IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KERRY BETTS,

Respondent.

Case No. 96,391

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

PETITIONER'S REPLY BRIEF

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

Neither the District Court nor trial court passed on the issue of whether the instant statute violates the separation of powers doctrine. Therefore, this issue, raised in Respondent's answer brief, is not properly before this Court.

Alternatively, the statute does not violate the separation of powers doctrine because a prosecutor's decision to seek enhanced penalties under section 775.082(8) is not a sentencing decision, but a charging decision which is solely within the discretion of the executive or state attorney. The state has always had discretion in charging that directly affects the range of potential penalties available to the sentencing court.

ARGUMENT

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

Respondent claims that if thetrial judge does not have discretionin deciding whether to impose a Prison Releasee Re-offender sentence upon a qualified defendant, then the Prison Releasee Re-offender statute violates the separation of powers doctrine.

Firstly, this issue was not passed on by either the trial or appellate courts and therefore, has not been preserved for review by this Court. See Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) (holding specific legal ground for objection, exception, or motion must be raised before trial court to be cognizable on appeal).

Secondly, the statute does not violate the separation of powers doctrine. The prison releasee reoffender statute prescribes a minimum mandatory sentence which must be imposed unless specified exceptions are present. Minimum mandatory sentencing statutes do not violate the separation of powers clause because the constitutional authority to prescribe penalties for criminal offenses is exclusively legislative. Thus, the legislature is exercising its own authority when it enacts a minimum mandatory statute and the prison releasee reoffender does not violate separation of powers principles.

STANDARD OF REVIEW

There is a strong presumption of constitutionality afforded to legislative acts under which courts resolve every reasonable doubt in favor of the constitutionality of the statute. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981) An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994). The constitutionality of a sentencing statute is

reviewed *de novo*. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997)(reviewing the constitutionality of the federal three strikes statute by *de novo* review); United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997).

MANDATORY SENTENCING STATUTES

Mandatory sentencing statutes are commonplace. Florida already has numerous mandatory minimum sentences and mandatory life without parole offenses. There are numerous minimum mandatory sentences in the trafficking statute. § 893.135, Fla. Stat. (1997). There is a three years minimum for possessing a firearm during certain enumerated felonies, § 775.087, Fla. Stat. (1997); there is a eight year minimum mandatory for possessing a machine gun during certain enumerated felonies § 775.087, Fla. Stat. (1997). There is a mandatory life without parole for several types of large trafficking offenses. § 893.135, Fla. Stat. (1997). There is a mandatory life without parole for a capital felony, which includes capital sexual battery. § 775.082(1), Fla. Stat. (1997).

Under the prison releasee reoffender sentencing prescription: a releasee who commits a third degree felony after being released from prison serves a minimum mandatory of five years; a releasee committing a second degree felony serves a minimum mandatory of 15 years; a releasee committing a first degree felony serves a minimum mandatory of 30 years. See s. 775.082(8)(a)2., Fla. Stat.

(1997). The Florida Legislature has merely added prison releasee reoffenders to the category of offenses for which minimum mandatory punishment is prescribed.

SEPARATION OF POWERS

Respondent fails to show that the prison releasee reoffender statute's minimum mandatory sentencing scheme is any different from any other minimum mandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984)(holding that the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is a minimum mandatory sentence like any other minimum mandatory.

Florida Courts have addressed separation of powers challenges to mandatory sentencing schemes and prosecutorial discretion claims. This Court has repeatedly rejected assertions that minimum mandatory sentences are an impermissible legislative usurpation of executive or judicial branch powers. Owens v. State, 316 So.2d 537 (Fla. 1975); Dorminey v. State, 314 So.2d 134 (Fla. 1975)(noting that the determination of maximum and minimum penalties remains a matter for the legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So.2d 330 (Fla. 1979)(rejecting claim that three-year mandatory

sentence for possessing firearm during felony "unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment").

In Lightbourne v. State, 438 So.2d 380 (Fla. 1983), this Court held that the penalty statute did not violate separation of power principles. Lightbourne claimed that the penalties statute, §775.082, violated separation of power doctrine because it eliminated judicial discretion in sentencing by fixing the penalties for capital felony convictions. Id. at 385. This Court characterized this claim as "clearly misplaced" and noted that the constitutionality of this section had been repeatedly upheld. Id. *citing* Antone v. State, 382 So.2d 1205 (Fla. 1980); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court reasoned that the determination of maximum and minimum penalties is a matter for the legislature. This Court further noted that only when a statutory sentence is cruel and unusual on its face may a sentencing statute be challenged as a violation of the separation of powers doctrine. Sowell v. State, 342 So.2d 969 (Fla. 1977)(upholding the three year mandatory minimum for a firearm against a separation of powers challenge).

Compare Young v. State, 699 So.2d 624 (Fla. 1997), where this Court held that a trial court may not initiate habitual offender proceedings; rather, the determination to seek such a classification is solely a prosecutorial function. The Young Court

expressed concern that by declaring its intent to initiate habitualization proceedings against a defendant, the trial court, in essence, became an arm of the prosecution, thereby violating the separation of powers doctrine. The Court noted its prior holdings which had declared: "[u]nder 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." To permit a trial court to initiate habitual offender proceedings would blur the lines between the prosecution and the independent role of the court. This effectively places the judge in a prosecutorial role. The Young Court found, based in part on separation of powers concerns, that only the prosecutor may initiate habitual offender proceedings.

In Woods v. State, 24 FLA.L.WEEKLY D831 (Fla. 1st DCA March 26, 1999), the First District held that the prison releasee reoffender statute does not violate Florida's strict separation of powers provision. Woods argued that the statute deprived the judiciary of all sentencing discretion and placed that discretion in the hands of the prosecutor who is a member of the executive branch. The Woods Court rejected that argument because the power to prescribe punishment for criminal offenses lies with the legislature not the judiciary. However, the First District Court certified the separation of powers issue to this Court as a question of great public importance because of the "somewhat troubling language" in

prior decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause.[1]

Respondent’s reliance on London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993) is misplaced. In London, this Court in dicta stated: “[because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated. Although the state attorney may suggest a defendant be classified as a habitual offender, only the judiciary decides whether or not to classify and sentence the defendant as a habitual offender.” London, 623 So.2d at 528 (Fla. 1st DCA 1993). In State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998), the Third District reasoned that because the trial court retained the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of

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[1] The Woods Court specifically cited State v. Benitez, 395 So. 2d 514, 519 (Fla. 1981)(rejecting a separation of powers challenge to a statute requiring mandatory minimum sentences for drug trafficking because the sentencing judge retained discretion to reduce or suspend the sentence upon the request of the state attorney for substantial assistance by the defendant, and citing a New York case for the proposition that, “[s]o long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities”) and London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993)(rejecting a separation of powers challenge to the habitual felony offender statute “[because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender”) to support this statement. Both cases are discussed and distinguished herein.

powers doctrine was not violated by the mandatory sentence. The statements in London and Meyers are merely dicta and they are contrary to controlling precedent from this Court which have consistently recognized that the constitutional authority to prescribe penalties for crimes is in the legislature. Lightbourne, *supra*.

PROSECUTORIAL DISCRETION

While the legislature does allow prosecutors some discretion in seeking prison releasee reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Authorizing flexibility in the implementation of substantive law, as long as adequate legislative direction is given to carry out the ultimate policy decision of the legislature, does not violate separation of powers principles. The prosecutor does not have uncontrolled discretion. The statute contains a section requiring that the prosecutor write a "deviation memorandum" explaining the decision not to seek prison releasee reoffender sanctions. The prosecutor must justify his decision not to seek prison releasee reoffender sanctions in writing to the legislature and must file a copy of those written reasons in a centralized location so that both the public and the legislature can easily access them. These records are kept for ten years. Thus, the legislature has made the ultimate policy decision in this area and

provided sufficient guidelines to prosecutors.

Florida already has a minimum mandatory sentencing statute that allows the prosecutor sole discretion to determine whether the minimum mandatory will be imposed. Florida's trafficking statute operates in a similar manner to the prison releasee reoffender statute. The trafficking statute allows the prosecutor to petition the sentencing court to not impose the minimum mandatory normally required under the trafficking statute for substantial assistance. Absent a request from the prosecutor, the trial court must impose the minimum mandatory sentence.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that the trafficking statute did not violate the separation of powers provision. The Court first explained the operation of Florida's trafficking statute, § 893.135. The trafficking statute contains three main components: subsection (1) establishes "severe" mandatory minimum sentences for trafficking; subsection (2) prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole and subsection (3) permits the trial court to reduce or suspend the "severe" mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized subsection (3) as an "escape valve" from the statute's rigors and explained that the "harsh mandatory penalties"

of subsection (1) could be ameliorated by the prospect of leniency in subsection (3). Benitez raised a separation of powers challenge arguing that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch because subsection (3) is triggered solely at the initiative of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities."

While the Benitez court stated that the trial court retained the final discretion, the actual discretion a trial court has under the trafficking statute is extremely limited. First, the trial court cannot reduce the minimum mandatory sentence in the absence of a motion from the prosecutor. Secondly, the prosecutor is free to decline the defendant's offer of substantial assistance and the trial court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981). Moreover, the trial court has only "one way" discretion. The trial court has no independent discretion to sentence below the minimum mandatory; the trial court only has the discretion to ignore the prosecutor's recommendation and impose the severe minimum mandatory

sentence even though the defendant provided assistance. This is a type of discretion that almost no trial court, as a practical matter, would exercise.

Moreover, the prosecutor has the discretion in other areas, as well as in the trafficking statute, to seek sentencing below the statutorily mandated sentence. For example, even before the sentencing guidelines specifically authorized a plea agreement as a valid reason for a departure, Florida courts allowed the prosecutor to agree to a downward departure from the guidelines. These cases held that the prosecutor's agreement alone is sufficient to constitute a clear and convincing reason justifying a sentence lower than the one required by applying the legislatively mandated sentencing guidelines. State v. Esbenshade, 493 So.2d 487 (Fla. 2d DCA 1986)(stating that a departure from the sentencing guidelines is warranted when there is a plea bargain); State v. Devine, 512 So.2d 1163, 1164 (Fla. 4th DCA 1987)(holding that a downward deviation was valid because it occurred pursuant to a plea bargain); State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1985)(holding a sentence below the guidelines was permitted because the state had agreed to downward departure in a plea bargain). Thus, prosecutors through plea bargains already have the discretion to agree to sentences below the legislatively authorized minimum mandatory and below the legislative authorized sentencing guidelines.

In McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District held the prison releasee reoffender did not violate separation of powers principles. McKnight argued that the statute gives the "ultimate" sentencing decision to the prosecutor and denies any sentencing discretion to the trial court in violation of separation of powers. The McKnight Court reasoned that the decision to seek prison releasee reoffender sanction is not a sentencing decision; rather, it is a charging decision. Charging decisions are properly an executive function. Moreover, charging decisions often affect the range of possible penalties. Accordingly, the prison releasee reoffender statute gives the prosecutor no greater power that he or she traditionally exercises.

In conclusion, the prison releasee reoffender does not violate separation of powers principles by creating a minimum mandatory sentencing requirement for recidivists. Nor does the statute improperly delegate a legislative function to the executive branch by allowing the prosecutor to determine if the legislative criteria for seeking or not seeking prison releasee reoffender sanctions are present. Accordingly, the prison releasee reoffender statute is constitutional.

CONCLUSION

Based on the foregoing, Petitioner asks this Court to reverse the instant sentence; disapprove the Second District's opinion in

State v. Cotton (and the Fourth District's opinion in State v. Wise,) and approve the Third District opinion in McKnight v. State.

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 Larry D. Combs Esq., 1800 Second Street, Suite 755, Sarasota, Florida, 34236, this 25th day of October, 1999.

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