IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **Case No. 96,522**

CHARLES W. CUMMINGS,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

MERITS BRIEF OF PETITIONER

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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.

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STATEMENT OF THE CASE

The State invokes this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi), Fla. R. App. P. (1999), of the Second District Court of Appeal opinion issued in this case noting conflict with McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999) [1] and Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999) [2]. Additionally, the instant opinion is in direct conflict wit h the Fifth District's opinion in Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999).

[1] McKnight is pending before this Court in Case Number 95,154.

[2] Woods is pending before this Court in Case Number 95,281.

STATEMENT OF THE FACTS

On September 20, 1997, Respondent was arrested for aggravated assault. The arrest affidavit indicates he pointed a steak knife at the victim not having the intent to kill although he stated he was going to kill her while pointing the knife at her. (R. 1) On October 6, 1997, the State filed its two count Information charging Respondent in Count I with aggravated assault and, in Count II, with battery. (R. 7-8) On October 23, 1997, the State filed its notice of Respondent's qualifications as a prison releasee reoffender pursuant to Section 775.082, Fla. Stat. (R. 10) On November 7, 1997, the victim of these two crimes, Rhonda Knight signed a notarized statement indicating she did not want to prosecute or participate in this matter. (R. 11) On January 26, 1999, an initial sentencing hearing was held. (R. 38-51) Respondent's mother addressed the court and advised that Respondent has a daughter with the victim, and all three of them lived with her for several months. (R. 40-41) Although she had previously signed a statement indicating she did not want to prosecute this matter (R. 11), at the hearing, Rhonda Knight, the victim in this case further stated:

> "Charles has been in and out of jail from the time in which he has been about 14 years old. He has gotten off on a lot of charges. He has been given probation. He has never finished

> the probation. He was not out of prison for three years before he met me. He got out in December of 1995. We met in January .... no, he got out in December of 1994, we met January, 1995. He was only out of prison a month before he met me.
>
> I honestly feel that he deserves the complete five years. He has never paid for the crimes that he has committed, and what he did against me could have put my daughter in so much jeopardy. Had she been there that evening, God, I don't even want to think about what might have happened to her. I don't want him in my life. He has done too much damage to me." (R. 43)

Ms. Knight further advised the court that Respondent had continued to write to her "the fact that he has continued to write to me and saying even if I want to kill you, I have all the information to do it." (R. 44) The court indicated its position that Respondent had to accept either 48 months or go to trial. (R. 44-45) After a recess, counsel advised the court that Respondent felt that 48 months was too much. The proceedings were concluded and reset for trial for February 2nd (R. 49-50), at which time a change of plea and sentencing took place. (R. 52-68)

On that date, Respondent signed a change of plea form, entering his plea of nolo contendre (R. 17-18) and was sentenced to 48 months imprisonment on Count I, (R. 21-22), and to time served on Count II. (R. 23-24) He further received 502 days credit for time served on Count I. (R. 25) Respondent's guideline scoresheet

totaled 57.4 points with a sentence range from 22.05 prison months to 36.75 prison months and recommended sentence of 29.4 prison months. (R. 26-27) The court advised Respondent it was willing to sentence him under the guidelines. The prosecutor objected to the court's failing to impose a prison reoffender sentence. The prosecutor provided the documentation required and noted the victim had already been heard. (R. 61-62) After accepting the plea from Respondent (R. 63-65), the court sentenced him as previously indicated (48 months DOC plus credit for time served) and stated:

> "This sentence is imposed under the sentencing guidelines and not under Section 775.0821 part (8)(D)(1)(d), Fla. Stat. indicating in my mind that there are extenuating circumstances that exist which would include the imposition of a prisoner reoffender sentence. This sentence as previously noted is imposed over the objection of the state attorney's office. (R. 66)

The State filed a direct appeal from this sentence, and on August 20, 1999, the Second District Court of Appeal issued its Opinion affirming the sentence imposed by the trial court. In that Opinion, the court cited cases from the First and Third District Courts of Appeal which it noted were in conflict, with its Opinion.

On September 3, 1999, a Notice to Invoke this Court's discretionary jurisdiction and a Motion to Stay Mandate was filed

in the Second District Court of Appeal. The Motion to Stay was granted on September 22, 1999. Jurisdictional Briefs were filed and this Court accepted jurisdiction in this cause on December 3, 1999.

SUMMARY OF THE ARGUMENT

The trial court erred in failing to sentence Respondent to a mandatory sentence as a prison releasee reoffender because the statute gives the trial court no discretion in sentencing defendants for whom the State seeks this sentencing and who qualify for it under the statute. This Court should reverse the instant sentences. Because Respondent entered his pleas based on the court's offer of the non Prison Releasee Re-offender sentence, Respondent must be given the opportunity to withdraw his pleas, should this Court reverse.

ARGUMENT

ISSUE I

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

The trial court erred in failing to sentence Respondent to a prison term of 5 years pursuant to the Prison Releasee Reoffender statute where the state sought and Respondent qualified for such sentencing. Section 775.082(8)(a), Fla. Stat. (1997), which sets out the criteria for sentencing under the Prison Releasee Reoffender Act, provides in pertinent part:

> "(8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit: ...k. Aggravated battery ... within 3 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 establishes by a preponderance of the evidence 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:***
>
> ...
>
> c. For a felony of the third degree, by a term of

imprisonment of 5 years;[3]

...

(d)1. 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.

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

The court erred in failing to sentence Respondent to the mandatory five years as a Prison Releasee Reoffender where he qualified as such. It is the state, not the trial court, who has discretion not to seek an enhanced sentence under s. 775.082(8) as evidenced by the language in (8)(a)2., "... *the state attorney may* seek to have the court sentence the defendant as a prison releasee reoffender." However, once the state seeks this sentencing and the defendant qualifies as such an offender, the court *must* sentence him to the enhanced sentence. The statute refers to circumstances

[3]Aggravated Assault without Intent to Kill is a third degree felony. See s. 784.021(a), Fla. Stat. (1997)

affecting the *prosecution* of the offense and prosecution is not a judicial function. It was the state's choice, not the trial judge's choice, as to whether to seek the mandatory sentence. The trial court did not have the discretion to refuse to impose the enhanced sentence where the state sought its imposition and Respondent qualified for such sentencing.

The fact subsection (d) does not bestow discretion upon the trial court to not impose the enhanced sentence is further evidenced by the language of (d) 2. which requires the state attorney to keep statistics on cases wherein the defendant qualified as a prison releasee reoffender but was not sentenced to the enhanced sentence. Since it is the state who must keep these statistics (seemingly as a justification for why such sentencing was not sought), it is the state who has the discretion as limited by the statute in seeking imposition of these enhanced sentences.

Additionally, the Senate Staff Analysis and Economic Impact Statement (Staff Analysis) prepared for this statute supports the state's claim it is the state which bears all the discretion in deciding whether to seek enhanced sentencing. See Exhibit B, attached, at pages 6, 7 and 10. See page 6:

> A distinction between the prison releasee provision and the current habitualization provision is that, when the state attorney does pursue sentencing of the defendant as a

> prison releasee reoffender and proves that the defendant is a prison releasee reoffender, the court must impose the appropriate mandatory minimum term of imprisonment.

See page 7:

> The CS provides legislative intent to prohibit plea bargaining in prison releasee reoffender cases unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides a written objection to such sentencing; or there are other extenuating circumstances precluding prosecution.

See page 10:

> This CS gives the state attorney the total discretion to pursue prison releasee reoffender sentencing. If the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum allowable for the offense.

The Staff Analysis clarifies that subsection (d) is directed at the state attorney and expresses an intent to prohibit plea bargaining except in these situations. (See Exhibit B, attached, at page 7.) This interpretation explains why the language in subsection (d) refers to factors affecting the prosection of the offense as opposed to reasons to mitigate the sentence. The staff analysis reflects the Second District's opinion in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998) followed in the instant case, was

wrongly decided.[4]

By contrast, the Third District in McKnight, in a lengthy, well-reasoned opinion, held that the statute does not afford the trial court discretion in imposing the Prison Releasee Re-offender sentence when the state seeks its imposition and the defendant

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[4]In Cotton, the Second District summarily concluded, "... applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the responsibility to determine the facts and exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms." Merit briefs have been filed in State v. Cotton, pending before this Court in Case Number 94,996. [Subsequently, the Fourth District in State v. Wise, 24 Fla. L. Weekly(D) 657 (Fla. 4th DCA March 10, 1999) aligned itself with Cotton and certified conflict with McKnight. Wise is pending before this Court in case number 95,230.]

The state notes that the legislature has done exactly as suggested by the Second District in Cotton and clarified that it is the state, not the judge, who has sentencing discretion under this statute. See Ch. 99-188, Laws of Fla., attached as Exhibit C, where the exception provision to Prison Releasee Re-offender sentencing now provides:

> 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 the state attorney determines*** that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

(Emphasis added.)

qualifies for such sentencing. The Third District based its holding on the plain language of the statute and the legislative history as set forth in the Staff Analysis and the House Committee on Criminal Justice Appropriations, Committee Substitute for House Bill 1371 (1997) Bill Research and Economic Impact Statement 11 (April 2, 1997).

The McKnight court noted that the exceptions set forth in subsection (d) (except for the provision regarding the victim's desire the defendant not be subject to the Prison Releasee Re-offender sentence) make no sense if applied to the trial court's discretion. For example, how can a sentencing judge apply (d) 1. a.: "The prosecuting attorney does not have sufficient evidence to prove the highest charge available;" (d) 1. b.: "The testimony of a material witness cannot be obtained;" or (d) 1. d. "Other extenuating circumstances exist which preclude the just *prosecution* of the offender." ? (Emphasis added.) These exceptions make no sense when applied to a judge's sentencing discretion. They make perfect sense when applied to a prosecutor's exercise of discretion in determining whether to charge a crime which will bring the defendant within the realm of the Prison Releasee Re-offender statute or to charge a lesser crime which would not invoke the statute.

The reasoning of McKnight based on the legislative history and plain language of the statute is the more sound analysis of the instant issue. McKnight was followed by the First District in Woods[5] and the Fifth District in Speed[6]. Based on the plain language of the statute and as clarified through the Staff Analysis, the trial court had no discretion not to impose the enhanced sentence in this case once the state sought enhanced sentencing and Respondent qualified for sentencing as a Prison Releasee Re-offender.

Because the language of the statute is mandatory and does not give the trial court discretion not to impose the mandatory

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[5]Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999) (based on plain language of the statute, statute does not afford trial judge discretion to not impose mandatory sentence; no need to resort to legislative history for this conclusion because of the plain language of the statute; however, legislative history additionally supports this conclusion; no violation of separation of powers/due process or equal protection; certified question to this Court:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

[6]Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999) (based upon plain language of the Act, and its legislative history, the state, not the trial judge, has discretion under subsection (d) as to whether to seek the mandatory prison term; no violation of separation of powers doctrine; raises issue but does not address possible due process violation based on victim's "veto" power.) Speed is pending before this Court in Case Number 95,706.

sentence, the instant sentence should be reversed. Because Respondent entered his pleas based on the court's offer of the non Prison Releasee Re-offender sentence should this Court reverse, Respondent must be given the opportunity to withdraw his pleas.

CONCLUSION

WHEREFORE based on the foregoing, Petitioner asks this Court to reverse the instant sentences; 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 Megan Olson, Assistant Public Defender, P. O. Drawer PD, Bartow, Florida 33831 this _____day of December, 1999.

_____

COUNSEL FOR PETITIONER