In the Supreme Court of Florida

Case No. SC00-518

Fredrick Snell,

Petitioner/Appellant,

v.

The State of Florida,

Respondent/Appellee.

On Discretionary Review of a Decision
of the First District Court of Appeal

Reply Brief of Petitioner on the Merits

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FREDRICK SNELL,

PETITIONER/APPELLANT,

V.

THE STATE OF FLORIDA,

RESPONDENT/APPELLEE.

_____/

PRELIMINARY STATEMENT

PETITIONER FILES THIS REPLY TO THE BRIEF OF RESPONDENT, WHICH WILL BE REFERRED TO AS "RB," ON THE QUESTIONS REGARDING THE CONSTITUTIONALITY OF § 775.082(8), FLA. STAT. (1997), THE PRISON RELEASEE REOFFENDER [PRR] ACT, AND WHETHER THE TRIAL COURT ERRED IN IMPOSING A PRR SENTENCE ON AN OFFENSE THAT MAY HAVE BEEN COMMITTED PRIOR TO THE STATUTE'S EFFECTIVE DATE, AND WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT CREDIT FOR TIME SERVED AS IT APPEARS IN THE RECORD, RESULTING IN AN ILLEGAL SENTENCE.

CITATIONS IN THIS BRIEF TO DESIGNATE RECORD REFERENCES ARE AS FOLLOWS:

"R. __" — RECORD ON APPEAL, VOL. I;

"T. __" — TRANSCRIPT OF PROCEEDINGS, VOLS. II AND III;

"SR._" — Supplemental Record, designated Vol. 1 of 1 (sentencing).

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

Pursuant to an Administrative Order of this Court dated July 13, 1998, counsel certifies that this brief is printed in 14 point Times Roman, a proportionately-spaced, computer-generated font and submitted on a disk in WordPerfect format.

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ARGUMENTS

ISSUE I— AS CONSTRUED IN WOODS V. STATE, THE ORIGINAL PRR ACT DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION, AND ALSO VIOLATES SEVERAL OTHER CONSTITUTIONAL PROVISIONS.

The Certified Question

Florida's constitution, art. II, §3, divides the powers of state government into legislative, executive, and judicial branches and says that "no person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein". The original PRR act, as interpreted by the district court in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), rev. granted, 740 So. 2d 529 (Fla. 1999), violates that 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.

Petitioner relies on the arguments made in the initial brief on the merits at 8-27.

Other Constitutional Violations

In addition to its decision on separation of powers, the district court rejected petitioner's additional constitutional claims that the act violates the single-subject

rule, that it constitutes cruel and unusual punishment, that it violates equal protection because it does not bear a rational relationship to legislative intent, and finally that it violates due process because it gives the victim discretion over sentencing, because it is void for vagueness and because it invites arbitrary application. the petitioner replies to respondent on each of these concerns below.

single subject requirement

respondent claims that "petitioner lacks standing to raise a single subject challenge," citing rollinson v. state, 743 so. 2d 585 (fla. 4th dca 1999) (rb at 17). petitioner's single offense occurred sometime between <u>january, 1997</u>, and <u>july 15, 1997</u> (r. 4). the prr act challenged in this case was passed as ch. 97-239, laws of fla. it became law without the signature of the governor on may 30, 1997.

rollison erroneously states that a defendant whose offense occurred after may 30, 1997, has no standing because the session law was re-enacted into the florida statutes on may 30, 1997. not so. that was the <u>original effective date</u> of the session law. it was not re-enacted into the florida statutes until march 25, 1999. ch. 99-10, laws of fla.

petitioner has standing to press his single subject challenge, and relies on the arguments contained in the initial brief, and on this court's recent decision in heggs v. state, 25 fla. law weekly s137 (fla. feb. 17, 2000), which invalidated on single subject grounds certain amendments to the sentencing guidelines which were contained in the same session law, ch. 95-184, laws of fla., as provisions dealing with domestic violence.

cruel and/or unusual punishment
vagueness
due process
equal protection

respondent addresses these arguments in 6 ½ pages (rb at 17-23). respondent believes a prison sentence can never be cruel or unusual. petitioner would point out that this court in hale v. state, 630 so. 2d 521 (fla. 1993), recognized that it could be, at least under the florida constitution. petitioner relies on his discussion of the other sub-issues in the initial brief at 31-42.

Issue II — If sentencing under the PRR Act is within the trial court's discretion, the case must be remanded for the trial court to exercise that sentencing discretion.

Respondent's sole argument on this issue is that State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999), is no longer good law because the statutory exceptions contained in the original PRR Act were removed by the Legislature by Ch. 99-188, Laws of Fla. However, Ch. 99-188 became effective on July 1, 1999, which was long after the dates of petitioner's single offense, January, 1997, and July 15, 1997, and, indeed, long after his sentencing date of September 19, 1998 [R. 6; 143].[1]

This Court has held that legislative enactments which occurred subsequent to a defendant's sentencing date cannot be used to bar the defendant's claims. State v. Trowell, 739 So. 2d 77, 78, n. 1 (Fla. 1999).

Likewise, in State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA), rev. granted, 741 So. 2d 1137 (Fla. 1999), the Fourth District held that even for those shown by the prosecutor to qualify

[1] Respondent fails to acknowledge that the original PRR Act was renumbered in Ch. 98-204, Laws of Fla., effective October 1, 1998, so at least as of that date, the Legislature had not yet decided to abandon the mitigating circumstances contained in the original Act.

under the act, the trial court could decide whether to impose a prr sentence. true to form, respondent has totally failed to address the state v. cotton and state v. wise positions in its brief.

if this court finds that the trial court retains the power to impose or decline to impose a prr sentence on a qualifying offender, petitioner's sentence must be vacated and the case remanded for the trial court to exercise that discretion. cf. crumitie v. state, 605 so. 2d 543 (fla. 1st dca 1992) (remand proper remedy where the judge thought a life sentence was mandatory for an habitual violent offender). moreover, any doubt as to whether the trial court knew it could exercise discretion must be resolved in favor of resentencing. cf. white v. state, 618 so. 2d 354, 355 (fla. 1st dca 1993) (where trial court might have misapprehended scope of its discretionary sentencing authority, sentences and case remanded for trial court to reconsider sentencing options).

<u>Issue III</u> — It was fundamental reversible error, and a denial of due process, to impose a prison releasee reoffender sentence for an offense committed prior to the effective date of the statute; and the sentence is illegal as a result.

The "prison releasee reoffender" statute, section 775.082(8), Fla. Stat., was created by Laws 1997, Ch. 97-239, §2, and became law effective May 30, 1997. Mr. Snell was charged in Count I with a single offense allegedly committed sometime between January 1, 1997, and July 15, 1997. [R. 6]. The alleged dates of the single offense in Count I squarely straddle the effective date of this statute, and the general verdict does not specify the date of commission of the single offense of which Mr. Snell was convicted and for which he was sentenced as a PRR.

Clearly, the PRR statute, consistent with due process, cannot be constitutionally applied to impose punishment for an offense committed prior to the date it became law. Because the general verdict does not state the date the jury found the single offense to have been committed, and because it is entirely possible that the jury found Mr. Snell guilty of the single offense based upon evidence of an act committed prior to May 30, 1997 — when the PRR statute became law — the imposition of a PRR sentence is

unconstitutional, a violation of due process, and the PRR sentence is illegal because it was not authorized by law at the time of commission of the offense. the state concedes that this statute cannot be applied to crimes committed before the statute's effective date [RB. 39]. it is the general verdict on a single count of sexual battery that is wholly ambiguous as to the jury's finding of the date of the single act upon which the jury found the crime to have been committed. although there is evidence in the trial record of acts both before and after the effective date of the PRR statute, either of which would support the jury's verdict of guilty of the single act alleged, there is simply no way to determine what evidence the jury relied upon in convicting mr. snell. where such a scenario implicates the application of conflicting sentencing statutes, as it does here, the rule of lenity requires that the defendant be given the benefit of the doubt and that he be sentenced under the more favorable sentencing alternative. griffith v. state, 654 so. 2d 936 (fla. 4th dca)(corrected opinion on motion for rehearing), quashed in part on other grounds, affirmed in part, state v. griffith, 675 so. 2d 911 (fla. 1996). see also, gilbert v. state, 680 so. 2d 1132 (fla. 3d dca 1996).

In State v. Griffith, 675 So. 2d 911 (Fla. 1996), this court did not discuss the application of the rule of lenity to construe the verdicts, as had the district court, but this court simply proceeded from the position that Griffith was a juvenile under age 16 when the offenses were committed, leaving the district court's construction of the verdicts undisturbed. The factual scenario presented in Griffith is very similar to that in this case in that the charges in both cases straddled periods of time that effected how the defendants would be sentenced, as an adult or a juvenile under 16 in Griffith's case, or under the guidelines or as a PRR offender in the instant case. Evidently, in Griffith, the evidence presented may have shown that the offenses were committed both before and after he turned age 16. Respondent's response to State v. Griffith is that it was incorrectly decided and contrary to State v. Whitton [RB. 46], in which none of the acts occurred prior to the effective date of the RICO statute. Griffith v. State and State v. Griffith, which do no conflict with regard to the determination of Griffith's age at the time of the offense for the purpose of sentencing, are controlling.

The Respondents reliance upon Burkett v. State, 731 So.

2D 695 (Fla. 2D DCA 1998), is misplaced. The case dealt with a declaration as a sexual predator; but such a declaration has been recognized not to be punishment, and is not a "sentence" effecting a liberty interest. It is thus distinguishable.

Respondent speaks of "continuing offense" in its arguments [RB. 39]. While a time span was alleged in this case, but one offense was alleged. Sexual battery is not a "continuing offense," but fully completed upon "union or penetration" without the victim's consent. Thus Jenkins v. State, 444 So. 2D 1108 (Fla. 1st DCA 1984), is also distinguishable as involving an on-going, continuing conspiracy. The same must be said for the cases from other states and the Supreme Court cited by respondent in support of its arguments. Each case involved, it appears, continuing offenses such as conspiracy or possession, while sexual battery is not.

Respondent also continues to rely on the arguments and authorities he presented in his initial brief.

<u>Issue IV</u> — the court committed fundamental reversible error when it failed to grant appellant credit for time served prior to sentencing.

Mr. Snell was arrested on September 18, 1997, pursuant to a warrant issued the day before, on the charge of sexual battery [R. 1-2]. On September 19, 1998, the court rendered a judgment and sentence. [R. 140-144]. The judgment reflects that Mr. Snell was given no credit for any time spent in custody prior to sentencing, that provision of the judgment not having been checked and having been left entirely blank [R. 143]. The court did not announce that Mr. Snell would be given credit for time served at sentencing [see SR. 38-40]. The record facially demonstrates that at least 1 year and 1 day credit was due, but the court failed to grant credit for that time served.

A sentence that fails to grant credit for time served is an illegal sentence, and thus, fundamental error. State v. Mancino, 714 So. 2d 429 (Fla. 1998). Mancino, in addition to directly holding that the failure to grant credit results in an illegal sentence, as this court has applied its principles, further held, "a sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" Statutory law mandates that such credit be given.

§ 921.161, Fla. Stat. The Supreme Court stated in Mancino that "since a defendant is entitled to credit for time served as a matter of law, 'common fairness, if not due process, requires that the state concede its error and correct the sentence 'at any time.'"

Without acknowledging that this is an issue of fundamental error or one that will affect the outcome of the case regardless of the resolution of the claims concerning the PRR act, the Respondent argues that this is the wrong forum to address the issue, but rather that it must be raised via a 3.800 motion in the trial court [RB. 48]. This issue was raised in the district court and affirmed without comment. This, however, is an appropriate forum to again raise the issue because (1) it resulted in an illegal sentence, Davis v. State, 661 So. 2d 1193 (Fla. 1995), and Mancino; (2) is fundamental error, Whitted v. State, 363 So. 2d 668 (Fla. 1978); and (3) because it will affect the outcome of the case, Trushin v. State, 425 So. 2d 1126 (Fla. 1983)("once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case"). See also, Savoie v. State, 422 So. 2d 308 (Fla. 1982); Zirin v. Charles Pfizer & Co., Inc., 128 So. 2d 594 (Fla. 1961); Bell v.

state, 394 so. 2d 979 (fla. 1982)("our review power is not limited to the certified question only.").

Regardless of the prr's constitutional issues, this sentence is an illegal sentence because the trial court failed to grant credit for time served, which resulted in petitioner having been committed to serve a mandatory 30 years as a prr offender plus approximately a year and a day prior to trial, a total sentence exceeding the maximum sentence authorized by the statute under which he was sentenced. davis v. state, 661 so. 2d 1193 (fla. 1995 (an illegal sentence is one exceeding the statutory maximum). this court's resolution of this issue will effect the outcome of the case even if the prr sentence imposed is allowed to stand. the sentence must be reversed and remanded for a determination of the amount of credit to be granted and the granting of such credit against the sentence.

conclusion

petitioner, fredrick snell, based on the arguments contained herein and the authorities cited in the initial brief, respectfully urges the court to answer the certified question in the affirmative, declare the prr act unconstitutional, to disapprove and quash the decision of the district court, and to remand with directions to resentence petitioner in accord with its disposition of the issues, and to grant such other relief the court deems just and equitable.

respectfully submitted,

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certificate of service

I hereby certify that a true and correct copy of the foregoing was furnished by delivery to Charmaine M. Millsaps, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the appellant by U.S. Mail, first-class postage prepaid, on April _____, 2000.

_____

Fred P. Bingham II