IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner, Case No. 96,394

v.

DARRYL JOHNSON,

Respondent.
_____/

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

MERITS BRIEF OF RESPONDENT

Walter L. Grantham, Jr.
Attorney for Respondent
Florida Bar No. 0705322
Belleair Oaks Professional Centre
2240 Belleair Road, Suite 135
Clearwater, FL 33764
(727) 447-2728

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED

STATUTES CITED

STATEMENT REGARDING TYPE

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

STATEMENT OF THE CASE AND FACTS

In addition to the facts enunciated by the Petitioner, a letter was filed by the Respondent's mother on or about April 13, 1998 with the Court file after being addressed to a previous Judge, the Honorable Richard A. Luce. (R p.20) The letter from the Respondent's mother factually indicated that the Respondent was depressed from having lost a job and his inability to get a job due to his previous prison sentence. That at the time of this offense the Respondent was taking drugs and was depressed from having the belief that he let his family down. (R p.20-23)

That on April 23, 1998 the Respondent also filed a letter that is a part of the Court file and part of this record, indicating to Judge Richard A. Luce that he was depressed, and also that his wife-to-be had lost her twins while the Respondent was incarcerated for this pending case. (R p.24)

The Court, in reviewing all facts of the case, was again apprised of the letter from the Respondent and his mother, and the Respondent felt the change of plea was the right thing to do and waived his right to proceed to Trial on the case. (R p.92-93) (R p.100)

The Court, in reviewing all facts of the case and specifically referenced previous discussions about the facts of the case, felt

that the Trial Court had the discretion to decide whether to impose the Prison Release Reoffender Enhanced Penalty. (R p.84, 87) In light of the facts previously known to the Court including, but not limited to, the fact of a thirty (30) year Habitual Violent Offender sentence with a fifteen (15) year minimum mandatory that could be imposed on a thirty-five (35) year old male, the Trial Court found that extenuating circumstances did exist, and did not impose a Life Sentence. (R p.87) (R p.101-103)

Additionally the Court knew, as announced by the State of Florida, that by sentencing the Respondent as a Habitual Violent Offender, the guideline sentence of from ten (10) years to sixteen point six (16.6) years was suspended. (R p.102) The Court found that extenuating circumstances exist that included the practicality of the length and severity of the punishment that the Court was imposing on the Respondent who the record supports was depressed, on drugs, would be fifty (50) years old at the time of the completion of his minimum mandatory sentence, and likely to be sixty-five (65) years old when he's released. (R p.94, 97)

SUMMARY OF THE ARGUMENT

The Trial Court has the discretion, under the Prison Releasee Reoffender Statute, to determine whether to impose a Life Sentence on a person who might otherwise qualify for a Life Sentence under the Statute, if one of the four Statutory exemptions are found to exist. The Trial Court is still the finder of fact based upon the separation of powers doctrine. The Legislature did not transfer the role of the State Attorney to control the sentencing of a Respondent by allowing the factual finding of the four statutory exemptions to the imposition of a Prison Release Reoffender sentence to be performed by the State Attorney and not the Trial Court. The Trial Court, upon hearing all the facts of the case, including facts presented at the sentencing, properly found that there were extenuating circumstances to warrant an exception to the Prison Releasee Reoffender enhanced sentence, and therefore had the discretion to impose a Habitual Violent Offender sentence of thirty (30) years in the Department of Corrections with a fifteen (15) year minimum mandatory.

ARGUMENT

THE TRIAL COURT DID NOT ERROR BY NOT SENTENCING THE RESPONDENT TO A LIFE SENTENCE UNDER THE PRISON RELEASE REOFFENDER STATUTE, AND CORRECTLY EXERCISED ITS DISCRETION BY FINDING THAT EXTENUATING CIRCUMSTANCE EXIST AS A STATUTORY EXCEPTION TO THE PRISON RELEASE REOFFENDER ENHANCED SENTENCE.

> Fla. Stat. §775.082(9)(a)(2), If the State Attorney determines that a Defendant is a Prison Release Reoffender as defined in subparagraph 1., the State Attorney may seek to have the Court sentence the Defendant as Prison Release Reoffender...
>
> Fla. Stat. §775.082(9)(a)(2)(d)1, It is the intent of the Legislation that if the Defendant is previously released from prison, who meet the criteria in paragraph (a), be punished to the fullest extent of the law and as provided in the 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 from 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.

This latest sentencing Statute, commonly referred to as the Prison Release Reoffender Act allows for the imposition of a Life Sentence for a person that would qualify as a Prison Release Reoffender for the offense of Robbery. At the time of filing the Appeal by the Petitioner in this case, there had been no Appellate decisions interpreting this Act.

The Second District Court of Appeal recently has ruled in this

issue on this Appeal regarding the Trial Court's discretion not to impose a sentence allowed for under the Prison Releasee Reoffender Act. In State of Florida v. Sammy Cotton, 24 F.L.W. D18 (Fla 2nd DCA 1998), the Second District Court of Appeal held that contrary to the Petitioner's argument that the 1997 adoption of the Prison Releasee Reoffender Act allows for the fact finding function for Fla. Stat. 775.082(8)(d)1 to be performed by the State Attorney; the Trial Court has the responsibility to make the fact finding. Therefore, the Trial Court has the discretion based upon the facts to exercise the discretion in not imposing a sentence under the Prison Releasee Reoffender Act.

State v. Sammy Cotton, 24 F.L.W. D18 (Fla. 2nd DCA 1998), specifically held that the provisions of §775.082(9) does not specifically transfer the exercise of discretion from the Court to the State Attorney. Due to the Statute's silence on the transfer of power, the historical fact finding prerogative of the Trial Court shall remain with the Trial Court under this Legislative Act. The well reasoned analysis of State v. Sammy Cotton, should not be disturbed, and therefore adopted by this Honorable Court.

Upon a closer reading of Florida Statute §775.082(9)(a)(1) as it is combined with paragraph (d)(2), would by strict construction follow the Second District Court's reasoning in State v. Sammy

Cotton. Florida Statute §775.082(9)(1) clearly indicates that if a person would otherwise qualify under the Prison Releasee Reoffender Act the State Attorney may seek a sentence under the Prison Releasee Reoffender Act. The clear language does not mandate the State of Florida to seek a sentence to the fullest extent of this provision if a person would otherwise qualify as a Prison Releasee Reoffender. The sentencing provisions would be triggered only if the State of Florida exercises its investigatory and prosecutory discretion by electing to seek to have a person sentenced as a Prison Releasee Reoffender.

Under Florida Statute §775.082(9)(d) which announces the exceptions to imposing a sentence under the Prison Releasee Reoffender Act, it is implied and inherent that the only way to proceed on a sentence under the Prison Releasee Reoffender Act is if the State of Florida has already exercised its election and discretion to attempt to have the Defendant sentenced under this enhanced penalty provision. Upon the attempt to have a Defendant sentenced under this enhanced penalty scheme the Legislature has announced four exceptions to the enhanced penalty. If the State Attorney as the prosecuting authority, were aware of these four exceptions, then they would not seek a sentence under this enhanced penalty provision, and therefore there would be no need for a fact

finding of the existence of an exception.

It would therefore be common sense that if the State Attorney believed that extenuating circumstances existed, they would merely need not to seek the Defendant to be sentenced under this Prison Releasee Reoffender Act. Therefore, under the full scheme of the operation of this Act it clearly is evident that these four exceptions were intended to remain a fact finding duty of the Trial Court. If as exceptions to the enhanced penalty did exist to the satisfaction of the State Attorney, the State Attorney does not by law have to file or seek the Defendant to be sentenced under the Prison Releasee Reoffender Enhanced Provision, and therefore the exceptions would not matter and would be meaningless.

As applied to the facts of this case the Trial Court clearly had a sufficient factual basis to find that other extenuating circumstances existed which precludes the just prosecution of the offender. The Respondent was, at the time of the offense, a thirty-five (35) year old black male who, based upon documents filed in the Court file, was suffering from depression and also substance abuse at the time of the commission of these offenses. The Trial Court, upon reviewing all of the facts of the case and in fact having discussed the facts of the case at previous Court hearings, took all the circumstances known to the Court, including

the fact the Respondent pled the day of Trial rather than exercising his full Constitutional Rights of having a Jury determine his guilt or innocence.

Based upon everything the Trial Court was aware of and discussions on the record of the facts contained within the Court file and within the Court's knowledge from being the Trial Court on the charge, made a factual finding that the exception of extenuating circumstances to preclude just prosecution of the offender existed. The Respondent was then sentenced to thirty (30) years as a Habitual Violent Offender with a fifteen (15) year minimum mandatory sentence.

The Trial Court clearly reviewed the facts of the case and found that the Trial Court still maintains the discretion to determine whether any of the four exceptions would apply, and then made a factual finding that the fourth exception to a sentence under the Prison Releasee Reoffender sentence does in fact apply under Fla. Stat. 775.082(9)(d)1(d). The Respondent was then sentenced as a Habitual Violent Offender to a term of thirty (30) yearsin prison with a fifteen (15) year minimum mandatory sentence.

CONCLUSION

WHEREFORE, the Trial Court correctly exercised its discretion in finding that extenuating circumstances exist to not sentence the Respondent to Life in prison, and the thirty (30) year Habitual Violent Offender sentence with a fifteen (15) year minimum mandatory should remain.

Respectfully Submitted,

Walter L. Grantham, Jr.
Counsel for Respondent
Belleair Oaks Professional Centre
2240 Belleair Road, Suite 135
Clearwater, FL 33764
(727) 447-2728
Florida Bar No. 0705322

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Merits Brief of Respondent has been furnished by **Federal Express** to the Florida Supreme Court located at 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy by **U.S. Mail** to Robert A. Butterworth, Attorney General, located at 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366 all this _____ day of _____, 1999.

_____
Walter L. Grantham, Jr.
Counsel for Respondent