IN THE SUPREME COURT OF FLORIDA

EARL L. NEWSOME,	:	
Petitioner,	:	
vs.	:	Case No. SC00-633
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

On April 7, 1999, a jury found the petitioner, Earl L. Newsome, guilty of burglary with assault or burglary with a deadly weapon, and the lesser-included offenses of robbery and assault.

The state previously sought to have Mr. Newsome sentenced as a habitual offender and a prison releasee reoffender (PRR). The trial court found Mr. Newsome to be both a habitual offender and a prison releasee reoffender, and sentenced him to a life sentence on the burglary conviction, which was a first-degree felony punishable by life, to a concurrent term of 30 years for the robbery conviction, and to time served on the assault conviction.

Mr. Newsome filed a timely notice of appeal on April 14, 1999. On March 8, 2000, the Second District Court of Appeal affirmed Mr. Newsome's sentence. See Newsome v. State, 25 Fla. L. Weekly D619 (Fla. 2d DCA 2000). Citing to Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), and to Jones v. State, 750 So. 2d 709 (Fla. 2d DCA 2000), the Second District ruled: (1) the PRR statute was constitutional; and (2) that it was not a double jeopardy violation to sentence a defendant under both the habitual offender statute and the PRR statute. The court acknowledged conflict with the Fourth District Court of Appeal on the second issue citing to Melton v. State, 746 So. 2d 1188 (Fla. 4th DCA 1999); Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999); Glave v. State, 745 So. 2d 1065 (Fla. 4th DCA 1999).

Mr. Newsome filed a Notice of Discretionary Jurisdiction in the Second District Court of Appeal on March 15, 2000. On March

28, 2000, this Court postponed its decision on jurisdiction, and ordered the Petitioner to file an initial brief on the merits.

SUMMARY OF THE ARGUMENT

The Petitioner was improperly sentenced as a Prison Releasee Reoffender where that statute violates the state single subject provisions, violates state separation of powers provisions, violates state and federal cruel and/or unusual punishment provisions, is void for vagueness under both state and federal constitutions, violates state and federal due process clauses, violates state and federal equal protection clauses, and violates state and federal ex post facto provisions.

The Petitioner was improperly sentenced as both a prison releasee reoffender and as a habitual felony offender where the Florida Statutes do not expressly provide for such punishment.

ARGUMENT

ISSUE I

SECTION 775.082(8), FLORIDA STATUTES (1997), THE PRISON RELEASEE REOFFENDER ACT, IS UNCONSTITUTIONAL.

Section 775.082(8), Florida Statutes (1997), the Prison Releasee Reoffender Act, is unconstitutional on the following grounds: (1) it violates the single subject provisions of Article III, Section 6, of the Florida Constitution; (2) it violates the separation of powers under Article II, Section 3 of the Florida Constitution; (3) it violates the cruel and/or unusual punishment provisions of the Eighth Amendment of the U.S. Constitution, and Article I, Section 17, of the Florida Constitution; (4) it is void for vagueness under both the state and federal constitutions; (5) it violates the due process clauses of both the state and federal constitutions; (6) it violates the equal protection clauses of both the state and federal constitutions; and (7) it violates ex post facto provisions of the state and federal constitutions.

1) Single Subject Requirement

Chapter 97-239, Laws of Florida, created the Prison Releasee Reoffender Punishment Act, which became law on May 30, 1997. A portion of the Prison Releasee Reoffender Punishment Act relating to the punishment of reoffenders was placed in section 775.082(8), Florida Statutes (1997). Another portion of the Act, which was placed in section 944.705, Florida Statutes (1997), requires DOC to notify inmates of the sentencing provisions of the Act if it is

violated within three years of release. None of the other subjects in the Act is reasonably connected or related to the subject of Prison Releasee Reoffender Punishment. These subjects include whether a youthful offender shall be committed to the custody of the department, when a court may place a defendant on probation or in community control if the person is a substance abuser, and expansion of the category of persons authorized to arrest a probationer or person on community control for violation. See §§ 948.01, 948.06, & 958.14, Fla. Stat. (1997).

> Article III, section 6, of the Florida Constitution provides, "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." This provision serves three purposes:
>
> > (1) to prevent hodge podge or "log rolling" legislation, i.e., putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon.
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> State v. Canova, 94 So. 2d 181, 184 (Fla. 1957).

Thompson v. State, 708 So. 2d 315, 316 (Fla. 2d DCA 1998).

The title and preamble of Ch. 97-239, Laws of Florida refer to prison releasee reoffender punishment, but several sections of Ch. 97-239 address whether a youthful offender shall be committed to the custody of the department, when a court may place a defendant on probation or in community control if the person is a substance

abuser, and expansion of the category of persons authorized to arrest a probationer or person on community control for violation. Those sections are linked only in the most general category of criminal law, but such a broad linkage is not sufficient where the subjects of various sections are separate, disassociated, and have no cogent relationship. See State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993) (single subject rule violated by act addressing the separate and distinct subjects of habitual felony offender sentencing and the licensing of private investigators and their authority to repossess personal property; "No reasonable explanation exists as to why the legislature chose to join these two subjects within the same legislative act, and we find that we must reject the State's contention that these two subjects relate to the single subject of controlling crime."); Bunnell v. State, 453 So. 2d 808, 809 (Fla. 1994) (act relating to the Florida Council on Criminal Justice violated the single subject rule where section 1 which dealt with "obstruction by false name" had "no cogent relationship", and was "separate and disassociated from" the purpose of sections 2 and 3, the Florida Council on Criminal Justice); Thompson, 708 So. 2d at 317 (Chapter 95-182, the violent career criminal sentencing act, unconstitutionally violated the single subject rule because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence which had no "natural or logical connection" to each other). Compare Burch v. State, 558 So. 2d 1, 3 (Fla. 1990) (the Crime Prevention and Control Act which had a lengthy preamble

addressing the need to fight rising crime rate properly dealt with comprehensive criminal regulations and procedures, money laundering, and safe neighborhoods where "all of its parts are directed toward meeting the crisis of increased crime").

The Act entitled "the Prison Releasee Reoffender Punishment Act" deals with unrelated subjects in violation of Article III, Section 6. Therefore, the Act violates the single subject rule.

2) Separation of Powers

Article II, Section 3 of the Florida Constitution states that:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Section 775.082(8), Florida Statutes (1997) violates Article II, Section 3 of the Florida Constitution in several separate and distinct ways. It restricts the ability of the parties to plea bargain in providing only limited reasons for the state's departure from a maximum sentence. Under Florida's constitution, "the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). The Act unlawfully restricts the exercise of executive discretion that is solely the function of the state attorney in determining whether and how to prosecute.

The victim is permitted to make the ultimate decision regarding the particular sentencing scheme under which a defendant will be sentenced. This occurs even if the trial judge believes

that the defendant should receive the mandatory punishment, or should not receive the mandatory maximum penalty. This is an unconstitutional delegation of authority.

Unless certain circumstances set out in the Act are met, the sentencing judge has no discretion to do anything other than sentence under the mandatory provisions. Those circumstances, which include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all dealing with other extenuating circumstances, are outside the purview of the trial judge. In contrast, the habitual felony offender statute, section 775.084, Florida Statutes (1997), vests the trial judge with discretion in determining the appropriate sentence. Although sentencing is clearly a judicial function, the legislature has vested this authority in the executive branch by authorizing the state attorney to determine who should and who should not be sentenced as a prison releasee reoffender. The separation of powers principles establish that, although the state attorney may suggest the classification and sentence, only the judiciary should decide whether to make the classification and impose the mandatory sentence. London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993). Lacking the provisions of the violent career criminal statute and the habitual offender statute that vest sole discretion as to classification and imposition of a sentence in the sentencing court, the Act violates the separation of powers doctrine.

In State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), the Second District held the Act does not totally eliminate judicial

fact-finding and sentencing discretion. Mr. Newsome believes the small amount of discretion left to the trial court pursuant to Cotton does not save the Act from violating the separation of powers. He requests that this Court find rule that the Act violates the separation of powers (which was not implicated in Cotton).

3) Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution and Article I, Section 17 of the Florida Constitution forbid the imposition of a sentence that is cruel and/or unusual. These prohibitions act against barbaric punishments and sentences which are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277 (1983).

Under the Act, the trial court has no sentencing discretion, cannot consider mitigating factors that may warrant a less severe punishment, and must impose the proscribed minimum mandatory penalties. Sentencing under the Act, therefore, will result in penalties which are totally disproportionate to the crimes for which a defendant is convicted, a miscarriage of justice, as well as a waste of the State's incarcerative resources.

The Act disproportionately punishes a new offense based on one's status of having been to prison previously without regard to the nature of the prior offense or whether one was released due to a reversal of one's conviction. A person who commits an enumerated felony one day after release from a county jail sentence for aggravated battery is not subject to the enhanced sentence of the

Act, but a person who commits the same offense and who had been released from prison within three years after serving a thirteen month sentence for a nonviolent offense such as possession of cannabis, welfare fraud, or issuing a worthless check must be sentenced to the maximum sentence as a prison releasee reoffender. The Act disproportionately applies only to persons released from State prisons, while not applying to persons released from federal prisons or those of other states. The Act also disproportionately punishes a person who commits an enumerated offense exactly three years after release from prison, while it is inapplicable to a person with the same record who commits the same offense three years and one day after release. A law which uses a prior record to enhance punishment far beyond what is proportionate for the crime committed violates the prohibition against cruel and unusual punishment. Solem v. Helm, 463 U.S. 277 (1983).

The Act also violates the cruel and unusual punishment clauses by the legislative empowering of victims to determine sentences. The Act permits the victim to mandate the imposition of the penalty by the simple act of refusing to put a statement in writing that he or she does not desire the imposition of the penalty. The victim can therefore affirmatively determine the sentencing outcome or can determine the sentence by simply failing to act. The State Attorney could determine the sentence by failing to contact a victim or failing to advise the victim of the right to request less than the mandatory sentence. If a victim became unavailable subsequent to a plea or trial, the defendant would be subject to

the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

Mr. Newsome requests that this Court find the Act unconstitutionally allows for the imposition of cruel and unusual punishment.

4) Vagueness

When a statute fails to give adequate notice to prohibited conduct, inviting arbitrary and discriminatory enforcement, the statute is void for vagueness. See Wyche v. State, 619 So. 2d 231 (Fla. 1993). The Act requires that a prison releasee reoffender sentence shall be imposed unless: the state attorney has insufficient evidence to prove the highest charge available; the testimony of a material witness cannot be obtained; the victim provides a written statement indicating he or she does not want the offender to receive the mandatory prison sentence; or other extenuating circumstances preclude just prosecution of the offender.

The Act fails to define the terms "sufficient evidence", "material witness", the degree of materiality required, "extenuating circumstances", and "just prosecution". The failure to define these terms renders the Act unconstitutionally vague because it gives no guidance as to the meaning of these terms or their applicability to a case. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to a defendant. The Act

is unconstitutional since it invites and apparently requires arbitrary and discriminatory enforcement.

Mr. Newsome urges this Court to hold that the Act is unconstitutionally vague.

5) Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. See Rochin v. California, 342 U.S. 165 (1952). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974).

The Act violates state and federal guarantees of due process in many ways. It invites discriminatory and arbitrary application by the state attorney who, in the absence of judicial discretion, has the sole authority to determine the application of the Act to any defendant. In the absence of statutory guidance, the state attorney has sole power to define and arbitrarily apply the exclusionary terms of "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution." Arbitrariness, discrimination, oppression, and lack of fairness are invited by providing for the victim to determine the sentence. The Act arbitrarily declares a defendant to be subject to the maximum penalty provided by law based on prior state imprisonment within the three prior years of an offense while not applying to defendants who commit a new offense three years and one day after release from a Florida prison and defendants who were previously

sentenced to jail, probation, or imprisonment in another state or a federal prison. The Act does not bear a reasonable relation to a permissible legislative objective. In Chapter 97-239, Laws of Florida, the legislature states its purpose was to draft legislation enhancing the penalties for previous violent felony offenders who reoffend and continue to prey on society, but despite this legislative goal the actual operation of the statute is to apply to any offender who has served a prison sentence for any offense and who commits and enumerated offense within three years of release. Even persons whose prior convictions and sentences were vacated on appeal may be found to come within the Act based on their date of release from prison. Legislation which punishes innocent conduct is overbroad. Delmonico v. State, 155 So. 2d 368 (Fla. 1963); Brandenburg v. Ohio, 395 U.S. 444 (1969). A statute which is so broad that it punishes the innocent as well as the guilty is void in violation of due process. Mr. Newsome urges this Court to hold that the Act violates due process.

6) Equal Protection

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause is whether the classification is based upon some difference bearing a reasonable relation to the object of the legislation. See Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above, despite the Act's intent to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who reoffend by

committing a new violent offense, the Act applies to offenders whose prior history includes no violent offenses whatsoever and even applies to persons whose prior convictions and sentences were vacated on appeal. The Act draws no rational distinction between offenders who commit prior violent acts and serve county jail or probationary sentences, and those who commit the same acts and yet serve short prison sentences. The Act draws no rational distinction between imposing an enhanced sentence upon a defendant who commits a new offense on the third anniversary of release from prison, and the imposition of a guidelines sentence upon a defendant who commits a similar offense three years and a day after release. The Act is not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

The Petitioner urges this Court to find that the Act violates the equal protection clause.

7) Ex Post Facto

Under Article I, Section 10, of the Florida Constitution, the legislature may not pass any retroactive laws. Mr. Newsome's prior prison sentence was completed on April 2, 1997, prior to the effective date of the Act, May 30, 1997. The only way to save the statute from ex post facto application is to hold that it is prospective only to those inmates released after its effective date. Mr. Newsome urges this Court to find that the Act may not be applied to him where the sentence for his prior offense expired before the effective date of the Act.

Wherefore, Mr. Newsome requests that this Honorable Court declare Section 775.082(8), Florida Statutes (1997) to be unconstitutional and/or inapplicable to him for the reasons set forth above, and to reverse his case and remand for resentencing.

While Mr. Newsome did not object to the imposition of the PRR statute at the time of sentencing, such an objection is not required to preserve the issue for appeal. In Trushin v. State, 425 So. 2d 1126 (Fla. 1983), this Court held if a constitutional infirmity arises from the face of particular legislation, and is not dependent on the facts of a particular case, the constitutional issue may be raised for the first time on appeal. It is also true that a sentencing error that causes a person to be incarcerated for longer than the law allows is a fundamental error that can be raised for the first time on appeal. See Gonzalez v. State, 392 So. 2d 334 (Fla. 3rd DCA 1981). Thus, the constitutionality of the Prison Releasee Reoffender Act may be addressed.

ISSUE II

THE TRIAL COURT ERRED IN SENTENCING THE PETITIONER AS BOTH A PRISON RELEASEE REOFFENDER AND AS A HABITUAL FELONY OFFENDER.

Mr. Newsome should not have been sentenced as both a prison releasee reoffender and a habitual offender. In King v. State, 681 So. 2d 1136 (Fla. 1996), the Court ruled that a sentencing judge may elect to impose a habitual offender sentence or a guidelines sentence on a habitual offender, but not both. The Court held:

> The substantive offenses of which King was convicted, burglary and robbery, are punishable "as provided in § 775.082, § 775.083, *or* § 775.084." §§ 810.02, 812.13, Fla. Stat. (1989) (emphasis added). Section 775.082 specifies the maximum term of imprisonment permissible for each classification of offense. Section 775.083 details the maximum fines applicable to designated crimes and noncriminal violations. Both imprisonment under section 775.082 and a fine under section 775.083 may be imposed for a single offense because section 775.083 specifically provides that "[a] person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in § 775.082." § 775.083(1), Fla. Stat. (1989); see also Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679-80, 74 L. Ed. 2d 535 (1983) (stating that where legislature specifically authorizes cumulative punishment under two statutes for the same conduct prosecutor may seek and court may impose cumulative punishment in single trial). However, nothing in section 775.084 authorizes that sentencing be imposed under that statute in addition to the punishment described in section 775.082. Moreover, section 775.084 specifically provides that "[i]f the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed *without*

> *regard* to this section." § 775.084(4)(c), Fla. Stat. (1989) (emphasis added). Thus, the sentencing judge may elect to impose an habitual offender sentence or a guidelines sentence, but not both.

Nothing in sections 775.082 and 775.084 authorizes that sentencing be imposed under both statutes. Although section 775.082(9)(c) provides that "nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to § 775.084 or any other provision of law," this merely allows for the alternative of sentencing under another sentencing scheme if another sentencing scheme can result in a greater sentence. Since the statutes do not specifically authorizes cumulative punishment for the same conduct under both section 775.082 and section 775.084, the cause must be reversed and remanded for resentencing.

If this Court holds that the Act allows for sentencing as both a prison reoffender and as a habitual felony offender, the Act violates the fundamental state and federal prohibitions against double jeopardy by imposing multiple punishments for the same offense. See Ohio v. Johnson, 467 U.S. 493 (1984); North Carolina v. Pearce, 395 U.S. 711 (1969).

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Petitioner respectfully asks this Honorable Court to reverse the sentence of the lower court, and remand the Petitioner's case for resentencing.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Anne Sheer Weiner, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of June, 2001.

Respectfully submitted,

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