IN THE SUPREME COURT OF FLORIDA

DEMETRIUS JONES,

Petitioner,

v. Case No. SC00-282

STATE OF FLORIDA,

Respondent.
____________________________/

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts is substantially correct for the purpose of this appeal.

SUMMARY OF THE ARGUMENT

ISSUE I:

A single sentence sentence was imposed, but under two separate sentencing statutes. Thus, Petitioner was correctly sentenced as an habitual felony offender and as a prison releasee reoffender, and that sentence does not violate double jeopardy.

ISSUE II:

The Prison Releasee Reoffender Act is constitutional; the arguments offered by Petitioner have been previously rejected.

ARGUMENT

ISSUE I

THE SENTENCE IMPOSED BY THE TRIAL COURT DID NOT VIOLATE DOUBLE JEOPARDY (Restated)

Petitioner's double jeopardy argument is without merit. Section 775.082(8)(c), Fla. Stat. (1997), provides "nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to section 775.084, Fla. Stat. (1997), or any other provision of law." Petitioner argues that this subsection is susceptible to two interpretations: (1) that a defendant can be sentenced both under the prison releasee reoffender act and as an habitual felony offender or (2) that the trial court has the option of selecting one or the other but not both and that the statute should be interpreted in a manner most favorable to the defendant. In this case, Petitioner argues that the interpretation should be that the court has the option of using the ACT or the habitual offender statute, but not both. The Petitioner is wrong. Petitioner can be legally sentenced as both a prison releasee reoffender and as an habitual felony offender to a single sentence encompassing both statutes.

Section 775.082(d)(1), Fla. Stat. (1997), states that, "It is the intent of the legislature that offenders

previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law*...*" When this section of the statute is read in para materia with section 775.082(c), Fla. Stat. (1997), it is clear that the trial court can impose a single sentence both as a prison releasee reoffender and as an habitual felony offender (if the defendant so qualifies). This is similar to the trial court imposing a 3 year minimum mandatory sentence for the use of a firearm under section 775.087(2), Fla. Stat. (1997), and a minimum mandatory sentence as an habitual violent felony offender. Such a sentence is proper so long as they run concurrently. *See* Jackson v. State, 659 So. 2d 1060 (Fla. 1995). In other words, a single sentence is being imposed but under two separate sentencing statutes.

Accordingly, because no multiple sentences have been imposed, Petitioner's sentence does *not* run afoul of the double jeopardy provision. The interpretation of the sentencing scheme by the Second District Court of Appeal should be affirmed.

ISSUE II

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL (Restated)

Petitioner attacks the Prison Releasee Reoffender Act, hereinafter referred to as the "ACT," on several constitutional grounds. The arguments advanced regarding single subject, separation of powers, vagueness, due process, equal protection, and ex post facto have been rejected by several courts; several of those decisions are currently under review by this Court and will not be readdressed in this brief. Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998); Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), *review granted* 740 So. 2d 529 (Fla. 1999); McKnight v. State,727 So. 2d 314 (Fla. 3d DCA), *review granted* __ So. 2d __ (Fla. 1999).; Cotton v. State, 728 So. 2d 251 (Fla. 2d DCA 1998), *review granted* 737 So. 2d 551 (Fla. 1999).

The ACT does not violate the prohibition against cruel and unusual punishment. At least three federal courts have rejected similar challenges to the federal "three strikes" statute. In United States v. DeLuca, 137 F. 3d 24, 40 (1st Cir. 1998), the First Circuit held that the Federal three strikes law does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. The

Seventh Circuit, in United States v. Washington, 109 F.3d 335 (7th Cir. 1997), agreed with the First Circuit by holding that the Federal three strikes law does not violate constitutional prohibitions against cruel and unusual punishment, ex post facto laws, double jeopardy provisions, equal protection clause, due process clause nor separation of powers doctrine. Again, in United States v. Farmer, 73 F. 3d 836 (8th Cir. 1996), the Eight Circuit concurred stating that the federal three strikes law against challenges alleging cruel and unusual punishment, ex post facto, equal protection, double jeopardy violations.

Petitioner's allegation that the mandatory term of imprisonment violates the cruel and unusual punishment provisions of the state and federal constitutions is amiss. The Florida Supreme Court, in State v. Benitez, 395 So. 2d at 518, rejected a challenge to the mandatory minimum sentences imposed for drug trafficking offenses. In doing so, the Court reiterated, "This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment." Id. "The dominant theme which runs through these decisions is that the legislature, and *not the judiciary* determines maximum and minimum penalties for violations of the law." Id.

A plurality of the United States Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual modes of punishment. *See* Harmelin v. Michigan, 501 U.S. 957, 965-66, 979-85 (1991). For example, in Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996), the Fifth Circuit ruled that a defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas' habitual offender statute, did not constitute cruel and unusual punishment. In Rummell v. Estelle, 445 U.S. 263 (1980), the Supreme Court of the United Stated held that a defendant's sentence of life imprisonment did not constitute cruel and unusual punishment for conviction of obtaining one hundred and twenty one dollars by false pretenses where the sentence was enhanced by recidivist statute. Therefore, Petitioner has not demonstrated that his enhanced punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

Accordingly, the Act is constitutional.

CONCLUSION

WHEREFORE the determination of the Second District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William L. Sharwell, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33831 this _____ day of March, 2000.

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