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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LAVERNE BROWN,

Petitioner,

v.

CASE NO. SC18-323
5TH DCA NO. 5D16-1045

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE FACTS

The State accepts Laverne Brown's ("Brown") statement of the case and facts but notes the following in support of its merits brief.

Brown was charged with a third-degree felony because of her two prior convictions. (R. 12).[1] Following the rendition of a guilty verdict, Brown waived her right to have a jury find beyond a reasonable doubt that she had two prior theft convictions. (T. 162-63). The judgments were received into evidence. (T. 164).

The Criminal Punishment Code Scoresheet provided for a maximum sentence of six years, taking into account Brown's convictions for petit theft (two prior convictions) and trespass. (R. 72-73). The trial court sentenced Brown as follows:

> THE COURT: Okay. Ms. Brown, you were convicted of petit theft, having two prior theft convictions. The time frame of your thievery was October 1st, 2015. Let's go back to a year before that, which is one of the predicate offenses for which you have a conviction for, which is 14-CF-14390, where you walked into a Macy's at the Millenia Mall, carrying a black purse and a shopping bag. You selected pieces of clothing at a men's department and took them to the fitting room, just as you did in this case. You dropped off pieces of men's clothing in the fitting room, came out. You selected six more pieces, returned to the fitting room.

[1] "R." references record 1 of the record on appeal. "T." references the trial transcript contained in record 2. "SR." references the supplemental record. Each reference is followed by the pertinent page number(s).

After you left, there were 13 pieces of clothing and three sensors found, left lying in the room. The purse was noticeably full. Pieces of clothing were missing.

You were not given permission to take the merchandise. You stole the merchandise. And then when you were confronted, you came up with a complaint of chest pains.

THE DEFENDANT: Yeah.

THE COURT: And so then law enforcement had to call out the fire department and you had to be transported to Dr. Phillips Hospital. And then after that, you were then taken into custody.

Then, just two months after that, you were back at it again, being a thief, going into Walmart. This time you stole $555.87 worth of merchandise. Again, caught on video, just as the prior case was and just as our case was.

When you were arrested in December of 2014, you began to cry, advising your father has brain cancer and you could not provide -- and you've been doing stupid stuff. This was your statement, according to this. Your father has brain cancer and you've been doing stupid stuff.

So you've been using your father's illness and now demise for quite some time as an excuse to justify you being a thief. You then again complained of chest pains. So this appears to be a routine, along with stealing, that once you're caught, you complain of chest pains. And then police again had to call rescue for your chest pains in that case. And here we are, 10 months later and you're back at it, being a thief again, being caught on videotape, taking things that don't belong to you.

Your history is that you're a thief. Your actions in this case are that you're a thief.

> Your crime has escalated since you first got arrested in Florida in 2004. And there appears to be no way to stop you from being a thief.
>
> THE DEFENDANT: No. There is.
>
> THE COURT: And putting you on probation certainly won't stop you from being a thief. Getting convicted for being a thief in October and then December in 2014 didn't stop you from being a thief. So there's only one logical way to stop you and that's to warehouse you so you'll stop stealing from people.
>
> Obviously, you were not taught not to steal from people. And -- and putting you on probation, I think, would be a waste of resources because I have no confidence at all that you would stop stealing. I think that you're a danger to the community, based upon your actions, and I believe that you will continue, based upon your actions, to steal. And I believe that there is a possibility this could get more violent as you look for more ways to avoid accountability.
>
> You've attempted twice to use the chest pains defense and that hasn't worked for you. So I have no idea what your next opportunity will be.
>
> I will make these two arrest reports part of the record in 2015-CF-13121 -- so that the appellate court can see and review the facts of those cases that occurred -- both of them occurred less than a year before you got caught stealing again.
>
> And so I do find you're a danger to the community. And I'm -- pursuant to Florida Statute 775.082(10), I intend to sentence you to prison based upon your being a danger to the community.

(T. 101-04).

In a subsequent written order, the trial court made the

following findings:

> Defendant was convicted of two thefts prior to being convicted of theft and trespass in the instant case. In 2014-CF-014390-A-O, Defendant was convicted of Possession of Antishoplifting or Inventory Control Device Countermeasure and Petit Theft of $100 or More on February 3, 2015, after she stole merchandise from Macy's. In 2014-CF-016501-A-O, she was convicted of Grand Theft Third-Degree on March 11, 2015, after she stole merchandise from Walmart. She has a pattern of complaining about chest pains when confronted with the thefts, and using her father's illness and demise as an excuse for her criminal behavior.
>
> Defendant's convictions in February and March 2015 did not deter her from committing the crimes in the instant case. A probationary sentence would be a waste of resources because the trial court has no confidence that she will stop stealing. Based upon her actions, the trial court finds that Appellant will continue to steal, and is therefore a danger to the community.

(SR. 118).

SUMMARY OF THE ARGUMENTS

Section 775.082(10), Florida Statutes (2015) is constitutional. When viewed in conjunction with subsection (3)(e), the statute mitigates the statutory maximum sentence that a similarly situated defendant would face upon conviction of a third-degree felony. Whether a defendant receives a nonstate prison sanction or a prison sanction, the statutory maximum remains the same. Here, for example, because Brown was convicted of theft (two prior convictions), the jury's verdict authorized a sentence of up to five years in prison. Subsection (10) establishes a statutory right to a sentencing cap of one year in jail for qualifying defendants.

Thus, the trial court's reliance on the facts of Brown's prior convictions did not implicate Apprendi v. New Jersey, 530 U.S. 466 (2000). And, any error was harmless beyond a reasonable doubt. Based on her escalating criminal history and the facts surrounding her current and prior convictions—which Brown did not contest during sentencing—a jury would have concluded that a nonstate prison sanction posed a danger to the community. This Court should affirm.

ARGUMENTS

(RESTATED)

THE ISSUE IS MOOT. ALTERNATIVELY, THE FIFTH DISTRICT PROPERLY CONCLUDED THAT SECTION 775.082(10), FLORIDA STATUTES (2015) WAS CONSTITUTIONAL.

Brown challenges the Fifth District Court of Appeal's ("Fifth DCA") holding that her three-year prison sentence did not violate the Sixth Amendment. The district court concluded that section 775.082(10), Florida Statutes (2015), entitled qualifying defendants convicted of a third-degree felony to mandatory mitigation, and that Apprendi v. New Jersey, 530 U.S. 466 (2000), was not implicated in the instant case because the sentence imposed did not exceed the statutory maximum established in section 775.082(3)(e). Brown argues that this Court should adopt the reasoning in Booker v. State, 43 Fla. L. Weekly D795 (Fla. 1st DCA April 18, 2018), as to the merits, and require that future determinations of dangerousness be made by a jury unless the determination can be made based on the jury's findings or the fact is admitted by the defendant.

According to the Florida Department of Corrections website, Brown was released from the custody of the Department of Corrections on April 19, 2018. See Corrections Offender Network, DC.STATE.FL.US, http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=154539&TypeSearch=IR (last visited June

24, 2018). This Court should dismiss review of the instant case as moot. See Porter v. State, 110 So. 3d 962 (Fla. 4th DCA 2013), rev. dismissed, 137 So. 3d 1021 (Fla. 2014).

The interpretation of a statute is reviewed de novo. Kasischke v. State, 991 So. 2d 803, 807 (Fla. 2008). "[I]n assessing a statute's constitutionality, this Court is bound 'to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent.'" State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994) (citation omitted).

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis added). "[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Blakely v. Washington, 542 U.S. 296, 303 (2004) (emphasis in original).

A. The Fifth DCA properly characterized section 775.082(10), Florida Statutes (2015), as a mandatory mitigation statute.

The Fifth DCA properly concluded that section 775.082(10) operates to mitigate the maximum sentence that a defendant convicted of a third-degree felony would otherwise face.

Subsection (10) provides:

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

§ 775.082(10), Fla. Stat. (2015). When viewed in a vacuum, any sentence above a nonstate prison sanction[2] would accurately be viewed as an upward departure sentence. However, the statute must be construed in conjunction with subsection (3)(e).

Here, for example, a jury found Brown guilty of theft as charged in the information; specifically, petit theft (two prior convictions), a third-degree felony, which is subject to a sentence not exceeding five years. See § 775.082(3)(e); 812.014(3)(c) Fla. Stat. (2015). Subsection (10) builds upon this further and mandates that where the total sentence points are 22 or fewer, a qualifying defendant must be sentenced to a nonstate prison sentence. "[I]rrespective of whether a defendant receives a nonprison or

[2] "[T]he phrase 'is understood to mean probation, community control, or imprisonment in the county jail for up to one year.'" Reed v. State, 192 So. 3d 641, 645 (Fla. 2nd DCA 2016) (citation omitted).

prison sanction, the maximum penalty remains static at five years." Woods v. State, 214 So. 3d 803, 815 (Fla. 1st DCA 2017) (on rehearing en banc) (Osterhaus, J., concurring in affirmance). Subsection (10) is an exception to the five-year statutory maximum and is triggered when a trial court considers factors beyond the conviction for the charged offense.[3] As the Fourth District explained,

> The enactment was a mandated mitigation of an otherwise available maximum penalty. The safety valve to this mandated mitigation was the discretion given to the trial court to adhere to the Criminal Punishment Code in lieu of the mandated mitigation of the defendant's sentence when the trial court made a written finding that the defendant was a 'danger to the community.'

Porter, 110 So. 3d at 963.

B. This case does not implicate Apprendi because the trial court did not exceed the statutory maximum in sentencing Brown.

Brown argues that the jury's verdict of guilt as to petit theft only authorized a nonstate prison sanction. Had Brown not had two prior theft convictions, her crime would have been punishable as a first-degree misdemeanor. See §812.014(2)(e), Fla. Stat. (2015). However, here, Florida law authorized a sentence of up to five years in prison based on the jury's verdict.

The exception provided by subsection (10) comes into play

[3] Sentence points are calculated pursuant to section 921.0024, Florida Statutes.

when a defendant meets the provided conditions, including a scoresheet calculation of 22 or fewer sentence points. The scoresheet takes into consideration factors beyond the jury's verdict of guilty. As Judge Eisnaugle, writing for the Fifth DCA, explained, "the jury's verdict authorized the trial court to sentence Appellant to five years in state prison *before* the trial judge considered the additional findings contemplated by section 775.082(10)." Brown v. State, 233 So. 3d 1262, 1265 (Fla. 5th DCA 2017) (emphasis in original). Here, because the trial court's sentence did not exceed the statutory maximum, there was no Apprendi violation.

Other jurisdictions have concluded similarly. In People v. Harper, 739 N.W.2d 523 (Mich. 2007), cert. denied, 552 U.S. 1232 (2008), the Michigan Supreme Court found that a similar statute[4]

> does not constitute a maximum sentence under Blakely; it bears no relation to the maximum sentence authorized by the jury verdict or the guilty plea. Rather, it establishes a statutory right to a cap on the defendant's period of incarceration, conditioned on the absence of substantial and compelling reasons to depart upward.

Harper, 739 N.W.2d 549. Likewise, here, section 775.082(10) provides defendants with a statutory right to a cap of one year in

[4] The statute required a trial court to impose "[a]n intermediate sanction . . . not exceed[ing] the upper limit of the recommended minimum sentence range or 12 months, whichever is less." Harper, 739 N.W.2d at 556. See also Mich. Comp. Laws § 769.34(4)(a).

jail. Blakely does not guarantee defendants "a right to sentences that are *less than* those authorized by a jury verdict or guilty plea." Id. at 549 (emphasis in original). The Michigan court rejected the argument that because the statute stated that a trial court "shall" impose an intermediate sanction, that defendants were constitutionally entitled under Blakely to a sentence of 12 months or less. Id. at 535. The Harper court concluded that "[t]he guidelines calculations . . . relate solely to a defendant's recommended *minimum* sentence range. The guidelines do nothing to alter or affect the maximum sentence that must be imposed solely on the basis of the jury verdict or the guilty plea." Id. at 537 (emphasis in original). "The statutory maximum for the relevant offense—which is the maximum authorized by the conviction and therefore the relevant maximum for Blakely purposes—has never changed." Id. at 538. See also Reed v. State, 192 So. 3d at 643 (stating that although Reed faced an aggregate statutory maximum sentence of 55 years in prison for his felony convictions, because he scored 13.9 points on the sentencing scoresheet, he "was presumptively entitled to a sentence that did not include a prison sanction unless the sentencing judge found him to be a danger to the public.").

Also, the Florida statute which establishes the punishment for a third-degree felony includes the language "not exceeding." See § 775.082(3)(e), Fla. Stat. (2015) ("For a felony of the third

degree, by a term of imprisonment not exceeding 5 years."). The state legislature could have included this limitation in subsection (10), by writing the statute as follows: "the court must sentence the offender to a nonstate prison sanction not exceeding one year in jail," or "notwithstanding section 775.082(3)(e), the court must sentence the offender to a nonstate prison sanction not exceeding one year in jail." But the legislature did not do so. This lends further support to the argument that the legislature intended the "statutory maximum" to be five years as provided for in subsection (3)(e).[5]

For purposes of Apprendi, the statutory maximum for a defendant convicted of a third-degree felony is five years, as provided for in section 775.082(3)(e). Subsection (10) is a statutory right to a sentencing cap, which is not protected by the Sixth Amendment jury trial guarantee. The trial court did not exceed the statutory maximum when it sentenced Brown to a three-year period of incarceration and therefore did not violate Apprendi's mandate.

Further, Apprendi does not preclude a sentencing court from considering the fact of a prior conviction. Contrary to Brown's assertion, the jury did more than "only [find] that Ms. Brown stole

[5] "The trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control." § 921.002(1)(g), Fla. Stat. (2015).

from Walmart." (Initial Brief at 13). Brown stipulated to two prior convictions, which enhanced the misdemeanor petit-theft to a third-degree felony. See Molfetto v. State, 955 So. 2d 1153, 1155 (Fla. 2d DCA 2007). And neither she nor defense counsel challenged the trial court's factual findings as to those offenses during sentencing. Both convictions occurred within approximately one month of each other, and approximately eight months before the charged offense in the instant case. The trial court determined that, based on the facts of those offenses, a nonstate prison sanction posed a danger to the public because Brown's recent convictions did not deter her from committing the instant theft, and when confronted, she either complained about chest pains or blamed her father's illness.

"[T]he Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain." Oregon v. Ice, 555 U.S. 160, 168 (2009). However, here, the trial court essentially concluded that, based on her criminal history, Brown was a recidivist who was undeterred by her recent, prior convictions. The finding that a nonstate prison sanction would pose a danger to the community was based primarily on the facts of Brown's current and prior convictions; specifically, that the prior convictions demonstrated an escalation in the crimes Brown was committing. "[R]ecidivism 'does not relate to the commission of the offense' itself." Apprendi, 530 U.S. at 496 (quoting Almendarez-Torres v.

United States, 523 U.S. 224, 230, 244 (1998). See also State v. Lowery, 826 N.E.2d 340, 354–55 (Ohio Ct. App. 2005) ("Some of the factors underlying a court's determination to impose consecutive sentences, i.e., the need to protect the public from future crime by the defendant and to make the sentence proportionate to the danger he poses to the public, are recidivism factors. As such, if related to a defendant's history of prior convictions, they may be proper under Blakely."). A trial court is not precluded from considering facts which are reflected in the jury's verdict. See Lopez v. People, 113 P.3d 713, 730 (Colo. 2005) (en banc), as modified on denial of reh'g (June 27, 2005), cert. denied, 546 U.S. 1017 (2005) ("We therefore determine that the aggravated sentence in this case was imposed constitutionally where the trial court deemed Blakely-exempt prior conviction facts to be extraordinary aggravating circumstances in this case."). Here, the trial court also considered Brown's criminal history, which was not an inherent component of the crime with which she was convicted. The court's consideration of the facts surrounding Brown's prior convictions was proper and did not implicate or offend Apprendi. Thus, as applied to Brown, the last sentence of section 775.082(10) did not violate her right to a jury trial, as guaranteed by the Sixth and Fourteenth Amendments.

Further, Brown has not established that the second sentence of subsection (10) is facially unconstitutional. The party

attacking the statute has the burden to establish that the statute is unconstitutional. State v. Sobieck, 701 So. 2d 96, 104 (Fla. 5th DCA 1997). "In a facial challenge, we consider only the text of the statute, not its specific application to a particular set of circumstances. For a statute to be held facially unconstitutional, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied." Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014).

It is conceivable that a trial court could impose a sentence that does not implicate Apprendi because its written findings could be based on facts reflected in a jury's verdict or a defendant's criminal history. And, a defendant could stipulate or agree pursuant to a plea agreement that a nonstate prison sanction poses a danger to the community. Section 775.082(10) merely requires that the trial court make written findings that a non-state prison sanction would present a danger to the community. It does not prevent a jury determination, a stipulation to the condition, or the trial court finding based solely upon a prior conviction. A facial constitutionality challenge fails where there are circumstances under which a statute "could be constitutionally applied." Castellanos v. Next Door Co., 192 So. 3d 431, 454 (Fla. 2016).

C. Any error was harmless.

Apprendi/Blakely errors are subject to harmless-error analysis. Washington v. Recuenco, 548 U.S. 212 (2006); Galindez v. State, 955 So. 2d 517, 522 (Fla. 2007). This Court must determine if the jury, beyond a reasonable doubt, would have concluded that a nonstate prison sanction could present a danger to the public had it been required to answer that question. Galindez, 955 So. 2d at 523. "[A] danger to the public does not require a history of violence and can be based on economic or other types of harm." Jones v. State, 71 So. 3d 173, 176 (Fla. 1st DCA 2011) (citing McCloud v. State, 55 So. 3d 643 (Fla. 5th DCA 2011)). See also Secong v. State, 225 So. 3d 909 (Fla. 3rd DCA 2017) ("The Defendant's continued crimes of theft and fraud present a threat to the property and financial security of those in his community. The Defendant has demonstrated a pattern of behavior that indicates that he . . . is undeterred from victimizing the people of his community for his own personal economic gain."); Porter, 110 So. 3d at 964 (concluding that a finding of danger was proper where prior sentences did not deter the defendant from committing more financial crimes).

The theft in the instant case, at a Walmart store, occurred on October 1, 2015. It was not Brown's first theft conviction. In October 2014, Brown stole clothing from a Macy's department store and complained of chest pains when confronted by store security.

Police and the fire department responded, with Brown being taken to the hospital. In December 2014, Brown entered a Walmart store and stole more than $500.00 worth of merchandise. She again complained of chest pains when confronted and the county fire rescue was called to the scene to treat her. In one of these incidents, Brown used an anti-shoplifting device to help her steal.

In conjunction with the instant case, the judge also sentenced Brown for trespass in a structure, a residence, also involving allegations of theft. The jury also could have considered Brown's other criminal history. At sentencing, the prosecutor detailed Brown's convictions dating back to 2004, which included convictions for possession and the sale of cocaine. Although the State did not have the evidence at the time of sentencing, it conceivably could have obtained and submitted to the jury evidence of Brown's out-of-state convictions for petit thefts and robbery. Based on her criminal history, including the fact that she had recently entered a residence without permission, the jury would have concluded that Brown required a nonstate prison sanction, within the statutory maximum, to protect the public from the danger she posed to the community. Any error in failing to submit the dangerousness determination to the jury was harmless.[6]

[6] Brown asks this Court to require that in the future, a jury make the dangerousness determination required by section 775.082(10). For cases currently in the direct appeal pipeline where the Apprendi/Blakely error is harmful, the State questions

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this Honorable Court affirm the Fifth District's ruling.

DESIGNATION OF E-MAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, in this proceeding: crimappdab@myfloridalegal.com (primary) and Marjorie.Vincent-Tripp@myfloridalegal.com (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Answer Brief of Respondent has been furnished by e-mail to counsel for Petitioner, Matthew Funderburk, Assistant Public Defender (444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118) at appellate.efile@pd7.org and at funderburk.matthew@pd7.org on June 28, 2018.

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whether this is a proper remedy considering Williams v. State, 242 So. 3d 280 (Fla.), reh'g denied, SC17-506, 2018 WL 1916525 (Fla. Apr. 23, 2018), wherein this Court concluded that empaneling a new jury to make the requisite factual finding was inappropriate.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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ATTORNEY GENERAL

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