ORIGINAL

FILED
DEBBIE CAUSSEAUX
JUN 30 1999
CLERK, SUPREME COURT
By ______

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY L. GREEN,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

5th DCA Case No. 98-2063

Supreme Court Case No. 95,952

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW, AS THE AUTHORITY CITED BY THE DISTRICT COURT AS CONTROLLING AUTHORITY FOR THE DECISION IN THIS CASE HAS BEEN CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION OF THE SECOND DISTRICT COURT, AND IS PENDING FOR REVIEW IN THE FLORIDA SUPREME COURT.

CONCLUSION 6

CERTIFICATE OF SERVICE 7

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Jollie v. State 405 So. 2d 418 (Fla. 1981)	3-5
McKnight v. State 727 So. 2d 314 (Fla. 3rd DCA 1999)	1, 2, 4
State v. Cotton 24 Fla. L. Weekly D18 (Fla. 3rd DCA 12/18/98)	2, 4

OTHER AUTHORITIES CITED:	
Section 775.082(8), Florida Statutes (1998)	1, 4

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY L. GREEN,	)	
	)	
Appellant/Petitioner,	)	
	)	5th DCA Case No. 98-2063
vs.	)	
	)	Supreme Court Case No.
STATE OF FLORIDA,	)	
	)	______________________
Appellee/Respondent.	)	
______________________	)	

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted, in the Putnam County Circuit Court, of burglary with a battery, petty theft, unlawful firearm possession, and cocaine possession.[1] (A 1) In the trial court, the Petitioner objected to the imposition of sentence under § 775.082(8) Fla. Stat. (1998); the Prison Releasee Reoffender Act, (hereinafter "PRR"). (A 2) On direct appeal to the Fifth District Court, the defendant challenged the constitutionality of the PRR statute. (A 3-8) The District Court affirmed the PRR sentence, in a *per curiam* Opinion which cited

---

[1] In this brief, references to the Appendix will be designated by the symbol "A" in a parenthetical, with the page number (s) to which reference is made. The Appendix contains excerpts from the Petitioner's Initial Brief, and the Opinion of the District Court.

McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999), as the controlling authority for the affirmance. (A 9) The Third District Court, in McKnight, certified that the McKnight decision was in conflict with the decision of the Second District Court in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 3rd DCA 12/18/98). McKnight is presently pending for review by this Court, (Fla. S. Ct. Case # 95,154).

Petitioner timely filed a Notice to Invoke this Court's jurisdiction, and this Petition follows.

SUMMARY OF ARGUMENT

Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal in the above-styled cause, rendered June 25, 1999. Jurisdiction of the Florida Supreme Court is invoked pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981); which states that when the a *per curiam* decision of the district court cites as authority a case which is pending for review in this Court, the jurisdiction of this Court may be invoked to review the *per curiam* decision of the district court.

ARGUMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW, AS THE AUTHORITY CITED BY THE DISTRICT COURT AS CONTROLLING AUTHORITY FOR THE DECISION IN THIS CASE HAS BEEN CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION OF THE SECOND DISTRICT COURT, AND IS PENDING FOR REVIEW IN THE FLORIDA SUPREME COURT.

In the trial court, over objection from the defense, the Petitioner was sentenced under § 775.082(8) Fla. Stat. (1998); the Prison Releasee Reoffender Act. The Petitioner, in his direct appeal to the Fifth District Court, challenged the constitutionality of the PRR statute. The District Court affirmed the PRR sentence, in a *per curiam* Opinion. The District Court's Opinion cited McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999), as the controlling authority. The Third District Court, in McKnight, certified that the McKnight decision was in conflict with the decision of the Second District Court in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 3rd DCA 12/18/98). McKnight is presently pending for review by this Court, (Fla. S. Ct. Case # 95,154).

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court ruled as follows:

> Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.
>
> Jollie, supra, 405 So.2d at 420

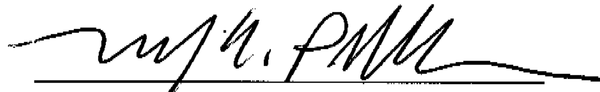
Petitioner therefore submits that this Court may now exercise jurisdiction to review the decision of the Fifth District Court in the instant case.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the Florida Supreme Court accept jurisdiction to review the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

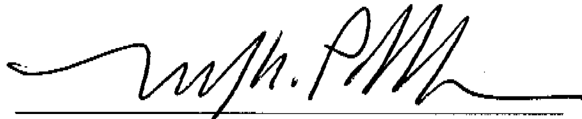


NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Jerry L. Green, DOC # 305672, Cross City Correctional Institution, P.O. Box 1500, Cross City, FL 32628-1500, on this 29th day of June 1999.



NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY L. GREEN,	)	
	)	
Appellant/Petitioner,	)	
	)	5th DCA Case No. 98-2063
vs.	)	
	)	Supreme Court Case No.
STATE OF FLORIDA,	)	
	)	______________________
Appellee/Respondent.	)	
______________________	)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

JERRY LEE GREEN, Appellant,	)	
vs.	)	CASE NO. 98-2063
STATE OF FLORIDA, Appellee.	)	

INTRODUCTION

In this brief, the following symbols will be used in parentheticals, to designate references to the record on appeal:

"R" - Documents, pleadings, court exhibits, and transcript of sentencing.

"T" - Transcript of trial proceedings.

STATEMENT OF THE CASE AND FACTS

The State charged the defendant/Appellant with burglary including a battery, petty theft, possession of a firearm by a convicted felon, and possession of cocaine. (R 4) The Information was later amended to delete the charges of cocaine and firearm possession. (R 17) The burglary and petty theft charges arose from a "home invasion" robbery that occurred on the evening of October 21, 1997, at the residence of Mrs. J. Carpenter, in Palatka. (T 6-11)

The victim could not identify her assailants, so that the defendant was arrested and charged with these crimes based on information given by his confederates. (T 17-21,24-28,97, 98) The defendant, when arrested, was in a vehicle in which narcotics were found. (T 28,29, 126) On arrest, the defendant gave a statement in which he admitted participation in the

charged offenses. (R 41); (T 105-113) Prior to trial, he wrote to the victim, apologized for having committed the burglary, and said he had done so in order to get money to support his addiction to narcotics. That letter was entered in evidence at trial, upon the stipulation of the parties. (T 93,94); (R 7,38,39)

At trial, the defendant again admitted participation in the charged offenses, and argued sought to argue voluntary intoxication as an affirmative defense. The trial court refused an instruction on voluntary intoxication. (T 138,139)

The defendant was found guilty as charged, and he was so adjudicated. (T 178,179); (R 42,58) Pursuant to notice and proof of the qualifying prior prison release date, the defendant was sentenced, over his objection, under § 775.082(8) Fla. Stat. (1988), the Prison Releasee Reoffender Statute. (R 9,62,66,86-93) The victim, through her son, made it known to the court that she did not feel that a life sentence was appropriate in this case. (R 49,93-95) For burglary, he was sentenced to life imprisonment, and for petty theft he was sentenced to "time served". (R 62,63,101-102)

ARGUMENT POINT III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE THE "PRISON RELEASEE REOFFENDER" ACT UNCONSTITUTIONAL.

This argument is offered in the alternative, in the event the Court is not persuaded by the arguments in Points I and II herein above, and is not intended as a waiver of those arguments.

In this case, the State gave notice of its intent to seek the imposition of the mandatory sentence for "reoffenders previously released from prison" pursuant to § 775.082(8) Fla. Stat. (1998). (R 9,80) Defense counsel sought to have the trial court declare the Prison Releasee Reoffender Act, (hereinafter, "the Act"), unconstitutional. (R 95-99) The trial court denied the motion, and sentenced the defendant to life imprisonment, pursuant to his classification a prison releasee Reoffender. (R 100-102)

Defense counsel argued that the Act is violative of the due process, equal protection, double jeopardy, excessive-punishment, ex post facto, separation-of-powers, and single-subject legislation provisions of the Florida and United States Constitutions. Art. I §§ 2, 9, and 16, Fla. Const.; Amends. V and XIV of the United States Constitution. (R 95-99) In addition, the defense argued that because the victim had indicated that she did not want the defendant to be sentenced to a life term, the defendant did not even qualify for sentencing under the act. (R 93, 94) Appellant will show that the Act is indeed unconstitutional; and more important, that even if this Court finds the Act is constitutional, that the defendant did not qualify for sentencing under the Act.

Ex Post Facto Violation

The Act requires anyone who commits a burglary of an occupied dwelling within three years of being released from prison, to be sentenced to a mandatory life prison term. §§ 775.082 (8)(a)1.q.; 775.082(8)(a)2.a.; and 810.02(1),(2)(a) Fla. Statutes (1997). The prison releasee Reoffender statute was enacted in response to the United States Supreme Court's ruling in Lynce v. Mathis, 519 U. S. 433 (1997), and became effective on May 30, 1997. Ch. 97-239, §7, Laws of Florida. Thus, when released from prison on May 13, 1997, the Appellant was not notified of the provisions of the Act, because it had not yet been enacted. (R 87-90) The legislative enactment of Section 775.082(8)(a) cannot be applied retroactively. See, e. g., State v. Yost, 507 So.2d 1099 (Fla. 1987), wherein it was held that the retroactive application of a statute affecting the accrual of gain-time to crimes committed prior to the effective date of the statute violated the ex post facto provisions of the United States and Florida Constitutions. See also, Weaver v. Graham, 450 U.S. 24 (1981); Art. I § 10, Fla. Const.; Art. I § 9, U. S. Const. It would violate the rule of lenity, (that criminal laws are to be strictly construed and most favorably to the accused), if inmates released prior to the effective date of the Prison Releasee Reoffender Act were subject to the Act's mandatory punishments. § 775.021(1), Fla. Stat. (1997).

Separation of Powers

The subject statute assigns to the State Attorney's Office the task of justifying the imposition of a sentence of less than the statutory maximum, and makes punishment to the "fullest extent of the law" mandatory for all who meet the definition of a prison releasee Reoffender. §§ 775.082(8)(d)1 and 775.082(8)(d)2 Fla. Stat. (1997). These provisions violate the separation of powers clauses of Florida's and the United States' Constitutions. Art. II § 3 Fla.

A- 4

Const.; Arts. I §1, II §1, and III §1, U. S. Const. That is, "Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2 (Fla. 1986). But see Art. V, §17, the Judiciary Article of the Constitution, which defines the powers and duties of State Attorneys. If a statute purports to give either the judicial or executive branch of government the power to create a crime or its punishment, a power assigned to the legislative branch, then that statute is unconstitutional. B. H. v. State, 645 So. 2d 987 (Fla. 1984). The prohibition against one branch of government exercising the power of another's "could not be plainer," and the Supreme Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers. Id., 645 So.2d at 991. "[T]he power to create crimes *and punishments* in derogation of the common law adheres solely in the democratic processes of the legislative branch." Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991).

In addition, just as the Prison Releasee Reoffender Act invades the State Attorney's province and discretion, the Legislature has attempted to transfer to the State Attorney's Office the *judicial* function of determining the sentence in a criminal case. A prosecutor's notice of intent to "seek" the imposition of the mandatory minimum provisions of Section 775.082(8) constitutes a *de facto* sentencing of the targeted defendant who qualifies, with no discretion left to the judge to determine whether such a sentence is necessary or appropriate or just. In contrast, § 775.084(3)(a)6 Fla. Stat., requires a trial judge to sentence a defendant pursuant to the enhancement provisions of the habitual offender statute "unless the court finds that such sentence is not necessary for the protection of the public." Thus, the Legislature has improperly delegated to State Attorney's the power to decide what the punishment for particular

crimes will be, by choosing to trigger the operation of the Prison Releasee Reoffender Act.

Single-Subject Legislation

The Act addresses provisions ranging from whether a youthful offender shall be committed to the custody of the Department of Corrections, to when a chronic substance abuser may be placed on probation or into community control, amending Sections 944.705, 947.141, 948.01, and 958.14, as well as Section 775.082 of the Florida Statutes. See, Ch. 97-239, §§ 2-6, Laws of Florida. Article III § 6 of the Florida Constitution provides:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

Chapter 97-239 created the Act [Section 775.082(8)], and also amended or created Sections 944.705, 947.141, 948.06, and 958.14. These other provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the Department of Corrections, to when a court may place a defendant on probation or in community control if the person is a substance abuser, and to expanding the category of persons authorized to arrest a probationer for violation. The only portion of Chapter 97-239 that relates to the same subject matter as sentencing prison releasee Reoffenders, is the provision creating § 944.705, which requires the Department of Corrections to notify inmates, in no less than 18-point type, of the consequences of the new Prison Releasee Reoffender Act; i.e., enhanced sentencing if certain enumerated crimes are committed within three years of release. Ch. 97-239 § 3, Laws of Florida. The other subjects are not reasonably connected with or related to the Prison Releasee Reoffender Act, and are thus not part of a single subject.

In Bunnell v. State, 453 So. 2d 808 (Fla. 1984), the Supreme Court held that the constitutionality of any statute requires that the act be both be fairly titled and bear a "cogent relationship" with all the subjects of all its sections. The provisions dealing with probation violations, arrest of probation violators, and forfeiting gain time for violations of controlled release, are not reasonably related to the mandatory punishment provisions for particular crimes committed within three years of a person's release from prison. That all the provisions within Chapter 97-239 *relate* to the general topic of "crime", does not mean that the disparate components are all of the same subject, any more than a single piece of legislation affecting contracts, torts and water quality would be the same "subject" because they are all "civil" topics.

Due Process

The Prison Releasee Reoffender Act violates Appellant's due process rights guaranteed by the state and federal Constitutions, in that it allows the prosecutor in each case to determine who shall be prosecuted as a prison releasee Reoffender, and to thereby determine the sentence that will be imposed. This usurps the Appellant's right to mitigation, and to have an impartial judge determine what sentence is appropriate under the circumstances. Art. I §9, Fla. Const.; Amend. XIV, U. S. Const. In other instances where a judge's sentencing discretion is annulled by a mandatory minimum sentencing mandate, safeguards have been provided; such as the requirement that the circumstance triggering the mandatory minimum sentence be charged and proven as an element of the crime. See, e. g., first-degree murder; capital sexual battery; and mandatory minimum sentences for using a firearm. §§ 782.04(1)(a), 794.011(2)(a), 775.087, and 775.082(1), Fla. Stat. (1997). See also State v. Tripp, 642 So.2d 728 (Fla.1994) (error to reclassify felony and enhance sentence for use of a weapon, without special verdict form/separate finding that defendant used weapon during commission of felony.) The trial court, in every

case, instructs the jury that it is their duty to determine the defendant's is guilt, and that the court's duty to determine a proper sentence, should the defendant be found guilty.

The fact that the prosecutor can decide to pursue sentencing options under the Prison Releasee Reoffender Act renders this statement fundamentally misleading. That is, if the defendant is found guilty of a felony punishable by life, trial court has no option to impose any sentence but life in prison. § 775.082(8)(a) Fla. Stat. (1997).

For the aforesaid reasons, Appellant submits that § 775.082 (8) is unconstitutional.

More important in the instant case, is that pursuant to § 775.082(d)1c Fla. Stat., sentencing under the Act was not justified. That is, the defendant's victim, through her son, provided written proof that she did not want the defendant sentenced to life imprisonment. (R 49,93-95) Appellant therefore submits that even assuming arguendo that the Act is constitutional, there was unrebutted evidence that the victim did not want the defendant to suffer enhanced punishment thereunder. The sentence imposed in this case was thus contrary to the legislative intent of the Act itself. § 775.082(d)1.c. Fla. Stat. (1998) Appellant therefore submits that his sentence should be vacated, and this case remanded for imposition of a guideline sentence.

98-656
NP

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1999

JERRY L. GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 98-2063

RECEIVED

JUN 25 1999

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Opinion Filed June 25, 1999

Appeal from the Circuit Court
for Putnam County,
Stephen M. Boyles, Judge.

James B. Gibson, Public Defender, and
Noel A. Pelella, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Lori E. Nelson, Assistant
Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. See McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999); see also Speed v. State, 24 Fla. L. Weekly D1017 (Fla. 5th DCA April 23, 1999); Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999).

COBB, GOSHORN and ANTOON, JJ., concur.