IN THE SUPREME COURT OF FLORIDA

STEVEN ROBINSON,

Petitioner,

v. CASE NO. 96,976

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF ARGUMENT

ISSUE I: The Prison Releasee Reoffender Act is constitutional. The Act does not violate the separation of powers doctrine or due process. Setting mandatory sentences is a proper matter for the legislature, and enforcing such a statute is a proper matter for the executive. Finally, the trial court still fulfills its proper role -- deciding whether the defendant is eligible for this sentencing enhancement and imposing the sentence itself.

ISSUE II: The fifteen year sentence for cocaine possession does not constitute fundamental error. Because Robinson did not object to this sentence below, any claim of error is procedurally barred.

ARGUMENT

ISSUE I

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).

Robinson contends that the Prison Releasee Reoffender Act is unconstitutional, as it violates the separation of powers doctrine. According to Robinson, 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).

Robinson's argument that the mandatory sentences for repeat offenders 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 Robinson's argument, this procedure does not mean that the executive has usurped the power of the judiciary, and it does not make the prosecutor the sentencing entity, as Robinson 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).

Robinson 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 Robinson's 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).

Robinson 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 Robinson's argument that the trial court is not required to follow the clear statutory mandate. The district court's decision affirming Robinson's sentence as a prison releasee reoffender should be approved.

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[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.

ISSUE II

ROBINSON'S SENTENCE FOR COCAINE POSSESSION IS NOT FUNDAMENTAL ERROR.

As his next point on appeal, Robinson contends that the trial court erred in imposing a fifteen year sentence for possession of cocaine. As Robinson admits, however, there was no contemporaneous objection when the trial court imposed this sentence. Further, Robinson never challenged this sentence through a 3.800(b) motion after sentencing.

Accordingly, this issue has been waived from appellate review. See Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, No. 92,805 (Fla. July 7, 1998). In Maddox, the district court ruled *en banc* that only sentencing errors which have been properly preserved can be raised on direct appeal. This includes any sentencing errors which previously may have been labeled "fundamental." The State contends that this is a correct interpretation of the recent changes to the appellate process encompassed in the Criminal Appeal Reform Act.

The scope of these changes has been addressed in detail in numerous briefs before this Court. For the sake of this Court's time, the State will not reiterate these arguments in detail here, but rather adopts its arguments as set forth in its brief in Maddox v. State, case # 92,805, presently pending before this Court.

In sum, the appellate system has become more and more clogged with sentencing errors which were either raised for the first time on direct appeal or were not even raised at all by appellate counsel but were simply apparent on the record. In an effort to combat this obvious waste of scare appellate resources, the legislature passed the Criminal Appeal Reform Act, codified in section 924.051, Florida Statutes, and this Court adopted Florida Rule of Criminal Procedure 3.800(b).

These changes were specifically designed to ensure that sentencing errors are dealt with initially in the proper forum for correction of such errors -- the trial court. Only if the trial court fails to correct such errors may they be dealt with by the courts of appeal -- the errors must first be properly preserved below.

The Reform Act has already led to multiple exceptions and interpretations -- exceptions which are so far-reaching as to effectively swallow the rule. Eliminating such exceptions in their entirety is the only effective means to ensure consistent application of the preservation requirement and to place the responsibility for sentencing back where it belongs -- in the trial courts. The State submits that this Court should adopt in its entirety the well-reasoned opinion of the district court in Maddox.

Even if this Court determines that there should be exceptions to the preservation requirement, the State submits that an exception would not be appropriate here, as any error in Robinson's sentence is harmless.

The fifteen year sentence for cocaine possession was to run concurrently with the mandatory fifteen year robbery sentence under the PRR statute. Accordingly, Robinson's overall sentence would remain unaffected by resentencing on the possession charge.

Moreover, the trial court found Robinson to be both a prison releasee reoffender and a habitual felony offender, and he does not contest either of these findings. (R. 198-200). The habitual offender finding made him subject to a ten year sentence for the possession of cocaine. See § 775.084, Fla. Stat. (1997). Thus, Robinson was subject to an additional ten year sentence on the cocaine possession charge in conjunction with his mandatory fifteen years on the robbery charge. Accordingly, any error in imposing the fifteen year concurrent sentence on the possession charge was harmless, as he could have received an even longer sentence.

Robinson's second point on appeal should be rejected by this Court.

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 Nancy Ryan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this _____ day of December, 1999.

_____
Kristen L. Davenport
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STEVEN ROBINSON,

Petitioner,

v. CASE NO. 96,976

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STEVEN ROBINSON,

Appellant,

v. CASE NO. 99-617

STATE OF FLORIDA,

Appellee.

/

Opinion filed October 29, 1999

OCT 29 1999

PUBLIC DEFENDER'S OFFICE
7TH JUD. CIR. DIV.

Appeal from the Circuit Court
for Marion County,
Thomas D. Sawaya, Judge.

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SHARP, W., J.

Robinson appeals from his judgment and sentence after a jury convicted him of robbery[1] (Count I); possession of cocaine[2] (Count II), and possession of drug paraphernalia[3] (Count IV). A

[1] § 812.13, Fla. Stat. (1997), a second degree felony.

[2] § 893.13(6), Fla. Stat. (1997), a third degree felony.

[3] § 893.147(1), Fla. Stat. (1997), a misdemeanor.

third count for possession of cannabis, was nolle prossed by the state. We certify this case to the supreme court.[1]

At issue here is the constitutionality of the Prison Releasee Reoffender Punishment Act (the "Act"), based on the separation of powers doctrine. This court has held that the Act does not violate the separation of power doctrine. ***Speed v. State,*** 732 So. 2d 17 (Fla. 5th DCA 1999). However, Robinson argues that the supreme court has held that similarly situated litigants should have similar opportunities for review in the courts of this state. In *Jollie v.* ***State,*** 405 So. 2d 418 (Fla. 1981), the court held that a district court opinion, which cites as controlling authority a decision that is pending for review in the supreme court constitutes express conflict and allows the supreme court to exercise its jurisdiction. The supreme court has taken jurisdiction in *Cotton v.* ***State,*** 728 So. 2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1999), which conflicts with our opinion in ***Speed.***

We therefore certify the question to the supreme court.

COBB and GRIFFTN, JJ., concur.

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[1] Fla. R. App .P. 9.030(a)(2)(iv),(vi).