IN THE SUPREME COURT OF FLORIDA

FRED REUBEN CLARKE,

Petitioner,

v. CASE NO. SC00-305

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in Courier New (12 point) proportionately spaced.

Petitioner was the defendant in the criminal division of the circuit court of the Fourteenth Judicial Circuit in and for Bay County, Florida, and the appellant in the First District Court of Appeal. Respondent was the prosecution and appellee below.

The parties will be referred to as they appear before this Honorable court. The following symbols will be used: References to the record on appeal shall be by the letter "R" followed by the page number. References to the trial transcript shall be by the letter "T" followed by the page number. References to the

supplemental record on appeal shall be by the letters "SR" followed by the page number.

STATEMENT OF THE CASE

Petitioner, Fred Reuben Clarke, was charged by information with battery on a law enforcement officer in Count I, felony fleeing in Count II, reckless driving in Count III, driving while license suspended in Count IV, and leaving the scene of an accident with property damage in Count V. (R 20-21) Prior to trial, petitioner pled guilty to driving while license suspended in Count IV of the information and was sentenced to time served. (R 39-40, 97-99)

Petitioner proceeded to a jury trial on the remaining counts. For purposes of trial, Count V, the leaving the scene with property damage charge, was renumbered as Count IV.

The jury returned a verdict of guilty as charged in the information in Count I, a verdict of guilty to the lesser offense of fleeing or attempting to elude in Count II, and verdicts of guilty as charged in the information in Count III and the renumbered Count IV. (R 44-45) Petitioner was adjudicated guilty and sentenced to five years in the Department of Corrections as both an habitual violent felony offender and prison releasee reoffender in Count I. Petitioner was also sentenced to time served in Counts II, III, and V.

On direct appeal to the First District Court of Appeal,

petitioner's convictions and sentences were affirmed. The First District Court of Appeal certified the same question it certified in Woods v. State, 740 So.2d 20 (Fla. 1st DCA), review granted, 740 So.2d 529 (Fla. 1999) as one of great public importance:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AT SECTION 775.082(A), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

Clarke v. State, 24 Fla. L. Weekly D2505 (Fla. 1st DCA Nov. 1, 1999). On February 9, 2000, the First District Court of Appeal denied petitioner's motion for rehearing and certification.

Notice of intent to seek discretionary review was filed by petitioner on February 11, 2000. On February 15, 2000, this Court issued an order postponing decision on jurisdiction and briefing schedule. This merits brief follows.

STATEMENT OF THE FACTS

Officer Wesley, of the Springfield Police Department, testified that in March 1998, he was working as a police officer for the city of Springfield. On March 7, 1998, he was driving west on 11th Street when he observed a vehicle run off the side of the road. The driver came back up onto the roadway and passed him by Rutherford High School at School Avenue. According to Wesley, the driver went completely down in the bus

off-loading ramp. Wesley turned around and turned on his blue lights. This was between 12:30 and 1:00 a.m. He was in a white patrol car with the City of Springfield on the side of the car. (T 17-19) Wesley tried to stop the driver, but the driver came back up onto the highway around Ram Road. The driver went across the center dividing line and he was making sharp movements back and forth across the highway. Wesley turned his siren on and tried to stop the vehicle but the vehicle rapidly picked up speed and took off. This was between 11th and Helen and Sanders. While eastbound on 11th, the vehicle made sharp erratic movements back and forth across the highway. According to Wesley, the vehicle was a black Firebird or Trans Am. (T 20-21) The driver turned on Transmitter going north. The driver ran a red light, lost control, and was fishtailing back and forth across the highway. Wesley followed him 60 miles an hour in a 40 mile per hour zone on Transmitter. Petitioner turned into a trailer park at 1401 Transmitter Road. At the time, petitioner stepped on his gas, spun the car around, and the back of his car hit a pine tree. Petitioner came back out on the highway and spun and hit the front of the officer's vehicle. (T 20-23)

According to Wesley, his car was struck in the front end on the push pad and the left corner which would be the driver's side front corner. In other words, he was side-swiped. Petitioner's car took off and he turned into another trailer

park at 1329. Wesley had his lights and siren still going. Petitioner pulled in right under a tree. Wesley pulled in behind. Petitioner got out of the vehicle and Wesley told him to stop. According to Wesley, petitioner said, “Fuck you, fuck boy, I made it home, you can’t do shit to me.” Petitioner took off running. Wesley grabbed him by his left arm and pulled him around. Petitioner pushed him in the chest trying to break free. Wesley testified that petitioner started striking him in the chest and arm. As a result, Wesley testified that he had a big bruise on his right arm. Wesley eventually gave petitioner a knee strike to the stomach and when petitioner bent over, he turned him around, rammed him into his car, and bent him over the car and handcuffed him. (T 24-27, 29) Wesley also testified that Sergeant Roswell was in charge of the accident investigation.

Sergeant Roswell, of the Springfield Police Department, testified that petitioner was in custody upon his arrival. Roswell observed damage to a pine tree and skid marks in the dirt. He also observed damage to the front bumpers and push guards on Wesley’s patrol car. The Firebird had damage to the right fender from striking the pine tree and damage to the left driver’s door and left fender from striking the patrol car. (T 42-44) Petitioner’s car was not black; it was silver. (T 47)

Petitioner testified that he lives at 1329 North Transmitter, lot number 1 and that he has two prior felony

convictions. On March 6, 1998, he went to his mother's house that evening. His mother lives on Everett Avenue. After he left his mother's house, he went down 11th to Everett, to Business 98, took a right, went up to School Avenue, and took a left down 11th. He was traveling east at 45 miles per hour. (T 61-63) Petitioner testified that he was not going on and off the road. He did not go into the bus loading zone at Rutherford. He observed a vehicle coming towards him that he knew was law enforcement. He hit his brakes. According to petitioner, the officer passed him and he didn't observe the officer turn around. Petitioner took a left on Transmitter from 11th and the officer came up behind him. He was not fishtailing. He was however, going 50 miles per hour. The officer turned his lights on by Phillips Meat Market on Transmitter. According to petitioner, the officer activated his blue lights twice. Petitioner was fifty yards from his house so he pulled into his driveway. (T 64-67)

Petitioner parked his car, opened his door, and the officer grabbed his arm, snatched him out of the car, grabbed him by the back of the neck, spun him around, kneed him in his stomach, slammed him into the car, and handcuffed him. (T 68) As a result, petitioner had a knot on his head. Petitioner told the officer that roughing him up was not necessary. Petitioner testified that he did not strike the officer in the chest nor did he hit him in his arm. There was no physical contact.

Petitioner denied striking the tree or striking the patrol car. There was no damage to petitioner's car. Petitioner also testified that he did not leave the scene of the accident, did not swerve on and off the road, did not swing at or push or kick the cop, and did not say I'm home, you can't arrest me. (T 68-71)

SUMMARY OF THE ARGUMENT

Issue I: Section 775.082, Florida Statutes (1997), (Prison Releasee Reoffender Act) violates the separation of powers provision of the Florida Constitution because it delegates to the State Attorney, an executive branch official, the power to make the final determination as to what sentence to impose upon a qualifying offender, an inherently judicial function. Section 775.082, Florida Statutes (1997) also violates the single subject rule of the Florida Constitution because its passage in Chapter 97-239, Laws of Florida, was accompanied by numerous other provisions not logically related to the subject matter of prison releasee reoffenders or the means utilized to achieve enhanced sentencing of prison releasee reoffenders.

Issue II: Petitioner's sentences under both the Prison Releasee Reoffender Statute and the Habitual Violent Felony Offender Statute violate the double jeopardy clauses of both the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution. The double

jeopardy clause protects against multiple punishments for the same offense.

Issue III: It was error to sentence petitioner as an habitual violent felony offender. Respondent failed to meet its burden to get the enhanced sentencing under Section 775.084(1)(b), Florida Statutes (1997) by failing to prove and introduce into evidence the certified copies of one of the statutorily enumerated prior felonies.

ARGUMENT

ISSUE I

PETITIONER'S SENTENCE AS A PRISON RELEASEE REOFFENDER IS ILLEGAL WHERE THE PRISON RELEASEE REOFFENDER STATUTE WAS ENACTED IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION AND THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION.

Petitioner was sentenced to five years in prison as a prison releasee reoffender upon his conviction for battery on a law enforcement officer. Petitioner's sentence as a prison releasee reoffender is unconstitutional.

The Prison Releasee Reoffender Act is unconstitutional in two respects. First, it violates the separation of powers provision of the Florida Constitution. Article III, Section 3, Florida Constitution. Second, it violates the single subject requirement of the Florida Constitution. Article III, Section 6, Florida Constitution.

The Prison Releasee Reoffender Act, Section 775.082, Florida Statutes (1997), as construed in Woods v. State, 740 So.2d 20 (Fla. 1st DCA), review granted, 740 So.2d 529 (Fla. 1999) violates the separation of powers provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the State Attorney as an official of the executive branch. The Act provides that the State Attorney, upon a showing that an offender qualifies as a prison releasee reoffender, shall have the discretion to determine whether the offender shall be subject to the mandatory sentencing provisions of the Act upon consideration of certain subjective criteria including the wishes of the victim and "other extenuating circumstances" which preclude "just prosecution" of the offender.

The legislature cannot delegate to the State Attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby prohibit the court from performing its inherent judicial function of imposing sentence. The legislature may enact mandatory sentences. See, O'Donnell v. State, 326 So.2d 4 (Fla. 1975) (finding thirty-year minimum mandatory sentence for kidnapping constitutional). The State Attorney enjoys virtually unlimited discretion in making charging decisions. State v. Bloom, 497 So.2d 2 (Fla. 1986). But the power to impose within the limits provided by law is traditionally vested in the judiciary. Smith v. State, 537

So.2d 982, 986 (Fla. 1989).

Florida's habitual offender law, Section 775.084, Florida Statutes, does not offend the separation of powers principle. Although the State Attorney may seek habitual offender sentencing, the trial judge retains discretion to find such enhanced sentencing not necessary for the protection of the public. Seabrook v. State, 629 So.2d 129, 130 (Fla. 1993). Similarly, in State v. Benitez, 395 So.2d 514 (Fla. 1981), the mandatory sentence provided for drug trafficking was accompanied by an "escape valve" which can only be triggered by initiative of the State Attorney. In Benitez, the statute did not violate the separation of powers provision because it vested in the prosecution only the narrow authority to determine whether a defendant had provided substantial assistance, an area particularly within the knowledge of the prosecutor. In addition, the separation of powers clause was not offended because the trial court retained the final discretion on what sentence to impose. Id.

The Prison Releasee Reoffender Act is different, however. When the State Attorney makes a decision to charge an offender as a prison releasee reoffender, the State Attorney also makes the final determination as to sentence to be imposed. The legislature has no authority to delegate to the executive branch an inherent judicial power. Gough v. State ex rel Sauls, 55 So.2d 111, 116 (Fla. 1951) (legislature without authority to

delegate to Avon Park city council power to determine legality of validity of votes cast). In the present case, the decision of the State Attorney to charge a defendant as a prison releasee reoffender constituted a decision by the State Attorney as to what sentence to impose. In this respect, the Prison Releasee Reoffender Act violates the separation of powers doctrine.

In the alternative, petitioner notes that the Second and Fourth District Courts of Appeal have found the Prison Releasee Reoffender Act constitutional, but have interpreted the Prison Releasee Reoffender Act to retain sentencing discretion with the trial court. In State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), review granted, 737 So.2d 551 (Fla. 1999) and State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), review granted, 741 So.2d 1137 (Fla. 1999), the district courts held that the trial court retained the discretion to apply the statutory exceptions even where the State Attorney seeks enhanced sentencing and impliedly rejects the statutory exception. Thus, in the alternative, petitioner requests that this Court adopt the rationale of the Second and Fourth District Courts of Appeal should it find the Prison Releasee Reoffender Act constitutional.

The Prison Releasee Reoffender Act also violates the single subject requirement of the Florida Constitution. Article III, Section 6, Florida Constitution. The legislation challenge

in this case was passed as Chapter 97-239, Laws of Florida. It created the Prison Releasee Reoffender Act and was placed in Section 775.082, Florida Statutes (1997). This new law amended or created Sections 944.705, 947.141, 948.06, 948.01, and 958.14. These various provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the department to when a court may place a defendant on probation or in community control if the person is a substance abuser. See, Sections 948.01 and 958.14, Florida Statutes (1997). Other matters encompassed within the Act included expanding the category of persons authorized to arrest a probationer or person on community control for a violation. See Section 948.06, Florida Statutes (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is the provision creating Section 944.705, Florida Statutes (1997). This section requires the Department of Corrections to notify every inmate of the consequences of the Act for the commission of criminal activity within three years of release from prison. The other subjects are not reasonably connected or related and are not part of a single subject.

In Bunnell v. State, 453 So.2d 808 (Fla. 1984), this Court struck an act for containing two subjects within it. This Court noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the

legislation, citing to Kirkland v. Phillips, 106 So.2d 909 (Fla. 1958). However, even if the title of the act gives fair notice, as the legislation did in Bunnell, another requirement of the single subject provision is to allow intelligent law-making and to prevent logrolling of legislation. State ex rel Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935); and Williams v. State, 100 Fla. 1054, 132 So. 186 (1936). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. State v. Lee, 356 So.2d 276 (Fla. 1978). The Florida Constitution specifically prohibits this kind of legislation in Article III, Section 6.

This Court's decision in Burch v. State, 558 So.2d 1 (Fla. 1990) is distinguishable because although complex, the legislation there was designed to combat crime through fighting money laundering and educational programs to foster safer neighborhoods. The means by which this subject was accomplished involved amendments to several statutes which by itself does not violate the single subject rule. The statute at bar, although less comprehensive in total scope as the one considered in Burch is less contained in its subject. It violates the single subject rule because the provisions dealing with probation violations, arrest of violators and forfeiting of gain time for violations of control release are not

reasonably related matters to specific mandatory punishment provisions for persons convicted of certain enumerated crimes within three years of release from prison. If the Florida Constitution's single subject rule means only that "crime" is a subject, then the legislation can pass review, but that is not the rationale utilized by this Court in considering whether acts of the legislature comply. The proper manner to review the statute is to consider the purpose of the various provisions, and the means provided to accomplish those goals and then the conclusion will be clear that several subjects are contained in the legislation. Bunnell, supra; State v. Johnson, 616 So.2d 1 (Fla. 1993); Burch, supra; State v. Thompson, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999).

Accordingly, this cause must be reversed and remanded with directions that petitioner's sentence as a prison releasee reoffender be vacated.

ISSUE II

PETITIONER'S SENTENCES UNDER BOTH THE HABITUAL VIOLENT FELONY OFFENDER STATUTE AND THE PRISON RELEASEE REOFFENDER STATUTE FOR THE SAME OFFENSE VIOLATE THE DOUBLE JEOPARDY CLAUSES OF BOTH THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Petitioner was sentenced to a five year mandatory minimum sentence in the Department of Corrections under both the Prison Releasee Reoffender Statute and the Habitual Violent Felony

Offender Statute. (R 59-63, 66-68, 89, 93) Petitioner's sentences under both statutes violate the double jeopardy clauses of both the Florida and Federal Constitutions by punishing petitioner twice for the same conviction.

Preliminarily, this Court may reach the merits of petitioner's claim despite the lack of an objection below. The prohibition against double jeopardy is fundamental. Benton v. Maryland, 395 U.S. 784, 795-96, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707 (1969). See also, State v. Mancino, 714 So.2d 429 (Fla. 1998) (a sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal and constitutes fundamental error.)

The double jeopardy clause of both the United States Constitution and the Florida Constitution guarantee that no person shall twice be put in jeopardy for the same offense. Part of that protection is against multiple punishments for the same offense. See, Lippman v. State, 633 So.2d 1061, 1064 (Fla. 1994). In the instant case, petitioner has received two separate sentences for the same offense.

In Adams v. State, 24 Fla. L. Weekly D2394, 2395 (Fla. 4th DCA Oct. 20, 1999), the Fourth District Court of Appeal examined the Prison Releasee Reoffender Statute in determining that the imposition of separate sentences under the Habitual Felony Offender Statute and under the Prison Releasee Reoffender Statute for the same offense constitutes a violation

of the double jeopardy clause:

> A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a Prison Releasee Reoffender and a Habitual Offender. Section 775.082(8)(c) states: "Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to Section 775.084 or any other provision of law." We conclude that this section overrides the mandatory duty to sentence a qualifying defendant as a Prison Releasee Reoffender under Section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.
>
> * * * *
>
> Furthermore, Section 775.021(4)(b) states:
>
> > 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...exceptions to this rule of construction are: 1. Offenses which require identical elements of proof.
>
> 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. The imposition of a sentence under both statutes constitutes double jeopardy and is illegal.

In Lewis v. State, 25 Fla. L. Weekly D144 (Fla. 5th DCA Dec. 30, 1999), the Fifth District Court of Appeal adopted the reasoning of the Fourth District in Adams, supra, in holding that sentences under both the Habitual Felony Offender Statute

and the Prison Releasee Reoffender Statute for the same offense is a violation of double jeopardy. However, in Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999), the Second District Court of Appeal has held to the contrary.

Petitioner requests that this Court adopt the rationale of the Fourth District Court of Appeal and reverse this cause with directions to vacate petitioner's sentence under the Prison Releasee Reoffender Statute. This is consistent with legislative intent should this Court find the Prison Releasee Reoffender Statute constitutional in that petitioner's sentence as an habitual violent felony offender is the harsher sentence because of the collateral consequences of being declared an habitual violent felony offender. Carafas v. LaValle, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). For instance, if the petitioner was convicted of another qualifying offense four years after his release from prison for the instant offense he would be subject to be enhanced sentencing provisions of the Habitual Felony Offender Statute because the new offense is within five years of his release but he would not be subject to the enhanced sentencing provision of the Prison Releasee Reoffender Statute because the new offense would be more than three years from his release from prison.

Accordingly, petitioner's sentence must be reversed and remanded for vacation of the Prison Releasee Reoffender sentence.

ISSUE III

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS AN HABITUAL VIOLENT FELONY OFFENDER.

The trial court found petitioner to be an habitual violent felony offender and sentenced him as such to five years in the Department of Corrections upon his conviction for battery on a law enforcement officer. (R 59-63, 67-68, 89, 93) No evidence, however, was introduced to support habitualization. The state did not introduce into evidence certified copies of petitioner's prior felony conviction for purposes of habitualization. The clerk of the circuit court has certified that there were no certified copies of prior judgments and sentences introduced into evidence at the sentencing hearing. (SR 108) Therefore the procedure utilized in this case did not comport with due process of law and petitioner is entitled to a new sentencing hearing.

All that is required to be sentenced as an habitual violent felony offender is that the state meet its burden of proving one of the statutorily enumerated predicate felonies and that the felony for which a defendant is being sentenced must have been committed within five years of his release from prison. Section 775.084(1)(b), Florida Statutes (1997). It is incumbent upon the state for purposes of habitualization to furnish proof of the following three dates: 1) the date of the current felony offense, 2) the date of the conviction for the

last prior enumerated felony, and 3) the date the defendant was released from prison imposed for the last felony conviction. Reynolds v. State, 674 So.2d 180 (Fla. 2d DCA 1996). Section 775.084(3)(a)4, Florida Statutes (1997) requires a trial judge to make findings:

> (3)(a) In a separate proceeding, the Court shall determine if the Defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows: 4. Each of the findings required as a basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

Due process principles apply in proceedings to determine whether a defendant is to be sentenced as an habitual offender. Specht v. Patterson, 386 U.S. 605 (1967). Here, the record does not reflect that the state submitted any evidence upon which the trial court could rely. King v. State, 590 So.2d 1032 (Fla. 1st DCA 1991); Pompa v. State, 635 So.2d 114, 116 (Fla. 5th DCA 1994). In short, the state failed to introduce into evidence certified copies of petitioner's prior felony conviction. All the court had to rely upon in arriving at its finding was the state's oral representations in court. Thus, the state failed to meet its burden to prove that under Section 775.084 petitioner's prior conviction was a valid conviction therefore the state failed to meet its burden of proof by a preponderance of the evidence.

Thus, petitioner's sentencing hearing violated due process

and the trial court's finding is erroneous. Petitioner's sentence as an habitual violent felony offender is therefore illegal and his sentence as such must be vacated.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, petitioner respectfully requests this court to quash the opinion of the First District Court of Appeal and reverse this cause.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this _____ day of February, 2000.

Respectfully submitted,

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APPENDIX