IN THE SUPREME COURT OF FLORIDA

PAUL BALKCOM,

Appellant,

v. Case No. SC00-127

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

AMENDED APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This case is before the Court on a certified question of great public importance. The issue presented is whether the Prison Releasee Reoffender Punishment Act, codified as section 775.082(8), Florida Statutes (1997), violates the separation of powers clause of the Florida Constitution. Jurisdiction arises under Article V, Section 3(b)(4), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

Petitioner, Paul Balkcom, was the defendant in the trial court and appellant in the district court. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court, and the appellee in the district court, and will be referred to herein as the state.

The record on appeal consists of four consecutively numbered volumes which will be referred to by use of the symbol "V," followed by the appropriate volume and page numbers.

Pursuant to the Florida Supreme Court's Administrative Order of July 13, 1997, this brief has been printed in Courier New 12-point.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with burglary of a dwelling, battery on a law enforcement officer, and resisting an officer with violence (V1-21). The case was tried before a jury which found petitioner guilty of each offense as charged (V1 53-55).

Before trial, the state filed a notice of intent to classify petitioner as a prison releasee reoffender (PRR) (V1-11). Petitioner responded by moving the trial court to find the PRR Act unconstitutional because it was enacted in violation of the single subject requirement of the Florida Constitution, and because its requirements violated the separation of powers clause of the state constitution. This motion was denied (V1 64, 113).

Thereafter, the trial court determined that petitioner met the criteria for sentencing as a prison releasee reoffender (V1 81-84), and announced that because petitioner met that criteria, "the sentence is an automatic" PRR sentence (V1-109). Although his presumptive guidelines sentence was 39.75 to 66.25 months in prison (V1-86), the court sentence petitioner to terms of 15 years for burglary (V1-76), 5 years for battery on a law enforcement officer (V1-77), and 5 years for resisting arrest with violence (V1-778). All sentences were to be served concurrently with each other.

On appeal to the first district court, petitioner again contested the constitutionality of the PRR Act on both the single

subject requirement and separation of powers grounds. The district court rejected both arguments, but certified the following question as being one of great public importance:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION.

As he asserted below, petitioner maintains that the PRR Act violates the separation of powers clause of the Florida Constitution. Article II, section 3, Florida Constitution.

SUMMARY OF ARGUMENT

The Prisoner Releasee Reoffender Act violates separation of powers under Article II, Section 3, of the Florida Constitution because it effectively delegates to the state attorney the inherent judicial function of imposing sentence while prohibiting the court from exercising sentencing discretion. This defect can be remedied by interpreting the Act as discretionary rather than mandatory on the court.

ARGUMENT

Point I

SECTION 775.082 OF THE FLORIDA STATUTES, KNOWN AS THE PRISON RELEASEE REOFFENDER ACT, IS UNCONSTITUTIONAL BECAUSE IT DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF ARTICLE II, SECTION 3, CONSTITUTION OF FLORIDA.

Before he was sentenced, petitioner moved the trial court to strike the state's notice of intent to seek a sentence pursuant to Section 775.082(8), Florida Statutes, and to declare that statute unconstitutional because it violated the separation of powers doctrine of the Florida Constitution, and the equal protection and due processes of both the state and federal constitutions (V1 60-63; V1 108-113). That motion was denied by the trial judge (V1-113).

Before the court imposed sentence, the judge opined:

> Well, my understanding under this statute that we're dealing with, **if he's found to be a prison releasee reoffender**, this being a second degree felony, that is the burglary of a dwelling, **then the sentence is an automatic 15 years**, correct?

(V1-109).

Thereafter, the court sentenced petitioner to 15 years in prison as a prison releasee reoffender (V1 81-84), for the burglary conviction.

Article II, section 3, of Florida's Constitution states that the powers of state government shall be divided into legislative, executive, and judicial branches and further provides that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." With that in mind, petitioner asks the Court to review Section 775.082(8), Florida Statutes (1997)(prison releasee reoffender act, hereafter "the Act"), and particularly the following portion:

> If the 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. Upon proof from the state attorney that establishes by a preponderance of the evidence the 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....

S. 775.082(8)2, Fla. Stat. (1997).

According to that passage, the state attorney has the discretion ("may seek") to invoke the sentencing sanctions but after that, the court is required to ("must") impose the maximum sentence. In short, the state attorney is free to trigger the law, and by doing so, divests the trial judge of any sentencing discretion. The combination of filing discretion in the state attorney and absence of sentencing discretion in the court means

that an officer of the executive branch exercises power which is inherently vested in the judicial branch.

The state attorney is given discretion not to file under the following criteria:

> 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.**

Section 775.082(8)(d)1, Florida Statutes.

The permissible "may" accorded the state attorney contrasts with the mandatory "must" imposed on the court. Sub-subparagraph "d" above affords the state attorney discretion the court normally employs in sentencing, i.e., consideration of "extenuating circumstances." Conversely, the Act prohibits the court from considering such factors.

No doubt the state attorney enjoys broad discretion in charging decisions. State v. Bloom, 497 So.2d 2 (Fla. 1986)(Under Art. II, Sec. 3, of Florida's constitution, the decision to charge and prosecute is an executive responsibility; a court has no authority to hold pre-trial that a capital case does not qualify for the death penalty); Young v. State, 699 So.2d 624 (Fla. 1997)("[T]he decision to prosecute a defendant as an habitual

offender is a prosecutorial function to be initiated at the prosector's discretion and not by the court"); State v. Jogan, 388 So.2d 322 (Fla. 3d DCA 1980)(The decision to prosecute or nolle pross pre-trial is vested solely in the state attorney). When, however, the charging function merges with the sentencing power and both are entrusted to the executive, the separation of powers doctrine is violated.

To clarify the argument here, it is not that the legislature lacks authority to enact a minimum mandatory sentence. Obviously, the legislature has that authority. E.g., O'Donnell v. State, 326 So.2d 4(Fla. 1975)(Thirty-year minimum mandatory sentence for kidnaping is constitutional); Owens v. State, 316 So.2d 537 (Fla. 1975)(upholding minimum mandatory 25 year sentence for capital felony); State v. Sesler, 386 So.2d 293 (Fla. 2d DCA 1980)(Legislature was authorized to enact 3 year minimum mandatory for possession of firearm during the commission of a felony). Rather, the argument is that the legislature cannot delegate to the state attorney the discretion which, once exercised, prohibits the court from performing its inherent judicial function of imposing sentence.

The cases that discuss separation of powers and the sentencing function assume that sentencing is the domain of the courts and that incursions by other branches would be unconstitutional. "[J]udges have traditionally had the discretion to impose any

sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So.2d 982, 985-986 (Fla. 1989).

Before sentencing guidelines, a sentence could not be appealed successfully if it was within the limits set by statute. The respective domains of the courts and legislature were delineated in Shellman v. State, 222 So.2d 789, 790 (Fla. 2d DCA 1969):

> [T]he fixing of minimum and maximum terms of imprisonment for criminal convictions is exclusively the province of the legislature, and the imposition of punishment within such limitations is a matter for the trial court in the exercise of its discretion, which cannot be inquired into upon the appellate level.

In State v. Benitez, 395 So.2d 514 (Fla. 1981), the court reviewed Section 893.135, regarding drug trafficking. That statute provided severe mandatory minimum sentence but had an escape valve permitting the court to reduce or suspend a sentence if the state attorney initiated a request for leniency based on the defendant's cooperation with law enforcement. The defendant contended that the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits... are triggered by the initiative of the state attorney." Id at 519. Rejecting that argument and finding the statute did not encroach on judicial power the court said:

> Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the **final** discretion to impose sentence, it does not infringe upon the

> constitutional division of responsibilities." People v. Eason, 40 N.Y. 297, 301, 386 N.Y.S. 673, 676, 353 N.E. 2d 587, 589, (1976).

The Supreme Court assumed, therefore, that had the statute divested the court of the "final discretion" to impose sentence it would have violated separation of powers, an implicit recognition that sentencing is an inherent function of the courts.

The Supreme Court made an identical assumption when the habitual offender law was attacked on separation of powers grounds in Seabrook v. State, 629 So.2d 129, 130 (Fla. 1993), saying that

> ... the trial judge has the discretion not to sentence a defendant as a habitual felony offender. Therefore, petitioner's contention that the statute violated the doctrine of separation of powers because it deprived trial judges of such discretion necessarily fails.

The Third District Court held the same view regarding the mandatory sentencing provision of the violent career criminal act, saying that it did not violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998). In the same vein, the district court said in London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993), that "Although the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender."

By passing the Act the legislature crossed the line dividing the executive from the judiciary. The prosecutor was given power to require the court to impose a maximum sentence and to prevent the court in the exercise of judicial discretion from imposing any less. No other law goes as far. While the court retains the technical job of pronouncing sentence, it is reduced to performing a ministerial duty. The court is left with no choice.

Presumably, the state could obtain a writ of mandamus to compel the judge to issue a mandatory sentence should the trial court not impose one.[1] Such a result would illustrate dramatically how the Act allows excessive executive inroads into the judicial domain. This Court is obligated to prevent such an excursion.

In Walker v. Bentley, 678 So.2d 1265 (Fla. 1996), the Supreme Court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. In language which applies here, the Court said that any legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine...." Id. at 1267. Sentencing, like

[1] Smith v. State, 696 So.2d 814 (Fla. 2d DCA 1997)(a party requesting mandamus must establish a clear legal right to the act, a clear legal duty on the official to perform it, and no adequate remedy at law).

contempt, is a "separate and distinct function of the judicial branch" and should be accorded the same protection.

Authority to perform judicial functions cannot be delegated. In re Alkire's Estate, 198 So. 475, 482, 144 Fla. 606, 623 (1940)(Supplemental Opinion), the Court opined:

> The judicial power[s] in the several courts vested by [former] Section 1, Article V... **are not delegable and cannot be abdicated** in whole or in part by the courts.

More specifically, the legislature has no authority to delegate to the state attorney, as a function of the executive branch, the inherent judicial power to impose sentence. Accord Gough v. State ex rel. Sauls, 55 So.2d 111, 116 (Fla. 1951)(The legislature was without authority to confer on the Avon Park City Counsel the judicial power to determine the legality or validity of votes cast in a municipal election). Applying that principle here, the Act wrongly assigns to the state attorney the discretion to deprive the court of power to impose a sentence that differs from the statutory mandates. Stated differently, the legislature gave the executive branch exclusive control of when the court may, or may not, make a sentencing decision.

Assuming that the Act means what it appears to say, that the state attorney has sole discretion and thereafter the court has none, two options are available. One, this Court can find that the legislature intended "may" instead of "must" when describing the trial court's sentencing authority. Two, this Court can decide

that the Act is mandatory on the trial court but is invalid for that reason. Since it is preferable to save a statute wherever possible, the more prudent course would be to interpret the legislative intent as not foreclosing judicial sentencing discretion.

Construing "must" as "may" is a legitimate remedy for legislation that invades judicial territory. In Simmons v. State, 160 Fla. 626, 36 So.2d 207 (Fla. 1948), a statute provided that trial judges "must" instruct juries on the penalties for the offense being tried. This Court held that jury instruction had to be based on the evidence as determined by the courts. Since juries did not determine sentences, the legislature could not require that they be instructed on penalties. The court held, therefore, that "the statute in question must be interpreted as being merely directory, and not mandatory." 160 Fla. at 630, 36 So.2d at 209. Otherwise, the statute would have been "such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the constitution." Id. at 629, 36 So.2d at 208, quoting State v. Hopper, 71 Mo. 425 (1880).

In Walker v. State, supra, at 1267, this Court saved an otherwise unconstitutional statute and held:

> **By interpreting the work "shall" as directory only, we ensure that circuit court judges are able to use their inherent power of indirect criminal contempt to punish domestic violence injunctions when necessary while at the same time**

ensuring that Section 741.30 as a whole remains intact.

See also, Burdick v. State, 594 So.2d 267 (Fla. 1992)(construing "shall" in habitual offender statute to be discretionary rather than mandatory); State v. Brown, 530 So.2d 51 (Fla. 1988); State v. Hudson, 698 So.2d 831 (Fla. 1997)("Clearly a court has discretion to choose whether a defendant will be sentenced as an habitual felony offender.... [W]e conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum term").

As in the cases cited above, the Act need not fail constitutional testing if construed as permissible rather than mandatory. But if the Act is interpreted as bestowing on the state attorney all discretion, and eliminating any from the courts, it cannot stand.

The Act limits the court to determine whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within 3 years of release from a state correctional institution. Beyond that, the Act purports to bind the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term, as in firearms or capital felony offenses, or left the final decision to the court, as in the habitual offender and career criminal laws, the Act unconstitutionally vested in the state attorney the discretionary authority to strip the court of its inherent power to

sentence. That feature distinguishes the Act from all other sentencing schemes in Florida.

Should this Court decide that the trial judge had discretion to not impose the 15 year sentence mandated by the Act, a remand is required for the trial judge to reconsider the disposition free of statutory restrictions. Comments made at sentencing indicate that the trial judge believed he was powerless to impose any other sentence due to the Act's mandatory provision (V1-109).[2] The difference between a fifteen year sentence that must be served day-for-day and the guidelines range of 39.75 months to 66.25 months (V1-86), is substantial. The record does not show that the trial judge considered the guidelines, a predictable result since the Act negates a guidelines sentence.

The same situation existed in a case where the state incorrectly represented to the trial court that a life sentence with a minimum 15 years as a habitual violent felony offender was mandatory, and the record was unclear about whether the judge accepted the stat's position. The Third District Court remanded for a new hearing in which the judge could exercise discretion. Cotton v. State, 588 So.2d 694 (Fla. 3d DCA 1991). In the case at bar, the record is similarly unclear, and the case should be

[2] The trial judge mused aloud at sentencing, "[T]his being a second degree felony, that is the burglary of a dwelling, then the sentence is **automatic** 15 years, correct?" (V1-109).

remanded for reconsideration by the trial judge, who must be allowed to exercise his sentencing discretion.

CONCLUSION

Based on the foregoing argument, reasoning and citations to authority, this Court must find that the Prisoner Releasee Reoffender Act is unconstitutional as a violation of the separation of powers doctrine contained in the Florida Constitution. The remedy is to remand for a guidelines sentence or for a new sentencing hearing at which the trial judge will have the option of exercising judicial discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to **CHARMAINE MILLSAPS**, Assistant Attorney General, by hand delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to appellant, **PAUL BALKCOM** on this day, .

Respectfully submitted,

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