IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner/Appellant

v.

ANDREA SMITH,

Respondent/Appellee.

Case No. 96,974

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

INITIAL BRIEF OF PETITIONER/APPELLANT ON THE MERITS

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<u>State of Florida v. Andrea Smith</u>

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner/Appellant certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable Mary Lupo
   Circuit Court Judge, Fifteenth Judicial Circuit
   (trial judge)

2. Don M. Rogers, Esq., Assistant Attorney General
   Office of the Attorney General, State of Florida
   Robert Butterworth, Attorney General
   (appellate counsel for State, Petitioner/Appellant)

3. Robert Gentile, Esq., Assistant State Attorney,
   Office of the State attorney, Fifteenth Judicial Circuit
   Barry Krischer, State Attorney
   (trial counsel for State, Petitioner/Appellant)

4. Diedre Doswell
   (Complainant/victim)

5. Andrea Smith
   (Respondent/Appellee)

6. Scott Suskauer, Esquire
   (trial counsel for Respondent/Appellee)

7. Mark Wilensky, Equire
   (appellate counsel for Respondent/Appellee)

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Petitioner/Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS I

CERTIFICATE OF TYPE FACE AND FONT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 775.082(8) FLORIDA STATUTES (1997) AUTHORIZES THE TRIAL COURT RATHER THAN THE STATE ATTORNEY TO DECIDE WHETHER TO PROCEED AGAINST A DEFENDANT AS A PRISON RELEASEE REOFFENDER IN A GIVEN CASE.

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases Cited **Page Number**

STATE CASES

Baker v. State, 636 So. 2d 1342 (Fla. 1994) 9

City of Pompano Beach v. Capalbo, 445 So. 2d 468 (Fla. 4th DCA 1984) 10

Ferguson v. State, 377 So. 2d 709 (Fla. 1979) 10

Fletcher v. Florida Public Co., 319 So. 2d 100 (Fla. 1st DCA 1975) 13

Foley v. State ex rel. Gordon, 50 So. 2d 179 (Fla. 1951) 10

Gulley v. Pierce, 625 So. 2d 45 (Fla. 1st DCA 1993) 10

Holly v. Auld, 450 So. 2d 217 (Fla. 1984) 10

Lincoln v. Florida Parole Commission, 643 So. 2d 668 (Fla. 1st DCA 1994) 10

Martin County v. Edenfield, 609 So. 2d 27 (Fla. 1979) 10

McKnight v. State, 24 Fla. L. Weekly D439 (Fla. 3d DCA February 26, 1999) . . . 4

Smith v. Crawford, 645 So. 2d 513 (Fla. 1st DCA 1994) 10

Smith v. State, 24 Fla. L. Weekly D2393 (Fla. 4th DCA October 20, 1999). 4

State v. Ashley, 701 So. 2d 338 (Fla. 1997) 13

State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), rev. pending, No. 95,230 (Fla. 1999) 4

STATUTES

Section 775.082 Florida Statutes 5

OTHER AUTHORITIES

Senate Staff Analysis and Economic Impact Statement, CS/SB 2362 12

Victimology: An International Journal 14
Vol. 2, No. 3-4, pages 525-534 (1997-98)

PRELIMINARY STATEMENT

Petitioner/Appellant was the appellee in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit of Florida.

Respondent/Appellee was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner/Appellant may also be referred to as the "prosecution' or the "State."

The following symbols will be used:

AB = Appellant's Initial Brief

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

On January 2, 1998 the State filed an information charging appellee with robbery, burglary of a dwelling and battery. (R 5) On January 15, 1998, the State of Florida filed its notice to seek maximum penalties under provisions of the Prison Releasee Reoffender Statute, § 775.082 Fla. Stat. (R 11) On June 4, 1998, Respondent/Appellee, Andrea Smith was found guilty of robbery and battery by a jury in the Fifteenth Judicial Circuit of Florida. (R 51-52)

Thereafter, on or about June 25, 1998 , and again on July 23, 1998, Appellee filed a Motion to Preclude Sentencing Under Florida Statute 775.082(8)(a)1. (R 56-57. 65-66) The State filed a response which requested "that this Honorable court ... sentence the defendant in accordance with the PRR Statute." (R 69)

On July 23, 1998, Respondent/Appellee appeared with counsel before the Honorable Mary Lupo, Judge of the Fifteenth Judicial Circuit of Florida. Respondent/Appellee's counsel argued that section 775.082(8) did not apply to Respondent/Appellee because of the exception contained in subsection 2.(d)1.c of the statute, to wit:

> (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:

> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect . . .

In support of his argument, Respondent/Appellee's counsel cited a letter from the victim -- Respondent/Appellee's one time girlfriend-- stating that "she did not want Mr. Smith to be sentenced under the prison re-offender statute and did not want him to receive a minimum mandatory sentence under the statute and she even went as far as to say that she did not even want him to go to prison." (T 168) The State, through its Assistant State Attorney Robert Gentile, argued that the statute gave the authority to the prosecutor -- not the court -- to determine who would be treated as a prison releasee reoffender (T 174-176). The trial judge then stated:

> Unfortunately, I agree with Mr. Gentile's interpretation of this statute. I believe it's compulsory for me to sentence you under Florida Statute 775.082 as a prison releasee re-offender punishment person. And so pursuant to that statute, I am sentencing you to fifteen years in prison as a mandatory minimum with credit for time served...(T 182)

However, the judge also noted:

> Now, what I will do for purposes of appeal, should be Mr. Suskauer prevail on the appeal, I will tell you what my sentence would be, not that it's binding, but what my sentence would be, had you not been a prison releasee re-offender punishment person, I would have sentenced you to forty state prison months with credit for the time served.(T 183)

Respondent/Appellee was then sentenced to 15 years in the Florida Department

of Corrections. .

Smith timely appealed to the Fourth District Court of Appeal. After due deliberation, the Fourth District issued a written opinion, a copy of which is attached hereto as "Appendix A" . The Fourth District applied their earlier decision in State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), rev. pending, No. 95,230 (Fla. 1999), holding "that the trial judge erred in concluding that she had no discretion to sentence Smith outside of the provisions of the Prison Releasee Reoffender Act." Smith v. State, 24 Fla. L. Weekly D2393 (Fla. 4th DCA October 20, 1999). In so doing, the Fourth District acknowledged that its decision conflicts with the Third District Court of Appeal's decision in McKnight v. State, 24 Fla. L. Weekly D439 (Fla. 3d DCA, February 26, 1999), rev. granted, No. 95,154 (Fla. August 19, 1999). 24 Fla. L. Weekly D2393 n.1.

This appeal follows.

SUMMARY OF THE ARGUMENT

This is a case dealing with the statutory construction of Ch. 97-239 Laws of Florida, the "Prison Releasees Reoffender Punishment Act" which is now part of section 775.082 Florida Statutes (1997). The statute provides, *inter alia:*

> (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:
>
> * * *
>
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect . . .

The issue before this Court is whether the exception enumerated in subsection (d)1.c is addressed to the discretion of the trial court or the state attorney. It is the court's duty to glean the legislative intent from a consideration of the act as a whole. A primary principle of statutory construction is that a court must construe a statute in conjunction with other statutes pertaining to the same subject matter. Courts may ascertain the intent of the legislature in enacting a statute by considering other statutes enacted in the same legislative session. A statute should not be interpreted so as to lead to an absurd result.

The Florida Senate staff analysis clearly states the intent of the Prison Releasee Reoffender Punishment Act is to restrict plea bargaining by the state attorney, and the

discretion provided in the statute is to be exercised by the state attorney. The language of section 775.082(8) Florida Statutes (1997) as well as the placement of subsection (d)1.c clearly demonstrates the subsection is merely one of the factors which a state attorney may consider when deciding whether to prosecute a particular defendant as a "prison releasee reoffender." Any other result would be absurd, since there is no way for a trial court to test the reliability of such a statement, and the victim -- rather than the State -- would have complete control over the prosecution of a criminal action.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 775.082(8) FLORIDA STATUTES (1997) AUTHORIZES THE TRIAL COURT RATHER THAN THE STATE ATTORNEY TO DECIDE WHETHER TO PROCEED AGAINST A DEFENDANT AS A PRISON RELEASEE REOFFENDER IN A GIVEN CASE.

This is a case of first impression dealing with the statutory construction of Ch. 97-239 Laws of Florida, the "Prison Releasee Reoffender Punishment Act" which became law without the Governor's approval on May 30, 1997 and was incorporated into section 775.082 Florida Statutes (1997). The case presents an important question, in that it will decide whether a certain statutory exception is meant to be exercised by the trial court or the state attorney. There is a conflict in the case law from the various district courts of appeal on the subject.

The statute defines a "prison releasee reoffender" as any defendant who commits or attempts to commit, an enumerated list of crimes including "robbery" "within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor." §775.082(8)(a)1q Florida Statutes (1997). The statute then provides:

> 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:
>
> * * *
>
> b. for a felony of the second degree, by a term of imprisonment of 15 years . . .

Although the statute provides that "nothing in the subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, it further provides:

> (b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

The statute then includes the following explanatory language, and provides for certain exceptions:

> (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.

Finally, the statute places the following burden on the state attorney and the Florida Prosecuting Attorneys Association, Inc.:

> 2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public on request, for at least a 10-year period.

The sole issue before this Court is whether the exception enumerated in subsection (d)1.c is addressed to the discretion of the trial court or the state attorney.

It is a fundamental rule of statutory construction that in construing a statute, the court must first attempt to ascertain the legislative intent from the language of the statute itself. See Baker v. State, 636 So. 2d 1342 (Fla. 1994). If the language of the statute is clear, the court must apply the statute as it was intended and may not supply its own

interpretation. See Holly v. Auld, 450 So. 2d 217 (Fla. 1984). Where, however, the phraseology of an act is ambiguous or is susceptible of more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject." Foley v. State ex rel. Gordon, 50 So. 2d 179, 184 (Fla. 1951).

A primary principle of statutory construction is that a court must construe a statute in conjunction with other statutes pertaining to the same subject matter. Ferguson v. State, 377 So. 2d 709 (Fla. 1979); Smith v. Crawford, 645 So. 2d 513 (Fla. 1st DCA 1994). It has also been held that courts may ascertain the intent of the legislature in enacting a statute by considering other statutes enacted in the same legislative session. Lincoln v. Florida Parole Commission, 643 So. 2d 668 (Fla. 1st DCA 1994); Gulley v. Pierce, 625 So. 2d 45 (Fla. 1st DCA 1993).

Finally, it is well settled that remedial statutes must be construed liberally to advance the intended remedy. Martin County v. Edenfield, 609 So. 2d 27 (Fla. 1979). If a literal interpretation of a statute leads to an absurd result, the strict letter of the law should yield to the obvious intent of the legislature. City of Pompano Beach v. Capalbo, 445 So. 2d 468, 471 (Fla. 4th DCA 1984).

Petitioner/Appellant respectfully submits that the language of section 775.082(8)

Florida Statutes (1997) as well as the placement of subsection (d)1.c clearly demonstrates the subsection is merely one of the factors which a state attorney may consider when deciding whether to prosecute a particular defendant as a "prison releasee reoffender." Obviously, a trial judge would have no knowledge of whether or not the prosecuting attorney had sufficient evidence to prove the highest charge available, nor would the court know if a material witness could not be obtained -- which are the factors enumerated by the statute in subsections (d)1.a and (d)1.b. Such knowledge would be available only to the state attorney, and it is the state attorney who, in paragraph 2, is charged not only with the responsibility of writing a memorandum explaining the "sentencing deviation," and maintaining it -- in the *state attorney's* case file -- but, in addition, forwarding a copy to the Florida Prosecuting Attorneys Association -- not the Florida Supreme Court.

An examination of paragraph 2 raises a further problem if one assumes subsection (d)1.c does not follow the other subsection (d) exceptions to the statute and is meant to provide discretion to the trial court rather than the state attorney: the state attorney, not the trial court, is directed to prepare the memorandum explaining the sentencing deviation in *every* case, yet if the Fourth District Court's position prevails at bar, it is the trial court which will exercise the discretion. Thus, the state attorney would be placed in the untenable position of writing a memorandum based on pure speculation: in effect guessing whether the victim's statement was truthful and reliable, and what effect -- if any

-- the statement had on the trial judge. It is entirely possible that the state attorney might not have prior knowledge of a written statement by the victim; and it is certain the state attorney would have no knowledge of the impact of such a statement on the trial judge. Indeed, depending on the circumstances under which it was written, the prosecutor might find such a statement worthless.

The Senate Staff Analysis and Economic Impact Statement for CS/SB 2362, the Senate Bill which created the Prison Releasee Reoffender Act, supports the conclusion that the terms of the act are directed toward the prosecutor rather than the trial court. Paragraph III of the analysis specifically provides "The CS [Committee Substitute] further provides that, if a state attorney determines that a defendant is a prison releasee reoffender, the state attorney *may* seek to have the court sentence the defendant as a prison releasee reoffender." The analysis goes on to point out that, "The state attorney is not required to pursue sentencing the defendant as a prison releasee reoffender. Even if the defendant meets the criteria for a prison releasee reoffender, the state attorney can seek to have the defendant sentenced under the sentencing guidelines or, if he meets relevant criteria, habitualized as an habitual felony offender, habitual violent felony offender, or violent career criminal." Significantly, the analysis sets forth the era which the state attorney must use in making that judgment, using the identical language of the statute:

> The CS provides legislature 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.

Finally, Petitioner/Appellant submits that in construing section 775.082 and particularly subsection (8)(d)1.c this Court must be sensitive to the well established law expressed in decisions such as City of Pompano Beach, supra., and the realities of any victim's pre-trial written statement which requests mercy for a defendant.

It is an ancient and well settled principle of common law that a criminal trespass is an offense against the State rather than an individual victim. See Fletcher v. Florida Pub. Co., 319 So. 2d 100, 104 (Fla. 1st DCA 1975). That principle remains in effect in Florida as do all other principles of the common law. See State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997). If this Court were to hold that subsection (8)(d)1.c were anything other than merely one of the factor which a state attorney could consider before prosecuting a defendant as a prison releasee reoffender, two absurd conclusions would result:

First, in view of the Confrontation Clause of the United States Constitution, there would be no way -- other than by asking the victim and hearing his or her answer in open court -- for a trial court to test genuineness of the written request or determine whether the victim was under duress when he or she wrote it. In short, if one were to assume that

subsection (8)(d)1.c were meant to provide discretion to the trial court without the intervention of the state attorney, then a written statement, in and of itself, would be an absolute bar to prosecution under section 775.082. Clearly, such a result would be absurd.

Secondly, and perhaps more importantly, if one were to interpret subsection (8)(d)1.c as an exception directed to the trial court's discretion, for the first time in the history of the common law the victim would be in exclusive control of a criminal prosecution. Given our current knowledge of the dynamics in many victim-perpetrator relationships -- particularly in domestic violence cases -- Petitioner/Appellant submits it would be even more absurd to conclude the Legislature intended to hand over to the victim the key to prosecution without giving the state attorney overriding authority.[1]

The only reasonable conclusion, given the language and structure of section 775.082 Florida Statutes (1997) is that the exceptions enumerated in (8)(d)1.a, b, c, and d, are exceptions which may be exercised at the discretion of the state attorney. The learned trial judge was correct when she relied on subsection (8)(d)1.c to hold that Respondent/Appellee had to be sentenced to the mandatory minimum sentence.

The decision of the Fourth District Court of Appeal should be reversed and the

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[1]See, for example: Walker, Lenore, *Battered Women and Learned Helplessness,* Victimology: An International Journal, Vol. 2, No. 3-4, pages 525-534 (1997-98).

District Court must be directed to affirm the sentence imposed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Petitioner/Appellant prays for an order of this Court to reversing the Fourth District Court of Appeal's decision with directions that the district court affirm the sentence imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Initial Brief of Petitioner/Appellant on the Merits" has been furnished by mail to Mark Wilensky, 515 North Flagler Drive, Suite 325, West Palm Beach, FL 33401 on December ____1999.

____
Don M. Rogers
Assistant Attorney General
Counsel for Petitioner/Appellant

Appendix A

(Fla. 3d DCA 1998); *Tillman v. State,* 718 So. 2d 944 (Fla. 3d DCA 1998), *review granted,* 727 So. 2d 914 (Fla. 1999); Cyrus v. *State,* 7 17 So. 2d 619 (Fla. 3d DCA 1998); *Almanza* v. *State,* 716So. 2d 351 (Fla. 3d DCA 1998); *Elliard, 714 So.* 2d at 1218; *Holloway v. State, 712 So,* 2d *439* (Fla. 3d DCA), *review granted,* 727 So. 2d 906 (Fla. 1998); *Dupree* v. Stare, 71 I So. 2d 647 (Fla. 3d DCA 1998); *Linder v. State,* 711 So. 2d 1340 (Fla. 3d DCA 1998).

* * *

Criminal law—Sentencing—Prison Releasee Reoffender Act does not violate prohibition against ex post facto laws, does not violate separation of powers doctrine, does not violate single subject rule, does not violate equal protection clause, does not constitute cruel and unusual punishment, does not violate substantive due process rights, and is not void for vagueness-In view of victim's written statement seeking leniency, trial judge erred in concluding that she had no discretion to sentence defendant outside provisions of Act-Conflict certified

ANDREA SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-2894. Opiion filed October 20, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Mary E. Lupo, Judge; L.T. Case No. 97.13057 CFA02. Counsel: Mark Wilensky of Dubincr & Wilensky, P.A., West Palm Beach, for appellant. Robert A. Buttenvorth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant, Andrea Smith, appeals his sentence of fifteen years in state prison pursuant to section 775.082(8)(a)1., Florida Statutes (1997), the Prison Releasee Reoffencler Act, on the grounds 1) that the trial judge erred in determining that sentencing under the Act was mandatory when the victim submits a letter to the judge requesting that the defendant is not sentenced under the Act, and 2) that the Act is unconstitutional because it violates the prohibition against ex post facto laws, violates the separation of powers doctrine, violates the single-subject rule, violates the equal protection clause, constitutes cruel arid unusual punishment, violates substantive due process rights, and that the exceptions to sentencing under the Act provided in section 775.082(8)(d)1. are void for vagueness. We previously addressed and rejected Smith's argumentsthat the Act violates the prohibition against ex post facto laws and the single-subject *rule. See Plain v. State, 720 So.* 2d 585 (Fla. 4thDCA **1998), *rev. denied,*** 727 So. 2d 909 (Fla. 1999); *Young* v. ***State,*** 719So. 2d 1010 (Fla. 4th DCA 1998), ***rev. denied, 727 So.*** 2d 915 (Fla. 1999). We, likewise, reject eachofthe other constitutional challenges raised by ***Smith. See Jennings*** v. ***State,*** No. 98-2903 (Fla. 4th DCA Oct. 20, 1999) [24 Fla. L. Weekly D2395]; ***Rollinson v. State,*** No. 98-0631 (Fla. 4th DCA Sept. 29, 1999) [24 Fla. L. Weekly D2253].

In view of the victim's written statement seeking leniency, we agree with Smith's argument that the trial judge erred in concluding that she had no discretion to sentence Smith outside of the provisions of the Prison Releasee Reoffender Act. See ***State v. Wise, 24*** Fla. L. Weekly D657 (Fla. 4th DCA Mar. 10, 1999), ***rev. granted, No.*** 95,230 (Fla. Aug. 5, 1999).[1] The trial judge indicated on the record that, if she had discretion in the matter, she would not sentence Smith under the Act. Accordingly, we reverse and remand for the trial judge to determine whether to impose a sentence under the Act or under the sentencing guidelines in light of our ruling in *Wise.*[2]

REVERSED and REMANDED. (WARNER, C.J., FARMER and STEVENSON, JJ., concur.)

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[1]As we did in *Wise,* we certify conflict with *McKnight v. State, 727 S.* 2d 3 14 (Fla. 3d DCA), *rev. granted,* No. 95,154 (Fla. Aug. 19. 1999).

[2]Of course, on remand, the trial judge will not be bound by her earlier preliminary indications that she would not he inclined to sentence Smith under the Act.

* * *

Criminal law—Speedy trial—Defendant's request for continuance constituted waiver of speedy trial-Trial court properly denied motion for discharge based on speedy trial violation where defendant requested and was granted a continuance, state subsequently nol prossed case, and information was filed more than one year later based on same occurrence

JAMES WALKER RUNYON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 97-2695. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Ben L. Bryan, Jr., Judge; L.T. Case No. 96-3286-CF. Counsel: Thomas F. Burns, Fort Pierce, for appellant. Robert A. Buttenvorth, Attorney General, Tallahassee, and Leslie T. Campbell, Assistant Attorney General, West Palm Bench, for appellee.

(KLEIN, J.) Appellant entered a plea to attempted capital sexual battery, reserving his right to appeal the issue ofwhether the trial court should have granted his motion to discharge based on a speedy trial violation. We affirm.

Appellant was arrested and incarcerated on April 4, 1995. On June 21, his counsel made the following request for a continuance of the trial:

> Judge, this is a capital sexual battery case. I've talked to [the state] and I've askedthatthiscouldbe continued, we'll waive speedy trial, until August the 30th, rather than August 2nd.

The court granted the continuance.

Rule of Criminal Procedure 3.191 (a) provides that a defendant has a right to a speedy trial within 175 days of being arrested for a felony. Without the continuance, the 175 days would have run in this case on September 26. On October 23, 1995, the state nol prossed the case. More than one year later, on November 20, 1996, an informationwas filed based on the same occurrence, and appellant moved for discharge on the ground that his right to a speedy trial under rule 3.191(a) had run. The trial court denied the motion.

Appellant argues that his request for a continuance was not a waiver of the right to speedy trial, but was rather a request for a twenty-eight day continuance. According to appellant, the speedy trial period was thus simply extended by twenty-eight days and continued to run, even after the state nolle prossed. He cites ***Sate v. Agee,*** 622 So. 2d 473 (Fla. 1993), in which the defendant had filed a demand for a speedy trial and in which our supreme court held that theperiodcontinuestonmafterthestatenolle prosses. Under *Agee,* once the period has expired, the state may not refile the charges. The *Agee* reasoning was applied to speedy rrial without demand under rule 3.191(a) in *Reed v. State,* 649 So. 2d 227 (Fla. 1995).

In *Stewart v. State,* 491 So. 2d 271, 272 (Fla. 1986), our supreme court held that "when a defendant requests a continuance prior to the expiration of the applicable speedy trial time period for the crime with which he is charged, the defendant waives his speedy trial right as to all charges which emanate from the same criminal episode.'

Appellant relies on *State v. Kubesh,* 378 So. 2d 121, 172 (Fla. 2d DCA 1980), in which the court stated that the "speedy trial meter' was "tolled" on the date "a continuance was stipulated to in order that appellees' eligibility for the pretrial intervention program could be determined." See also ***Johns v. Stare, 340 So.*** 2d 528 (Fla. 2d DCA 1976). We conclude that *Kubesh* and *Johns* are distinguishable from *Stewart* because they involved stipulations for tolling of the speedy trialperiod. Inthepresent case, the record does not reflect stipulated tolling, but rather a request for a continuance by the appellant. This constituted a waiver of speedy trial under *Stewart.* We therefore affirm. (WARNER, C.J., and TAYLOR, JJ. concur.)

* * *

Unemployment compensation-Misconduct-Use of derogatory language to describe customer of employer-Appeals referee's finding of misconduct was not based on competent, substantial evidence where only evidence presented of statements alleged to constitute misconduct was customer's transcript of conversation recorded on her voice mail which was hearsay-Claimant comments did not evince willful or wanton disregard of employer interest so as to support denial of benefits

MICHELLE TUGGLE DURALL, Appellant, v. UNEMPLOYMENT APPEALS COMMISSION and BELLSOUTH COMMUNICATION SYSTEMS, INC. Appellees. 4th District. Case No, 98-2851. Opinion filed October 20, 1999. Appeal fmm the State of Florida, Unemployment Appeals Commission: L.T. Case No. 98-2272. Counsel: Michelle A. Durall, Coral Springs, pro se. Lean H. Le Jr., Atlanta, Georgia, for Appellee-BellSouth Communication Systems, Inc.

(BLACKWELL WHITE, A., Associate Judge.) The claimant Michelle A. Durall, appeals a final order of the Unemployment Appeals Commission ("the UAC") denying her unemployment