IN THE SUPREME COURT OF FLORIDA

KENNETH GRANT,

Petitioner, :

vs. : Case No. 1999-1604

STATE OF FLORIDA, :

Respondent. :

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

References to the opinion of the Second District Court of Appeal (which is reproduced in the Appendix of this brief) will be designated "A", followed by the appropriate page number. References to the record before the Second District will be designated "R", followed by the appropriate page number.

STATEMENT OF THE CASE

An information filed November 18, 1997, in Pinellas County Circuit Court charged Kenneth Grant, Appellant, with sexual battery, a second degree felony (R8-9). The State provided notice that a habitual offender sentence would be sought ((R12).

On November 30, 1998, Appellant served a "Motion to Declare Section 775.082(8), Florida Statutes (1997) to be Unconstitutional or to Determine that the Prison Releasee Reoffender Act is Inapplicable to the Defendant" (R13-32). At a hearing held the same day before Circuit Judge Richard A. Luce, the judge outlined the possible penalties that would be applicable based upon the State's assertion that Appellant qualified as a prison releasee reoffender and a violent career criminal (R91-4). Appellant admitted that he had been to prison "at least three times" (R95). The judge then offered a 15 year mandatory sentence pursuant to the prison releasee reoffender act if Appellant would plead to this offense (R95). The judge promised concurrent guidelines sentences on the other cocaine possession charges (R96). The judge also clarified that he would impose 15 years pursuant to the habitual felony offender sentencing provisions (R96).

Defense counsel then argued that the Prison Releasee Reoffender Act was unconstitutional as applied to Appellant, but conceded that identical motions had previously been rejected by the court (R97-8). The court adhered to the prior rulings, but declared that the issue was preserved for appellate review (R98). Appellant agreed to plead no contest to the sexual battery charge

in return for the offered sentence and reserving the right to appeal the constitutional issue (R99-104, 67-8) .

The judge noted that a certificate from the Department of Corrections indicated that Appellant was last released from prison on May 31, 1996 (R105). He found that the new offense was within three years, and imposed a 15 year mandatory sentence as a prison releasee reoffender (R106, 77-9). The judge further detailed the exhibits supporting Appellant's classification as a habitual offender and found that Appellant qualified (R106-7). A concurrent 15 year sentence with a habitual felony offender designation was imposed (R107, 77-9).

A timely notice of appeal was filed December 17, 1998 to the Second District Court of Appeal (R82) . In an opinion filed November 24, 1999, the Second District held that §775.082(8), Fla. Stat. (1997), the Prison Releasee Reoffender Act, was constitutional. The court discussed constitutionality of the Act with reference to the single subject requirement, separation of powers, cruel and unusual punishment, vagueness, due process, equal protection, and ex post facto challenges (A2-6). The court also addressed a separate issue where Grant argued that imposition of both a habitual offender sentence and a prison releasee reoffender sentence for a single offense violated double jeopardy. The Second District held that because the 15 year minimum mandatory sentence under the Prison Releasee Reoffender Act was made concurrent with the 15 year habitual offender sentence, there was no error (A6-7).

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review Grant's case on two grounds. First, the Second District expressly construed the constitutionality of a statute and declared it valid. This Court has already accepted review of similar decisions holding §775.082(8), Fla. Stat. (1997) valid which were issued from other district courts of appeal. Second, the holding that a defendant may be sentenced as both a habitual felony offender and a prison releasee reoffender for a single offense is in conflict with decisions from other district courts of appeal.

ARGUMENT

ISSUE I

THE DISTRICT COURT'S DECISION EXPRESSLY DECLARES A STATE STATUTE VALID, GIVING THIS COURT JURISDICTION PURSUANT TO FLA. R. APP. P. 9.030(a) (2) (A) (i).

The opinion issued by the Second District (see Appendix) expressly declares §775.082(8), Fla. Stat. (1997) (the Prison Releasee Reoffender Act) to be valid. The opinion discusses constitutional challenges grounded upon the single subject requirement (A2), separation of powers (A3), cruel and unusual punishment (A4), vagueness (A4-5), due process (A5), equal protection (A6), and ex post facto (A6). The opinion also notes that this Court has granted review on cases from other district courts of appeal which have upheld the statute against attacks on its constitutionality, e.g., Speed v. State, 732 So. 2d 17 (Fla. 5th DCA), rev. granted, Case No. 95,706 (Fla. September 16, 1999); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), rev. granted, 740 So. 2d 529 (Fla. 1999); McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, 740 So. 2d 528 (Fla. 1999) (A3).

Since then, this Court has also granted review in King v. State, 729 so. 2d 542 (Fla. 1st DCA), Case No. 95,669 (Fla. November 15, 1999) and Lookadoo v. State, 737 So. 2d 637 (Fla. 5th DCA), Case No. 96,460 (Fla. November 15, 1999). Both of these decisions accepted for review also found the Prison

Releasee Reoffender Act to be constitutional.

This Court should exercise its discretion to review Grant's case for the same reasons that it granted review in previous decisions from other district courts of appeal which declared the Prison Releasee Reoffender Act valid.

ISSUE II

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW, GIVING THIS COURT JURISDICTION PURSUANT TO FLA. R. APP. P. 9.030(a)(2)(A)(iv).

The opinion issued by the Second District (see Appendix) holds that imposition of a mandatory sentence under the Prison Releasee Reoffender Act which runs concurrently with a habitual felony offender sentence on the same offense does not violate constitutional provisions against double jeopardy (A6-7). This holding directly conflicts with the Fourth District's decision in Adams v. State, 24 Fla. L. Weekly D2394 (Fla. 4th DCA October 20, 1999). In Adams, the court held that imposition of sentences as both a habitual felony offender and as a prison releasee reoffender for the same offense violated the double jeopardy guarantee against multiple punishments. The Adams court also determined that the Legislature did not intend to authorize "double sentences" when it enacted the Prison Releasee Reoffender Act.

Other decisions in conflict with the opinion at bar are Thomas v. State, 24 Fla. L. Weekly D2763 (Fla. 5th DCA December 10, 1999) and Melton v, State, 24 Fla. L. Weekly D2719 (Fla. 4th DCA December 8, 1999). Both of these decisions cite to Adams and direct the trial court to vacate one of the two sentences.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Kenneth Grant petitions this Court to grant review of the Second District's decision in Grant v. State, Case No. 98-04943.

APPENDIX

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

KENNETH GRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 98-04943

Opinion filed November 24, 1999.

Appeal from the Circuit Court for Pinellas County; Richard A. Luce, Judge.

James Marion Moorman, Public Defender, and Douglas S. Connor, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, far Appellee.

PARKER, Acting Chief Judge.

Kenneth Grant appeals his sentence for sexual battery, which the trial court entered pursuant to the Prison Releasee Reoffender Act (the Act), section

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775.082(8), Florida Statutes (1997). Grant alleges that the Act is unconstitutional on seven different grounds and that his sentence violates constitutional prohibitions against double jeopardy. We affirm.

SINGLE SUBJECT REQUIREMENT.

Grant argues that the provisions of the Act which deal with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release, violate the single subject requirement of Article III, Section 6, of the Florida Constitution, because they are not reasonably related to the specific mandatory punishment provision in subsection eight. However, the First, Fifth, and Fourth Districts have rejected this argument as it relates to the Act. See Durden v. State, 24 Fla. L. Weekly 02050, D2050 (Fla. 1 st DCA Sept. 1, 1999); Lawton v. State, 24 Fla. L. Weekly D1940, 01940 (Fla. 5th DCA Aug. 20, 1999); Young v. State, 719 So. 2d 1010, 1011-12 (Fla. 4th DCA 1998), review denied, 727 So. 2d 915 (Fla. 1999). The Fourth District has provided the following analysis:

> The test for determining duplicity of subject "is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort." Chapter 97-239, Laws of Florida, in addition to adding section 775.082(8), also amended sections 944.705, 947.141, 948.06, 948.01 and 958.14. The preamble to the legislation states that its purpose was to impose Stricter punishment on reoffenders to protect society. Because each amended section dealt in some fashion with reoffenders, we conclude that the statute meets that test.

Young, 719 So. 2d at 1012 (citations omitted).

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SEPARATION OF POWERS.

Grant argues that the Act violates Article II, Section 3, of the Florida Constitution, also known as the separation of powers clause, in three ways: (I) it restricts the parties' ability to plea bargain by providing limited reasons for the State's departure: (2) it does not give the trial judge the authority to override a victim's wish not to punish the violator to the fullest extent of the law; and (3) it removes the judge's discretion. As to the first reason, there can be no constitutional violation because there is no constitutional right to plea bargaining. See Fait-weather v. State, 505 So. 2d 653, 654 (Fla. 2d DCA 1987). See also Turner v. State, 24 Fla. L. Weekly D2074, D2075 (Fla. 1st DCA Sept. 9, 1999) (rejecting the argument that the Act violates the separation of powers clause because it restricts plea bargaining). As to reasons two and three, this court has interpreted the Act to give the trial court the discretion to determine whether a defendant qualifies as a prison releasee reoffender for purposes of sentencing under section 775.082(8). See State v. Cotton, 728 So. 2d 251, 252 (Fla. 2d DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999). Furthermore, even though the Fifth, First, and Third Districts have disagreed with this interpretation, they have nonetheless upheld the constitutionality of the Act in the face of a separation of powers challenge. See Speed v. State, 732 So. 2d 17, 19-20 (Fla. 5th DCA), review granted, No. 95,706 (Fla. Sept. 16, 1999); Woods v. State, 740 So, 2d 20, 24 (Fla. 1st DCA), review granted, 740 So. 2d 529 (Fla. 1999); McKnight v. State, 727 So. 2d 314, 317 (Fla. 3d RCA), review qtanted, 740 So. 2d 528 (Fia. 1999).

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CRUEL AND UNUSUAL PUNISHMENT.

Article I, Section 17, of the Florida Constitution prohibits cruel and unusual punishment. Grant argues that the Act violates this prohibition because it allows for sentences that are disproportionate to the crime committed, However, the First District has rejected this challenge to the constitutionality of the Act. See Turner, 24 Fla. L. Weekly at 02075. "We do not find that imposition of the maximum sentence provided by statutory law constitutes cruel or unusual punishment, because there is no possibility that the Act inflicts torture or a lingering death or the infliction of unnecessary and wanton pain." Id. (citing Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998)).

VAGUENESS.

Grant argues that the Act is unconstitutionally vague because it fails to define "sufficient evidence," "material witness," "the degree of materiality required," "extenuating circumstances," and "just prosecution." However, a defendant may not raise a vagueness challenge if the statute clearly applies to their conduct. See Woods, 740 **So.** 2d at 24-25 (rejecting vagueness challenge to the Act). In Woods, the defendant had been released from prison one month before he committed a robbery. Id. at 21. After a jury found him guilty, he was sentenced as a prison releasee reoffender to fifteen years in prison. Id.

In the instant case, Grant was released from the Department of Corrections on May 31, 1996, and the sexual battery occurred on August 5, 1997, just over one year later. Section 775.082(8)(a)1. defines "prison releasee reoffender" as:

"any defendant who commits . . . [s]exual battery . . . within 3 years of being released from a State correctional facility operated by the Department of Corrections or a private vendor." Just as the Act clearly applied to the defendant in Woods, it clearly applies to Grant. Moreover, none of the terms Grant challenges as vague concern whether the statute applies to him. Therefore, we conclude that Grant is prohibited from raising any argument that the Act is unconstitutionally vague.

DUE PROCESS.

Grant argues that the Act violates the due process clause in several ways: (1) it invites discriminatory and arbitrary application by the state attorney; (2) it gives the state attorney the sole power to define its terms; (3) it gives the victim the power to decide that the Act will not apply to any particular defendant; (4) it allows for arbitrary determination of which defendants will qualify; and (5) it does not bear a reasonable relationship to a permissible legislative objective. Reasons one through four are rendered moot by this court's decision in Cotton that the trial court has the discretion to determine whether a defendant qualifies as a prison releasee reoffender for purposes of sentencing under section 775.082(8). See 728 So. 2d at 252. The First and Third Districts have expressly rejected reason five as a ground for declaring the Act unconstitutional. See Turner, 24 Fla. L. Weekly at D2075; McKnight, 727 So. 2d at 319 ("this statute bears a rational relationship to the legislative objectives of discouraging recidivism in criminal offenders and enhancing the punishment of those who reoffend, thereby comporting with the requirements of due process").

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EQUAL PROTECTION.

Grant's equal protection argument is identical to his due process argument. For the reasons discussed above, we do not find that the Act violates the equal protection clause.

EX POST FACTO.

Grant argues that the Act is an unconstitutional ex post facto law in that it allows for retroactive application to include offenders who were released from prison prior to its effective date. This argument has been rejected by the Fifth and Fourth Districts. See Grav v. State, 24 Fla. L. Weekly D1610, D1610 (Fla. 5th DCA July 9, 1999); Plain v. State, 720 So. 2d 585, 586 (Fla. 4th DCA 1998), review denied, 727 So. 2d 909 (Fla. 1999). The Fourth District provided this rationale:

> In this case, the Act increases the penalty for a crime committed after the Act, based on release from prison resulting from a conviction which occurred prior to the Act. It is no different than a defendant receiving a stiffer sentence under a habitual offender law for a crime committed after the passage of the law, where the underlying convictions giving the defendant habitual offender status occurred prior to the passage of the law. Under those circumstances habitual offender laws have been held not to constitute ex post facto law violations.

Plain, 720 So. 2d at 586 (citations omitted).

DOUBLE JEOPARDY.

Lastly, Grant argues that his sentence violates double jeopardy because it consists of two separate sentences as a prison releasee reoffender and as a habitual felony offender for a single offense. However, the final judgment and sentence clearly reflects that Grant received one sentence of fifteen years as a habitual felony offender

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with a minimum mandatory term of fifteen years as a prison releasee reoffender. Minimum mandatory sentences are proper as long as they run concurrently. See Jackson v. State, 659 So. 2d 1060, 1061-62 (Fla. 1995). Moreover, Moreland v. State, cited by Grant, is distinguishable because in that case the defendant actually received two alternative sentences. See 590 So. 2d 1020, 1021 (Fla. 2d DCA 1991) (defendant was sentenced to life in prison with a twenty-five year minimum mandatory as a habitual offender *or* to life under the guidelines, whichever was less). Because the minimum mandatory sentence runs concurrently to the habitual felony offender sentence, there is no error.

Affirmed.

NORTHCUTT, J., Concurs.
ALTENBERND, J., Concurs specially. .

ALTENBERND, Judge, Concurring.

I concur in this opinion with two limitations. First, in light of this **court's** decision in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), we have no need to determine whether the act would be unconstitutional as a violation of separation of powers if this court interpreted the act to give the trial judge no discretion in sentencing.

Second, I believe that the First District's reasoning in Turner v. State, 24 Fla. L. Weekly 02074 (Fla. 1st DCA Sept. 9, 1999), concerning the issue of cruel or unusual punishment is incorrect or at least insufficient. Turner relies on language from

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a case involving the death penalty. To determine whether Prison Releasee Reoffender sentencing is cruel or unusual, one must perform a proportionality review. See Hale v. State, 630 So. 2d 524, 526 (Fla. 1993). Such a review is a complex process. More important, I do not believe that such a review can be conducted for this act as a whole. I believe that the review must examine each statutory offense affected by the act to determine whether the statutory sentence prescribed for that offense is unconstitutionally disproportionate. Cf. Gibson v. State, 721 So. 2d 363 (Fla. 2d DCA 1998) (life without possibility of parole not unconstitutional for penile capital sexual battery).

Mr. Grant negotiated a plea to receive a fifteen-year sentence in this case for a sexual battery that is classified as a second-degree felony. Thus, a sentence of fifteen years has been an authorized legal sentence for this crime for many years. See § 775.082(3)(c), Fla. Stat. (1999). Although the analysis of cruel or unconstitutional punishment is an objective analysis and is not truly a case-specific analysis, I would note that Mr. Grant's own scoresheet would have allowed a lawful guidelines sentence of twenty years' imprisonment for this offense, and it appears that he was also eligible for habitual offender sentencing. In this case, Mr. Grant has not established that his sentence is cruel or unusual.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 5th day of January, 2000.

Respectfully submitted,

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