IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

PETITIONER,

v.

REGINALD B. COLEMAN,

RESPONDENT.

Case No. 95,783

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

MERITS BRIEF OF PETITIONER

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STATEMENT REGARDING TYPE

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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)[2].(See Exhibit A, attached.) Additionally, the instant opinion is in direct conflict with the Fifth District's opinion in Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999)[3].

STATEMENT OF THE FACTS

In an amended information filed December 10, 1997, (the original information was filed May 29, 1997; I: 1-2), the state charged Respondent with burglary of Dessie Johnson's home and petit theft of property of Joseph Devine (Johnson's son) for acts occurring April 10, 1997. (I: 17-18)[4] On October 31, 1997, the state filed

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

[2]Woods is pending before this Court in case number 95,281.

[3]Speed is pending before this Court in case number 95,706.

[4]Respondent entered Johnson's house without her consent and took her son's radio. (II: 18-26)

its notice Respondent qualified for sentencing as a Prison Releasee Re-offender. (I: 15) After a jury trial, Respondent was found guilty as charged. (I: 34-37; II: 133)[5]

At Respondent's sentencing hearing conducted at the close of his trial, the state requested Respondent be sentenced to the Prison Releasee Re-offender statute because he had committed the instant burglary within three years of his release from prison (on a qualifying offense). The state provided the court copies of Respondent's qualifying conviction(s). (II: 138-141)[6] The court expressed dissatisfaction with the legislative mandate which the court felt required it to impose the Prison Releasee Re-offender enhanced sentence. (II: 141-142) One of Respondent's two victims [Mr. Devine, the petit theft victim; (I: 17)] spoke at sentencing indicating he did not wish Respondent to receive the fifteen year sentence. (II: 143) Mr. Devine also submitted a statement in writing indicating he did not want Respondent sentenced to the fifteen years as a Prison Releasee Re-offender. (I: 50)

Feeling it had no choice, the court sentenced Respondent to

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[5]Before trial, the state offered to reduce the burglary charge to petit theft based on the victims' lack of cooperation with the state. Appellant rejected the offer. (II:9-14)

[6]The state explained below it did not provide a witness from the Department of Corrections to testify as to Respondent's release date from prison because based on the date of sentence for his qualifying prior conviction (June of 1994) and commission of the instant burglary (April of 1997), regardless of when he was released from incarceration after imposition of sentence, the new offense was committed within three years of that date. (II: 139-141)

fifteen years incarceration for the burglary conviction as a Prison Releasee Re-offender. (I: 38-39; 42; 44; II: 144) The guidelines provided a range of between five and eight and a half years incarceration. (I: 44)

On December 11, 1997, Respondent moved for reconsideration of his sentence. (I: 47) This motion was denied on January 15, 1998. (I: 54) This same date Respondent filed his timely notice of appeal. (I: 56)

On review to the Second District Court of Appeal, Respondent argued the trial court had discretion not to impose the mandatory sentence pursuant to the statute where the victim did not want the offender to receive the maximum sentence and provided a letter to this effect. The state argued it was the state, not the trial court, which held discretion as to whether to seek the enhanced sentence for qualified defendants. On June 4, 1999, the Second District, based on their opinion in State v.Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), reversed Respondent's sentence. The court found the trial judge had discretion not to impose the enhanced Prison Releasee Re-offender sentence and remanded for resentencing because the judge did not realize he had such discretion when he imposed the enhanced sentence. The court certified its opinion conflicted 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 A, attached.) Additionally, the instant opinion

is in direct conflict with the Fifth District's opinion in Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999).

On June 7, 1999, the state filed its timely notice to invoke this Court's discretionary jurisdiction. (See Exhibit B, attached.) [A corrected notice was filed June 11, 1999, reflecting the proper name of Respondent. (See Exhibit C, attached.)] This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The trial court did not err in sentencing Appellant to the enhanced mandatory prison term for a Prison Releasee Re-offender where the state sought such sentencing and Appellant qualified for such sentencing. The court did not have discretion to impose a lesser sentence.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN FINDING IT HAD NO DISCRETION NOT TO SENTENCE RESPONDENT AS A PRISON RELEASEE RE-OFFENDER WHERE HE QUALIFIED FOR SUCH SENTENCING.

The trial court did not err in finding it did not have discretion in sentencing Respondent to a prison term of fifteen (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;
>
> ...

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

In the instant case, Respondent was convicted of burglary of an occupied dwelling as charged. (I: 17-18; 34-37; II: 133) The state filed a notice Respondent qualified as a prison releasee reoffender and required sentencing under s. 775.082, Fla. Stat. (1997). (R15) Upon proof Respondent qualified for such sentencing, the court sentenced him to the requisite fifteen years incarceration concluding it had no discretion not to impose the mandatory Prison Releasee Re-offender sentence. The court did not err in this finding.

It is the state, not the trial court, which 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.

The only exception to punishment under the Prison Releasee Re-offender statute for qualifying defendants is set forth in 775.082(8)(d)1, which provides:

> (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 this case, pursuant to (d)1.c., the victim did not want the Respondent to serve the mandatory prison term.[7] However, because

[7]In the instant case, it was the petit theft victim, not the burglary victim, who provided the written letter indicating he did not want the Respondent to be imprisoned under the statute. Because the petit theft conviction did not subject Respondent to the Prison

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 correctly found it 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 which 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.

Additionally, the Senate Staff Analysis and Economic Impact Statement (Staff Analysis) prepared for this statute supports the

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Releasee Re-offender sentence, this letter did not come within the purview of the statute regardless of whether the statute leaves the discretion to the state or the court. [The state did not raise this issue in either the circuit or district court.] If the state is successful in this appeal, this issue will become moot. If the state is not successful in this appeal, pursuant to the District Court's opinion, Respondent will be resentenced with the trial judge exercising discretion under the statute as to whether to impose the Prison Releasee Re-offender sentence. The state can raise this issue at any resentencing and the burglary victim can provide such a letter at that time if she is so inclined.

state's claim it is the state which bears all the discretion in deciding whether to seek enhanced sentencing. Once such sentencing is sought for a qualified offender, the court must impose the enhanced sentence. See Exhibit D, attached, at pages 6 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 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 D, attached, at 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.

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[8], 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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[8]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." State v. Cotton is 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.[9]

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[9]The fact it is only the state which holds discretion in determining whether to seek imposition of the mandatory prison releasee reoffender sentence upon a qualified defendant even if the victim does not wish such a sentence to be imposed, is in keeping with similar court decisions regarding prosecutorial discretion regarding how and what to charge regardless of the wishes of the victim. State v. Gonzalez, 695 So.2d 1290, 1292 (Fla. 4th DCA 1997)("[t]he determination as to whether to continue prosecution rests with the prosecutor, the arm of the government representing the public interest, and not with the victim of the crime or the trial court." (emphasis added)); McArthur v. State, 597 So.2d 406, 408 (Fla. 1st DCA 1992) (Decision to initiate criminal prosecution rests with the state attorney, not the victim.)

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[10] and the Fifth District in Speed[11]. Based on the plain language 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 District Court's opinion reversing Respondent's sentence and remanding the case for resentencing should be vacated

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[10]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 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?

[11]Speed v. State, 732 So.2d 17 (Fla. 5th DCA 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.)

and the fifteen year sentence imposed by the trial court reinstated.

CONCLUSION

Based on the foregoing, Petitioner asks this Court to vacate the District Court's opinion below; approve the Third District's opinion in McKnight v. State; and direct the trial court's imposition of the fifteen year Prison Releasee Re-offender sentence be reinstated.

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 Allyn Giambalvo, Assistant Public Defender, Office of the Public Defender—Appeals, Pinellas Criminal Justice Center, 14250 49th Street North, Clearwater, Florida 34622, this 12th day of July, 1999.

_____
COUNSEL FOR PETITIONER