IN THE SUPREME COURT OF FLORIDA

EDWARD PERRY WILLIAMS,

Petitioner,

vs.

Case No. 2000-158

STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CYNTHIA J. DODGE
Assistant Public Defender
FLORIDA BAR NUMBER 0345172

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

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.

STATEMENT OF THE CASE AND FACTS

Petitioner appealed his sentence of life imprisonment as a prison releasee reoffender for two counts of armed burglary to the Second District Court of Appeal. Williams v. State, (Case No. 98-04934) (Fla. 2d DCA December 15, 1999) (see Appendix A-l). In the opinion, the Second District affirmed Petitioner's case on the authority of Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999) (see Appendix A-2). In Grant, the Second District held that §775.082(8), Fla. Stat. (1997), the Prison Releasee Reoffender Act, was constitutional.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review Petitioner's case. In citing to Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999), 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.

ARGUMENT

ISSUE

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 A-l) affirms Petitioners's case on the authority of Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999) (see Appendix A-2). In Jollie v. State, 405 So. 2d 418 (Fla. 1981), the Florida Supreme Court held that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is pending review in the Florida Supreme Court continues to constitute prima facie express conflict and allows Supreme Court to exercise its jurisdiction.

In Petitioner's case, Williams v. State, Case No. 98-4934 (Fla. 2d DCA Dec. 15, 1999), the Second District Court of Appeal affirmed the lower court without opinion and cited to Grant, a case currently seeking review in the Florida Supreme Court. Since the opinion issued by the Second District in Grant expressly declares §775.082(8), Fla. Stat. (1997) (the Prison Releasee Reoffender Act) to be valid, this Court can exercise its discretion to review the instant case.

The Grant opinion discusses constitutional challenges grounded upon the single subject requirement, separation of powers, cruel and unusual punishment, vagueness, due process, equal protection,

and ex post facto. The Grant 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).

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 Petitioner'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.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Edward Perry Williams petitions this Court to grant review of the Second District's decision in Williams v. State, Case No. 98-04934.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EDWARD PERRY WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 98-04934

Opinion filed December 15, 1999,

Appeal from the Circuit Court for Polk County; Susan W. Roberts, Judge.

James Marion **Moorman,** Public Defender, and Cynthia J. **Dodge,** Assistant Public Defender, **Bartow,** for Appellant.

Robert A. **Butterworth,** Attorney General, Tallahassee, and Anne S. Weiner, Assistant Attorney General, Tampa, for Appellee.

PER **CURIAM.**

Affirmed. **See** Grant v. State, No. 98-04943 (Fla. 2d DCA Nov. 24, 1999).

FULMER, A.C.J., and WHATLEY and CASANUEVA, JJ., Concur.

A-1

Hillsborough County; Cynthia A. Holloway, Judge.

(PER CURIAM .) We affirm in part and reverse in part the summary denial of Robert Dale Fisher's motion for correction of sentence, filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Fisher filed two notices of appeal, the first from the initial order denying his motion, case number 99-1066, and the second from the second amended order denying his motion, case number 99-3012. The second amended order corrects a date, and does not change the substantive basis for the denial. Both orders address the same motion. Therefore, we have consolidated the two cases.

We reverse the orders insofar as they deny Fisher's request for relief related to his sentence for conspiracy to traffic in methaqualone. The enhancement of that offense from a first-degree felony to a life felony violated the prohibition against double jeopardy. Under the circumstances of this case, Fisher must be resentenced on the conspiracy conviction without the enhancement. See ***Hopping v. State,*** 708 So. 2d 263 (Fla. 1998).

In addition, the trial court's retentionofjurisdiction over the first thirdofthe sentence on the conspiracy conviction was impermissible, and it must be stricken, because Fisher elected to be sentenced undertheguidelines. *See Kennedy* v. ***State,*** 490 So. 2d 195 (Fla. 2d DCA 1986) (holding that the trial court may not retain jurisdiction over a sentence when the defendant is sentenced under the guidelines).

Fisher's other arguments are without merit and we affirm the circuit court's disposition of them without comment.

Affirmed in part, reversed in part, and remanded for resentencing in accordance with this opinion within thirty days of the date of the mandate issued in this case. (BLUE, A.C.J., and NORTHCUTT and GREEN, JJ., Concur.)

* * *

Criminal law-Sentencing-Prison Releasee Reoffender Act—Double jeopardy-Act is not unconstitutionally vague; is not an unconstitutional ex post facto law; does not violate single subject requirement or equal protection, due process, or separation of powers clauses; and does not amount to cruel and unusual punishment-No double jeopardy violation resulted from imposition of habitual offender sentence and concurrent mandatory minimumsentence as prison releasee reoffender for single offense

KENNETH GRANT, Appellant, v, STATE OF FLORIDA, Appellee. 2nd Disuict. Case No. 98-04943. Opinion filed November 24, 1999. Appeal from the Circuit Court for Pinellas County; Richard A. Luce, Judge. Counsel: James Marion Moot-man, 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, for 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 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 D2050, D2050 (Fla. 1st DCA Sept. 1, 1999); *Lawton v.* ***State,*** 24Fla. L. Weekly D1940, D1940 (Fla. 5thDCA Aug. ***20, 1999); Youngv. 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 955.14. 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).

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: (1) 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 violatorto 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 pleabargaining. ***See Fairweatherv. State,*** 505 So. 2d 653,654 (Fla. 2dDCA 1987). *See also Turner v.* ***State, 24*** Fla. L. Weekly D2074, D2075 (Fla. 1st DCASept. 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 25 1,252 (Fla. 2d DCA 1998), review ***granted, 737 So.*** 2d 55 1 (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 ofpowerschallenge. *See Speed* v. ***State,*** 732 So. 2d 17, 19-20 (Fla. 5th DCA), ***review granted, No. 95,706*** (Fla. Sept. 16, 1999); ***Woodsv. 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 DCA), ***review granted,*** 740 So. 2d 528 (Fla. 1999).

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 arc 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 D2075. "We do not fmd 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 "justprosecution." 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 monthbefore he committed a robbery. *Id.* at 2 1. 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 3 1, 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.

A-2

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 3 19 (' '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").

EQUAL PROTECTION.

Grant's equalprotectionargument 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 fromprisonprior to its effective date. This argument has been rejected by the Fifth and Fourth Districts. See *Gray* 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 habitualoffender 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 with a minimummandatory term of fifteen years as a prison releasee reoffender. Minimum mandatory sentences are proper as long as theyrunconcurrently. *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. 2dDCA 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 D2074 (Fla. 1st DCA Sept. 9, 1999), concerning the issue of cruel or unusual punishment is incorrect or at least insufficient. *Turner* relies onlanguage from 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 wouldnote 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.

* * *

Criminal law-Probation revocation-Remand for entry of order specifying conditions violated

JIMMIE LLOYD JAMES, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 98-03189. Opinion filed November 24, 1999. Appeal from the Circuit Court for Polk County; Dick Prince, Judge. Counsel: James Marion Moorman, Public Defender, and Joanna B. Conner, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robert J. Krauss, Senior Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM .) We affirm the sentence imposed on violation of probation. On remand, the trial court shall enter an order specifying the conditions of probation that were violated, (ALTENBERND, A.C.J., and WHATLEY and SALCINES, JJ.. Concur,)

* * *

Estates--Limitation of actions-Trial court properly dismissed petition to reopen estate where claim was filed more than two years after decedent's death-Section 733.710, Florida Statutes (1997), is a statute of repose that bars untimely filed claims-Conflict certified

LUTHERAN BROTHERHOOD LEGAL RESERVE FRATERNAL BENEFIT SOCIETY, Appellant, v. ESTATE OF ROBERT F. PETZ, Deceased, Appellee. 2nd District. Case No. 99-00445. Opinion filed November 24, 1999. Appeal from the Circuit Court for Lee County; Hugh E. Starnes, Judge. Counsel: Ralf R. Rodriguez of Buchanan, Ingersoll Professional Corporation, Miami, for Appellant. Robert E. Bone, Jr. of Cottrell, Warchol, Merchant & Rollings, L.L.P, Cape Coral, for Appellee.

(CASANUEVA, Judge.) Lutheran-Brotherhood Legal Reserve Fraternal Benefit Society appeals an order dismissing with prejudice its petition to reopen the estate of Robert F , Petz. We affirm the trial court's determination that the petition was barred by operation of section 733.7 10, Florida Statutes (1997).

While insured under life insurance contracts issued by Lutheran Brotherhood, Robert F. Petz died on May 28, 1.990. His estate was opened with the appointment of his wife, Betty G. Petz, as personal representative. Prior to her appointment as personal representative, Lutheran Brotherhood paid to Mrs. Petz the death benefits due pursuant to Mr. Petz's various life insurance contracts. Without objection, Mrs. Petz accepted and retained these payments. Ultimately, the estate was closed by court order on May 16, 1991.

On June 24, 1997, six years later, Mrs. Petz initiated a civil action in Pennsylvania against Lutheran Brotherhood, alleging that she sustained damages caused by Lutheran Brotherhood's breach of certainlife insurance contracts. A thrust of her complaint was that Mr. Petz had twice forged her signature: first, on a release that

CERTIFICATE OF SERVICE

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

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

CYNTHIA J. DODGE
Assistant Public Defender
Florida Bar Number 0345172
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/cjd