the legislature is to punish reoffenders to the fullest extent of the law, "unless *the state attorney determines* that 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. 99-88, § 2, at 1041-42, Laws of Florida (emphasis added).

Although the amendment did not take effect until July 1, 1999, "courts have a duty to consider subsequent legislation in arriving at a correct interpretation of a prior statute." Gamble v. State, 723 So. 2d 905, 907 (Fla. 5th DCA 1999). The amendment clarifies that it is the prosecutor, and not the victim, who has the discretion to decide whether to pursue enhanced sentencing. See Turner, 24 Fla. L. Weekly at D2075. Contrary to Speed's argument here, the victim has not been given the power to sentence.

Speed alternatively contends that the statute may be saved by giving the trial court the discretion to apply the statutory exceptions to mandatory sentencing. § 775.082(8)(d), Fla. Stat. (1997). This is the position adopted by the Second and Fourth District Courts of Appeal. See State v. Wise, 24 Fla. L. Wkly. D657 (Fla. 4th DCA March 10), rev. granted, case # 95,230 (Fla. Aug. 5, 1999); State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999) (case # 94,996).

The State submits that these decisions ignore the clear statutory language, as well as the legislative history of the statute, and should therefore not be followed by this Court.

The statute provides that "[u]pon proof ... 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..." § 775.082(8)(a)(2), Fla. Stat. (1997) (emphasis added). This language clearly provides that sentencing is mandatory, not discretionary.

The legislative history supports such a finding as well. The court in McKnight thoroughly examined the relevant legislative reports, quoting extensively from staff analysis reports as well as impact statements. These statements clearly reveal that the statute was designed to leave no room for discretion where the State has met its burden of proving that the defendant qualifies for PRR sentencing. 727 So. 2d at 316.

The McKnight court further noted that allowing the statutory exceptions to be applied by the trial court would lead to absurd results. For example, the trial court would be in no position to conclude that prison releasee reoffender sanctions should not be applied because "the testimony of a material witness cannot be obtained" or "other extenuating circumstances ... preclude the just prosecution of the offender." § 775.082(8)(d), Fla. Stat. These statutory exceptions -- including the victim's preference exception -- obviously apply to the decision of the prosecuting attorney, not

the trial court.[1] Accordingly, the trial court's role is clearly mandatory. Id. at 317. This Court should reject Speed's argument that the trial court is not required to follow the clear statutory mandate.

Speed finally claims that the statute is vague because it does not define the terms "extenuating circumstances," "just prosecution," or "victim." This claim should also be rejected.

A statute is unconstitutionally vague if it "'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Bouters v. State, 659 So. 2d 235, 238 (Fla.) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)), cert. denied, 116 S.Ct. 245 (1995). Moreover, a court must find an allegedly vague statute to be constitutional "if the application of ordinary logic and common understanding would so permit." State v. Hoyt, 609 So. 2d 744, 747 (Fla. 1st DCA 1992).

The State submits that the terms Speed attacks are not unconstitutionally vague, using ordinary logic and common sense. The "other extenuating circumstances" condition is clearly a simple

---

[1]The exceptions provide reasons for the prosecuting attorney to decline to apply the statutory mandate. Of course, the prosecutor is not *required* to forgo PRR sentencing any time one of these exceptions apply. Rather, such a decision is left to his or her discretion.

catch-all provision, allowing the prosecutor to retain his or her discretion to seek the imposition of these enhanced provisions as the circumstances require, and the use of the terms "victim" and "just prosecution" are sufficiently well understood in criminal cases. There is nothing unconstitutionally vague about this sentencing scheme. See Woods, 24 Fla. L. Wkly. at D833 (rejecting vagueness challenge to PRR statute).

Speed's final challenge to the statute should be rejected, and the district court's decision affirming Speed's sentence as a prison releasee reoffender should be approved.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests that this Court approve the decision of the district court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

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

_____
Kristen L. Davenport
Assistant Attorney General