IN THE SUPREME COURT OF FLORIDA

WILLIE SANDERS,

Petitioner,

v. CASE NO. 96,398

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The Prison Releasee Reoffender Act does not violate the separation of powers doctrine. Setting mandatory sentences is a proper matter for the legislature, and enforcing such a statute is a proper matter for the executive. Contrary to Sanders' argument, the statutory scheme does not make the prosecutor a judge. The trial court still fulfills its proper role -- deciding whether the defendant is eligible for this sentencing enhancement and imposing the sentence itself.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL.

Concerned about the early release of felony offenders and the resulting impact on Florida's residents and visitors when such offenders continue to prey upon society, the legislature determined that public safety could best be ensured by providing for lengthy mandatory sentences for those who commit new serious felonies upon their release from prison. Accordingly, the Prison Releasee Reoffender Punishment Act was enacted, effective May 30, 1997. Ch. 97-239, Laws of Florida.

Under this statute, an individual who commits certain enumerated violent felonies within three years of being released from prison must be sentenced to the statutory maximum term of imprisonment. § 775.082(8), Fla. Stat. (1997).

Sanders contends that the Prison Releasee Reoffender Act is unconstitutional, as it violates the separation of powers doctrine. According to Sanders, the legislature has improperly delegated the sentencing power of the judiciary to the executive. In other words, by invoking the mandatory penalties required by the statute, the executive has become the sentencing entity. This claim must be rejected.

First of all, it is well-established that setting penalties for crimes is a matter of substantive law within the power of the legislature. McKendry v. State, 641 So. 2d 45, 47 (Fla. 1994); Smith v. State, 537 So. 2d 982, 985 (Fla. 1989). Accordingly, arguments that mandatory sentences violate the separation of powers doctrine have been uniformly rejected by this Court. See, e.g., Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Scott v. State, 369 So. 2d 330, 331 (Fla. 1979); Sowell v. State, 342 So. 2d 969 (Fla. 1977).

Sanders' argument that the mandatory sentences for repeat offenders here infringes on the power of the judiciary should likewise be rejected. The legislature acted well within its authority in setting these mandatory sentences.

The statute also sets forth a procedure whereby the executive initiates the sentence enhancement process. Contrary to Sanders' argument, this procedure does not mean that the executive has usurped the power of the judiciary, and it does not make the prosecutor a judge, as Sanders asserts. While the executive *initiates* the process, it is the court which decides whether the defendant qualifies under the statute, and it is the court which imposes the sentence itself. Cf. Young v. State, 699 So. 2d 624, 625-27 (Fla. 1997) (state attorney has sole authority to initiate habitual offender proceedings).

Sanders argues that the sentencing procedure here is infirm because there is no requirement of a jury finding of the underlying basis for the mandatory sentence. To the contrary, the statute does in fact require such a finding -- the jury must find the defendant has committed a qualifying felony on a certain date. The trial court then applies this finding to the provisions of the statute -- examining, for example, whether the defendant had been released from prison within three years of the date the jury found the crime had been committed.

The Prison Releasee Reoffender Act gives the State Attorney no greater power than that traditionally exercised in the charging decision, and it in no way infringes upon the sentencing power of the judiciary -- which still has to evaluate whether the State has proven that the defendant qualifies for sentencing under the statute and still has to impose the sentence itself. McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, case #95,154 (Fla. Aug. 19, 1999).

This Court should adopt the well-reasoned decision of the district court in McKnight, and Sanders' separation of powers argument should be rejected. See also Woods v. State, 24 Fla. L. Wkly. D831 (Fla. 1st DCA March 26) (agreeing with McKnight, rejecting separation of powers challenge to PRR statute), rev. granted, case #95,281 (Fla. Aug. 23, 1999); Speed v. State, 732 So.

2d 17 (Fla. 5th DCA) (same), rev. granted, case # 95,706 (Fla. Sept. 16, 1999).

Sanders alternatively contends that the statute may be saved by giving the trial court the discretion to apply the statutory exceptions to mandatory sentencing. § 775.082(8)(d), Fla. Stat. (1997). This is the position adopted by the Second and Fourth District Courts of Appeal. See State v. Wise, 24 Fla. L. Wkly. D657 (Fla. 4th DCA March 10), rev. granted, case # 95,230 (Fla. Aug. 5, 1999); State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999) (case # 94,996).

The State submits that these decisions ignore the clear statutory language, as well as the legislative history of the statute, and should therefore not be followed by this Court.

The statute provides that "[u]pon proof ... 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..." § 775.082(8)(a)(2), Fla. Stat. (1997) (emphasis added). This language clearly provides that sentencing is mandatory, not discretionary.

The legislative history supports such a finding as well. The court in McKnight thoroughly examined the relevant legislative reports, quoting extensively from staff analysis reports as well as

impact statements. These statements clearly reveal that the statute was designed to leave no room for discretion where the State has met its burden of proving that the defendant qualifies for PRR sentencing. 727 So. 2d at 316.

The McKnight court further noted that allowing the statutory exceptions to be applied by the trial court would lead to absurd results. For example, the trial court would be in no position to conclude that prison releasee reoffender sanctions should not be applied because "the testimony of a material witness cannot be obtained" or "other extenuating circumstances ... preclude the just prosecution of the offender." § 775.082(8)(d), Fla. Stat. These statutory exceptions -- including the victim's preference exception -- obviously apply to the decision of the prosecuting attorney, not the trial court.[1] Accordingly, the trial court's role is clearly mandatory. Id. at 317.

This Court should reject Sanders' argument that the trial court is not required to follow the clear statutory mandate.

Sanders also contends that the statute is constitutionally infirm because its provisions are vague. This claim was not

[1]The exceptions provide reasons for the prosecuting attorney to decline to apply the statutory mandate. Of course, the prosecutor is not *required* to forgo PRR sentencing any time one of these exceptions apply. Rather, such a decision is left to his or her discretion.

properly preserved below and should not be considered by this Court.

Under section 924.051(3) of the Florida Statutes, a defendant is precluded from raising any errors, including sentencing errors, which were not properly preserved below. Proper preservation, of course, requires that the specific legal argument or ground upon which the objection is based must be presented to the trial court. Occhicone v. State, 570 So. 2d 902, 905-06 (Fla. 1990), cert. denied, 500 U.S. 938 (1991).

Here, Sanders never argued in the trial court that the statute is vague. (R. 255-60). His vagueness challenge should therefore be summarily rejected as unpreserved.

Even if this claim had been preserved, it should still be rejected as without merit. Sanders claims that the statute is vague because it does not define the terms "victim," "extenuating circumstances" or "just prosecution." The State submits that these terms are not unconstitutionally vague, using ordinary logic and common sense.

A statute is unconstitutionally vague if it "'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Bouters v. State, 659 So. 2d 235, 238 (Fla.) (quoting Connally v. General Construction Co., 269 U.S.

385, 391 (1926)), cert. denied, 116 S.Ct. 245 (1995). Moreover, a court must find an allegedly vague statute to be constitutional "if the application of ordinary logic and common understanding would so permit." State v. Hoyt, 609 So. 2d 744, 747 (Fla. 1st DCA 1992).

Applying this analysis here, the terms Sanders attacks are not unconstitutionally vague. The "other extenuating circumstances" condition is clearly a simple catch-all provision, allowing the prosecutor to retain his or her discretion to seek the imposition of these enhanced provisions as the circumstances require, and the use of the terms "victim" and "just prosecution" is sufficiently well understood in criminal cases. There is nothing unconstitutionally vague about this sentencing scheme. See Woods, 24 Fla. L. Wkly. at D833 (rejecting vagueness challenge to PRR statute).

Sanders finally contends that the statute should not have been applied to him because he was released from prison before it was enacted. According to Sanders, applying the statute in such cases violates the Ex Post Facto Clause.

Once again, this claim was never raised in the trial court and accordingly was not properly preserved. Moreover, even if it had been preserved, it should still be rejected as without merit.

It is a well-established principle of law that the relevant statute to be applied in sentencing a defendant is the statute in

effect *at the time the defendant committed his crime*. See, e.g., State v. Smith, 547 So. 2d 613, 616 (Fla. 1989); Martinez v. State, 625 So. 2d 1306, 1307 (Fla. 3d DCA 1993). Here, the Reoffender Act was in effect when Sanders committed his crime, and accordingly he was subject to its provisions.

There is absolutely no precedent for Sanders' suggestion that he is not subject to the terms of this statute because it was not in effect until after he was discharged from prison. As the Fourth District Court of Appeal has held, the Prison Releasee Reoffender Act is not an ex post facto law as applied to defendants who committed their crimes after the effective date of the statute. Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998).

Sanders' final attack on the constitutionality of the statute should be rejected by this Court, and the district court's decision affirming Sanders' sentence as a prison releasee reoffender should be approved.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests that this Court approve the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief has been furnished by hand delivery to Susan A. Fagan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this _____ day of December, 1999.

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