IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. **CASE NO.: 96,391**

KERRY BETTS,

Respondent.
_____/

ON PETITION FOR REVIEW FROM THE

SECOND DISTRICT COURT OF APPEAL

STATE OF FLORIDA

MERITS BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

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

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts, as set out in the Merits Brief of Appellant is adequate and substantially correct for purposes of this review with the following exceptions: (1) Respondent had never previously received help for his addiction and depression at the same time which is critical for recovery and sobriety . The trial judge found that a sentence which included a treatment program at the Florida Center for Addiction and Dual Disorder was appropriate and necessary for the successful treatment of the Respondent, and (2) the testimony given at the Sentencing Hearing presented a reasonable probability that treatment at the Florida Center for Addiction and Dual Disorders would be successful. Otherwise, the Respondent incorporates and adopts same for the purposes of this Merit Brief.

SUMMARY OF THE ARGUMENT

The trial court did not err in refusing to sentence Respondent to a prison term of fifteen (15) years pursuant to the Prison Releasee Reoffender statute because the statute provides for the trial court's discretion in sentencing.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN REFUSING TO SENTENCE THE RESPONDENT TO THE MANDATORY FIFTEEN (15) YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER.

The trial court did not err in refusing to sentence Respondent to a prison term of fifteen years pursuant to the Prison Releasee Reoffender statute. Section 775.082(8)(a), Florida Statutes (1997) which set out the criteria for sentencing under the Prison Releasee Reoffender (henceforth stated as PRR) provides in part:

> (8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:..g.robbery...within three 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 established by a preponderance of the evidence that 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:

3. .....

c. For a felony of the second degree, by a term of imprisonment of fifteen (15) years.

(d)1. If 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.** (emphasis added)

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

The state has the discretion whether or not to seek to have the court sentence as a PRR under Statute 775.082(8) and if the

State does “seek” the PRR sentencing, it must then prove to the court by a preponderance of the evidence that the offender is a PRR. Once this is established, then the court must sentence the offender as out-lined in (2)(a-d), in this case to fifteen (15) years for the second degree felony of robbery. However, the legislature has provided for leniency and judge’s discretion under those circumstances enumerated under (d)1(a-d). In those cases, the offender need not be “punished to the fullest extent of the law” (d)1. and it is reasonable to assume that the legislature must mean that the court has discretion under those enumerated circumstances to sentence the offender to a lessor punishment than to the “fullest extent of the law”.

Any other interpretation of this section of the statute would subject the offender’s punishment to the whim of the state and

would have inequitable, arbitrary and capricious results for offenders sentenced under this statute. A good example for this is provided in the instant case. One of the extenuating circumstances which the statute provides for leniency is outlined in (d)1(d): “other extenuating circumstances exist which preclude the just prosecution of the offender”.

In this case, the trial judge was presented with extensive testimony from eight witnesses, including Appellee, to substantiate

the mitigation of sentence based on Appellee's documented history of mental illness and substance abuse. (I:T 141-151)

The state argued for a thirty (30) year habitual offender sentence with the first fifteen (15) years served as a mandatory term under the Prison Releasee Reoffender statute pursuant to Statute

775.082(8)(a)2.c., Florida Statute (I:T 159).

In arguing for a thirty (30) year sentence with the fifteen (15) year mandatory term as a Prison Releasee Reoffender, the state argued that the Legislature intended Prison Releasee Reoffenders to be punished to the fullest extent of the law and that Appellee's drug and mental health problems did not qualify as reasons not to impose the Prison Releasee Reoffender sentence (I: 159-160).

Based upon the testimony in mitigation of sentence, the trial judge found that one of the statute's exceptions to the enhanced sentencing exists in this case. The court in *State v. Cotton*, 24

Fla Law Wkly D18 (Fla 2nd DCA 1998), declared that the trial judge possesses the discretion to determine the applicability of the circumstances or exceptions which make the mandatory sentence discretionary. In this case, the trial judge found that the Appellee had a history of cocaine dependancy and a Major Depressive Disorder and that neither condition had ever been adequately

treated. Further findings based upon the court appointed psychologist was that the Appellee was in probability under the influence of prescription medication, illicit psychoactive substance and alcohol on the night of the offense.

Had the Legislature intended that the state would have the option to decide when the enumerated circumstances would be applied, it would have said so clearly. The Legislature intended to provide longer sentences for Prison Releasee Reoffenders but left discretion to the trial court for sentencing when those circumstances or exceptions arose.

The court in *State v. Cotton*, supra, held that the applicability of the exceptions of subsection (d) involves a fact finding function. It is the trial court, not the prosecution, that has the responsibility to determine the facts and to exercise the discretion permitted by the statute. It is the prerogative of the trial court to make the findings of facts and to exercise discretion in the sentencing. As previously stated, had the Legislature wished to transfer this exercise of judgment to the

state, it would have done so in unequivocal terms.

In *State v. Wise*, 24 Fla. L. Wkly (D) 657 (Fla.4th DCA, March 10, 1999), the court noted that the function of the state attorney is to prosecute and upon conviction, seek an appropriate penalty or

sentence. The *Wise* court went on to state that it is the function of the trial court to determine the penalty or sentence to be imposed. This position is consistent with the requirements of due process, equal protection and the state constitutional Doctrine of Separation of Powers. These doctrines have been relied upon in an attempt to challenge the habitual offender statute. *In London v. State*, 623 So.2d. 527 (Fla. 1st DCA 1993), a list of these cases are presented which have held that the Habitual Offender statute is constitutional and does not violate equal protection, due process and/or Separation of Powers provisions. The court in *London* repeated that because a 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 a 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.

The Supreme Court in *Seabrook v. State*, 629 So.2d. 129 (Fla 1993), held that the Habitual Offender statute, Section 775.084 did not violate the Doctrine of Separation of Powers as set forth in Art. V.§3(b)(4) Fla. Const., because the court had discretion not

to sentence the offender as a habitual offender. {§775.084(4)(a)(d)} If the prison releasee reoffender statute

leaves no discretion to the court in sentencing, it would be argued that this statute would violate that doctrine and be therefore, unconstitutional. The court in *King v. State*, 597 So.2d. 309(Fla 2nd DCA 1992), declared that the habitual offender statute provides that the trial court does retain discretion to exercise leniency and to sentence the offender to a less severe penalty than the maximum. p.316

The Supreme Court in *State v. Blume*, 497 So.2d, 2 (Fla.1986), granted a Writ of Prohibition as the appropriate remedy when a trial court attempted to interfere with the prosecutorial discretion of a state attorney. 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. Art. II, §3, Fla. Const. In *State v. Jogan*, 388 So.2d 322 (Fla.3rd DCA 1980), the Third District Court reversed a trial court's dismissal of an Information filed against a defendant conditioned on his military enlistment. The Third District Court held that the pretrial decision to prosecute or nol-pros is a responsibility vested solely in the state attorney. While recognizing a court's latitude and discretion during post trial disposition, *Jogan* reiterated that the State has absolute discretion at pre trial.

In *Infante v. State*, 197 So.2d. 542 (Fla 3rd DCA 1967), the appellant argued that the sentence for the offense committed was excessive under the circumstances of the case. The appellate court found that the sentence was within the limits of the punishment imposed by statute. The appellate court held that it had no power to reverse a sentence within the bounds set by the statute upon the ground that the sentence was an abuse of the discretion exercised by the trial court. The court noted that it had well been established in this state that a determination of the sentence to be imposed falls within the discretion to be exercised by the trial court. The exercise of discretion will not be disturbed if the sentence imposed does not exceed the bounds established by statute.

The trial judge in this case found that a sentence which included a dual treatment program was appropriate and therefore exercised his discretion in deciding not to sentence Respondent to fifteen years in prison.

CONCLUSION

Based on the foregoing, Respondent asks this court to affirm the sentence of the trial court and approve the Second District opinion in *Cotton v. State* and the Fourth District's opinion in *State v. Wise*.

Respectfully submitted,

_____
Larry D. Combs, Esquire
Attorney for Respondent
COMBS & WALKER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via First Class United States Mail to Wendy Buffington, Attorney General's Office, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33602, on this the _____ day of October, 1999.

_____
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