IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC00-1130
	)	
FREDRICK BROOKS,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Appeal from the Circuit Court of the
17th Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal

T = Transcript

CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts, with the following additions:

At sentencing, the defense argued that the Prison Releasee Reoffender Act was unconstitutional (T 231-233; written motion in Supplemental Record before District Court of Appeal). The trial court denied the motion, and stated, "The Court finds that the defendant is a prison released re-offender" (T 234). The state then contended that 15 years was a mandatory minimum for a PRR. The defense contended that it was not mandatory and that the court in its discretion could still sentence under the guidelines (T 235, 237-238). The court found, "... recent release releasee re-offender is appropriate in this case." The court pronounced sentence thus: "... the Court finds you guilty as a habitual offender and sentences you, sir, to 25 years in the Florida State Prison" (T 239).

This Court issued an order postponing its decision on jurisdiction and calling for briefs on the merits.

SUMMARY OF ARGUMENT

I.

This Court should dismiss review. The conflict certified by the Fourth District Court of Appeal does not really exist. Any conflict on the double jeopardy issue need not be decided in this case because the Prison Releasee Reoffender sentence here is illegal for another reason: it was not orally pronounced. Even if right for the wrong reason, the District Court's decision overturning the PRR sentence should be affirmed.

II.

The PRR statute violates the constitutional ban on double jeopardy to the extent that it and other statutes permit both PRR and habitual offender sentences for the same crime. The statutes must be interpreted to prohibit the double jeopardy violation. The legislative intent manifested in the statutes is that PRR and habitual offender are alternatives between which the state may elect but which may not be imposed together.

ARGUMENT

POINT I

THIS COURT SHOULD DISMISS REVIEW BECAUSE RESPONDENT WAS NOT PROPERLY SENTENCED AS A PRISON RELEASEE REOFFENDER.

This Court postponed its decision on jurisdiction when it ordered briefs of the merits. It must now decide against jurisdiction, or in the alternative decline to exercise it.

The issue raised by the state on discretionary review is not properly before this Court. There is in fact no conflict of decisions as certified by the District Court of Appeal, and this Court is therefore without jurisdiction. Alternatively, the issue is moot and need not be reached to resolve this case. This Court should therefore exercise its discretion not to decide it. In either event, this Court should dismiss review. See, Arenado v. Florida Power & Light Co., 541 So. 2d 612 (Fla. 1989); Gonzalez v. State, 25 Fla. L. Weekly S460 (Fla. June 8, 2000); and Hull v. State, 25 Fla. L. Weekly S406 (Fla. May 18, 2000).

The state's arguments on the merits center on justifying double habitual offender and Prison Releasee Reoffender sentences because the minimum sentences are concurrent. (See footnote 6 on page 11 of the state's merits brief.) However, this whole premise fails because the trial court never orally sentenced Respondent to the 15-year PRR minimum. The minimum is therefore improperly included on the written sentence and commitment (R 32).

At sentencing, the court stated that it found Respondent to be a PRR , as well as an habitual offender (T 234, 239). However, the court never pronounced the 15-year PRR minimum, even though the state argued that it was mandatory (T 237-238). The court only pronounced the 25 year habitual offender sentence (T 239). Perhaps the court accepted the defense's argument that the 15 years were not mandatory (T 235); for whatever reason, it did not impose it.

The orally pronounced sentence is the valid one; the written document merely memorializes it and must be corrected to conform to it if it deviates from it. See, Maddox v. State, 25 Fla. L. Weekly S367, S371 (Fla. May 11, 2000) ("... a deviation from an oral pronouncement that results in an increased term of incarceration is a patent, serious sentencing error ....").

Here, then, whether the PRR sentence was a double jeopardy violation need not be decided. This Court should simply let the District Court of Appeal's decision stand, even if it was right for the wrong reason. See, Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999).

This Court need not decide in this case the conflict certified by the Fourth District because the case with which the conflict was certified, Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), is now before this Court on merits briefs and is awaiting decision.

ARGUMENT

POINT II

CLASSIFYING A DEFENDANT AS BOTH A PRISON RELEASEE REOFFENDER AND A HABITUAL FELONY OFFENDER VIOLATES DOUBLE JEOPARDY.

The fundamental state and federal constitutional prohibitions against being placed twice in jeopardy for the same offense are violated by the Prison Releasee Reoffender (PRR) Act, § 775.082(8), Fla. Stat. (1997).[1] Art. I, § 9, Fla. Const.; Fifth Amendment, U.S. Const. The double jeopardy clauses protect against multiple punishments for the same offense. See, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2089, 23 L.Ed.2d 656 (1969); Ohio v. Johnson, 467 U.S. 493 , 104 S.Ct. 2531, 81 L.Ed.2d 425 (1984); and Hegstrom v. State, 401 So. 2d 1343 (Fla. 1981). The PRR Act is not exclusive and by its terms it would appear to be applicable to many defendants who may also be classified and sentenced as habitual offenders, habitual violent offenders, or violent career criminals. In the instant case, Petitioner was sentenced under both the Act and as a habitual felony offender under § 775.084(4), Fla. Stat. (1997) (R 32).

Legislatures, not courts, prescribe the scope of punishment. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d. 535 (1983). However, a legislature is not presumed to intend for one to be punished twice for the same offense, unless there is a clear intent to do so. Missouri v. Hunter, supra, and Whalen v. United

[1]Petitioner's crime was in 1998 (R 3).

States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The double jeopardy clauses seek to ensure that the total punishment does not exceed that authorized by the legislature. See, Jones v. Thomas, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989); Hegstrom v. State, supra; and Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." Jones v. Thomas, quoted in Adams.

The Fourth District, in Adams, the case upon which the same court based its decision in the instant case, correctly ruled that only one sentence can be imposed where a defendant qualifies under the PRR Act and another sentencing statute. See also, Gordon v. State, 745 So. 2d 1016 (Fla. 4th DCA 1999), and West v. State, 25 Fla. L. Weekly D1253 (Fla. 4th DCA may 24, 2000). The court in Adams found that the PRR and habitual offender statutes created alternative sentencing options for the same offense. Alternatives mean that one but not both punishments may be applied. Adams; see also, Ex Parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873).

§ 775.082(8)(c), Fla. Stat. (1997), upon which the state now relies, is not to the contrary:

> Nothing in this subsection shall prevent a court from imposing a greater sentence of

> incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

The court in Adams concluded that this statute overrides the mandatory PRR sentence where the trial court elects to hand down a harsher habitual offender sentence. The statute does not expressly state that one can be sentenced under both the PRR Act and the habitual offender statute. If a particular defendant's history fits the statutory criteria for both statutes, the statute gives the trial court an opportunity to elect one statute or the other. The requirement of an election is in keeping with Hegstrom v. State, supra, and with double jeopardy principles. See also, Moreland v. State, 590 So. 2d 1020 (Fla. 2d DCA 1991).

This is especially true when one considers § 775.021(4)(b)(1), Fla. Stat. (1997):

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.

Again, Adams considered this second statute and concluded, "If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the same offense." It is now clear that the predicates required for both PRR and habitual

offender sentencing enhancements are essential elements of proof which the state must prove beyond a reasonable doubt like any other element of a crime. See, Apprendi v. New Jersey, 13 Fla. L. Weekly Fed. S457, 2000 WL 807189 (U.S. June 26, 2000). These elements may not be doubled up without violating double jeopardy. See also, Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); and § 775.021(4)(a), Fla. Stat. (1997).

At best, § 775.082(8)(c) is susceptible of two constructions: (1) that one can be sentenced under both the PRR Act and the habitual felony offender statute; or, (2) that the trial court has the option of selection one or the other, but not both. Since the statute is (at best) susceptible of differing construction, this Court is required to use the construction that is most favorable to the accused. § 775.021(1), Fla. Stat. (1997). That construction is the second construction identified above, that the sentencing judge has the option of using the Act, or the habitual felony offender statute, but not both.

Omitted from the state's discussion of the statues is § 775.082(8)(b), Fla. Stat. (1997), which figured in the Fourth District's decision in Gordon v. State, supra:

> 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.

Respondent here, like Gordon, was sentenced to an extended term as an habitual offender, and therefore, under Gordon's interpretation, was sentenced under paragraph (c) of § 775.082(8), which authorizes the habitual offender sentence as an alternative for a PRR. Again, the Fourth District correctly concluded that the statutory scheme as a whole did not authorize the double penalties.

The state's calculations of potential release dates are not availing. Most importantly, such calculations do not address the more fundamental constitutional double jeopardy concerns, and certainly cannot override them. In West v. State, supra, the Fourth District acknowledged the state's similar factual contentions, but nonetheless held that the dual sentences constituted double jeopardy. In fact, one of the problems with the dual sentences is the different release eligibility requirements under the PRR and habitual offender statutes. Adams relied heavily on the fact that a defendant would have served one sentence for the offense before he was eligible for release on the other sentence. Both Adams and the Fifth District's decision in Lewis v. State, 751 So. 2d 106 (Fla. 5th DCA 1999) held that the legislative intent of the PRR Act was to impose the most severe of the two sentencing possibilities rather than two separate sentences for the same offense. Despite any calculations, the fact remains that the differing opportunities for gain time between defendants sentenced as habitual offenders and those sentenced under the PRR Act mean

that Petitioner would almost certainly be eligible for release on one sentence before he had completed the other. This means that the multiple punishment provision of the constitutional double jeopardy clauses has been violated.

This Court must affirm the decision under review.

CONCLUSION

For the reasons stated in Point I, this Court should dismiss review. If it does decide the merits in Point II, this Court must affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to August A. Bonavita, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 14th day of July, 2000.

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