In the Supreme Court of Florida

CASE NO. SC00-519

LEONARD McKINNEY,

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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_____/

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 failing to grant credit for time served against respondent's sentence.

Citations in this brief to designate record references are as follows:

"R. __" — Record on Appeal, Vol. I, paginated 1 through 195, including transcripts of sentencing, motion for new trial, motion to declare § 775.082(8) unconstitutional [R. 126-194];

"T. __" — Transcripts trial of proceedings, Vols. II-IV, pp. 1-444, paginated consecutive to each other, but non-consecutive to Vol. I;

"SR. __" — Supplemental Record (transcript of motion to suppress

identification).

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 a 14 point proportionately-spaced, computer-generated font and submitted on a disk in WordPerfect format.

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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 5-27.

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 7). Petitioner's crime occurred on January 8, 1998. [R. 8-9]. 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 original effective date 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 at 8-27, 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 2 ½ pages (RB at 18-20).

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 27-41.

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.

Petitioner's view that the judge did not know that he had discretion not to sentence petitioner as a PRR is demonstrated by his treatment of the state's request that he sentence petitioner as a violent career criminal. The state had asked that petitioner be sentenced as a violent career criminal under §775.084(1)(c), Fla. Stat. (1997) (I R 17-18) and a prison releasee reoffender (I R 19). The judge recognized that he had discretion to decline to sentence petitioner as a violent career criminal and in fact did not do so, citing four mitigating circumstances: (1) the crimes did not involve violence; (2) petitioner lived with the victims; (3) burglary is not as violent a crime as the other violent crimes in the statute; and (4) petitioner had shown remorse[1] (I R 109-11).

Respondent totally fails to address this argument in its brief.

The judge failed to recognize that he also had discretion not to sentence petitioner as a prison releasee reoffender. In *State v. Cotton*, 728 So. 2d 251 (Fla. 2nd DCA 1998), *rev. granted*, 737 So. 2d 551 (Fla. 1999), which was decided after petitioner's sentencing hearing, the court held that the judge still retains discretion to sentence a defendant under the statute, or to impose a sentence under the habitual offender statute.

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[1] These mitigating circumstances could qualify as such under § 775.082(8)(d)1.d., Fla. Stat. (1997): "Other extenuating circumstances exist which preclude the just prosecution of the offender."

Respondent claims that *State v. Cotton* is no longer good law because the statutory exceptions to the original PRR Act were removed by the legislature in Ch. 99-188, Laws of Fla., effective on July 1, 1999, which was long after petitioner's January 8, 1998 crime, and his sentencing date of June 10, 1998 [R. 8-9; R. 82-89].[2]

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, note 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 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

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[2] 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.

(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).

ISSUE III — THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO GRANT CREDIT FOR TIME SERVED ON COUNT III, RESULTING IN THE IMPOSITION OF AN ILLEGAL SENTENCE

Respondent repeatedly asserts that "the record does not show entitlement to relief on its face nor does it identify the court record which demonstrate that he is entitled to more jail time credit than he actually received." [RB. 35; 39].

To the contrary, the records show, and the respondent has consistently argued, that he was arrested on January 10, 1998, on all charges [R. 1, Arrest Affidavit], and he was charged by Information on January 30, 1998, with burglary of an occupied conveyance, unarmed robbery, and burglary of an occupied structure, all offenses allegedly occurring on January 8, 1998 [R. 8-9]. Furthermore, the judgment credits him with 152 days of pre-sentencing custody as to the concurrent sentences on Counts I and II only, but credits zero (0) days as to Count III, a sentence imposed consecutive to Counts I and II. [R. 82-89]. At sentencing, however, the court orally announced Mr. McKinney would receive full credit for time served, 152 days. [R. 193-94]. This is sufficient record of arrest and the announcement that he would receive credit for full time served, 152 days, to support his claim of denial of such credit with respect to Count III, which appears only in the judgment.

The vast bulk of the respondent's argument is devoted to asserting that this Court should not exercise jurisdiction over this "extra" issue given that the case is before the court upon a certified question concerning the constitutionality of the PRR statute under which respondent was sentenced as to the same count for which he was

denied jail time credit, the full mandatory 15 years on that count. [RB. 35-39].

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. This 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.'"

Furthermore, because Petitioner was sentenced to the maximum sentence under the PRR statute on this count, 15 years, the failure to grant credit for time serves means that the actual time to be served under the sentence totals 15 years plus 152 days. Thus, it exceeds the maximum permitted by law and is, again, an illegal sentence. *Davis v. State*, 661 So. 2d 1193 (Fla. 1995). Because the sentence is, by definition, illegal under both cases, the issue is one of fundamental error.

"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 Whitted v. State, 363 668 (Fla. 1978); Miami Gardens, Inc. v. Conway, 102 So.2d 622 (Fla.1958); Vance v. Bliss Properties, Inc., 109 Fla. 388, 149 So. 370 (1933)." *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983). This Court also said in *Trushin*, "While we have the authority to entertain

issues ancillary to those in a certified case, *Bell v. State,* 394 So.2d 979(Fla.1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case." (Emphasis added). This issue will effect the outcome of the case regardless of what decision is made with regard to the certified question; he is still entitled to the credit for time served. Additionally, in *Trushin*, this Court observed that fundamental error, particularly of the kind that would effect the outcome of the case, should be addressed even for the first 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. 39]. 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*, 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* ("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 15 years as a PRR offender plus approximately 152 days 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, LEONARD McKINNEY, 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 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