IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-877

OLIVER BROWN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S ANSWER BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court below and the appellant in the Fourth District Court of Appeal and will be referred to herein as "Petitioner." Respondent, the State of Florida, was the prosecution in the trial court below and the appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State." Reference to the record on appeal will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to Petitioner's brief will be by the symbol "IB," followed by the appropriate page numbers.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

_____
JOSEPH A. TRINGALI
Assistant Attorney General

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal subject to the additions and clarifications set forth in the argument portion of this brief which are necessary to resolve the legal issue presented upon appeal.

SUMMARY OF THE ARGUMENT

POINT I

In light of this Court's recent opinions in Salters[1] and Thompson[2], Respondent agrees that Petitioner's sentence as a violent career criminal is improper. However, Respondent submits that the trial court may, at resentencing, sentence Petitioner as either a habitual felony offender or habitual violent felony offender, pursuant to Section 775.084, Fla. Stat. (1994).

POINT II

A defendant who desires to establish that he was prejudiced because he was forced to stand trial in prison clothing must make a timely objection and establish on the record that he was identified by a juror as being a prisoner by reason of his wearing the prison uniform. The objection must be something more than a mere recitation of the fact that the defendant is wearing jail clothing. The error, if any was harmless in light of the entire record.

POINT III

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[1]Salters v. State, 25 Fla. L. Weekly S365 (May 11, 2000).

[2]State v. Thompson, 750 So.2d 643 (Fla. 1999)

A trial court possesses broad discretion in granting or refusing discovery motions and in protecting the parties. Only an abuse of this broad discretion constitutes 'fatal error.'" There is no general constitutional right to discovery in a criminal cases, and neither the Sixth Amendment nor due process compels pre-trial disclosure In fact, in many jurisdictions, a criminal defendant is not allowed to take discovery depositions of potential witnesses." Discovery depositions are a right granted by the legislature, and court rules limit that right in criminal cases and when dealing with prisoners. Appellate courts have reversed convictions where a defendant has not been given the opportunity to depose a witness only when the reviewing court found that such denial actually prejudiced the defendant's ability to adequately prepare for his defense. The trial court did not abuse its discretion in offering him the services of an appointed attorney to take depositions on Petitioner's behalf.

ARGUMENT

POINT I

IN LIGHT OF THIS COURT'S RECENT OPINIONS IN SALTERS AND THOMPSON, RESPONDENT AGREES THAT PETITIONER'S SENTENCE AS A VIOLENT CAREER CRIMINAL IS IMPROPER; PETITIONER MAY BE RESENTENCED AS A HABITUAL FELONY OFFENDER OR HABITUAL VIOLENT FELONY OFFENDER (Restated).

In light of this Court's recent opinions in Salters and Thompson, Respondent agrees that Petitioner's sentence as a violent career criminal is improper. Based on Salters, Petitioner correctly argues that he has standing to challenge the constitutionality of the statute under which he was sentenced. Further, this Court recently held that Chapter 95-182, which includes the Violent Career Criminal provision under which Petitioner was sentenced, violated the single subject rule and, thus, is unconstitutional. Thompson. Further, since Respondent agrees that Petitioner has standing to challenge his sentence as a violent career criminal, Respondent submits that this Court need not determine the issue of whether Chapter 96-388, Laws of Florida is unconstitutional as violating the single subject rule. Salters.

Respondent submits that, consistent with Salters and Thompson, Petitioner must be resentenced in accordance with the valid laws in effect at the time that Petitioner committed his offense, i.e. November 22, 1996 (R 3-4). In this regard, Respondent notes the

State submits that the trial court may, at resentencing, sentence Petitioner as either a habitual felony offender or habitual violent felony offender, pursuant to Section 775.084, Fla. Stat. (1994).

Respondent submits the State properly served notice on Petitioner that it was seeking to have him sentenced as a habitual felony offender/habitual violent felony offender/violent career criminal (R 16-7). The record indicates that Petitioner clearly qualifies as either a habitual felony offender or habitual violent felony offender (T 459-460); and so long as the new sentence is not vindictive, an imposition of a habitual felony offender sentence would be proper. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); Fasenmeyer v. State, 457 So.2d 1361 (Fla. 1984); Norton v. State, 731 So.2d 762 (Fla. 4th DCA 1999).

Accordingly, Respondent agrees that Petitioner must be resentenced, and submits that, consistent with this Court's holdings in Salters and Thompson, he must be resentenced in accordance with the valid laws in effect at the time Petitioner committed his offense, including sentencing as a habitual felony offender or habitual violent felony offender.

POINT II

REVERSIBLE ERROR DID NOT OCCUR WHEN THE TRIAL COURT PERMITTED APPELLANT TO BE TRIED IN JAIL CLOTHING (Restated).

In his second argument on appeal, Petitioner contends the trial court reversibly erred by overruling his objection to being trial in jail clothing. Respondent strongly disagrees.

In the first place, Respondent respectfully submits this issue was not properly preserved for appellate review. It is well settled that in order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court. Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). The contemporaneous objection rule requires an objection which is sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for review. Fainer v. State, 633 So. 2d 480 (Fla. 1st DCA 1994); Wenzel v. State, 459 So. 2d 1086 (Fla. 2d DCA 1984). And a defendant who desires to establish that he was prejudiced because he was forced to stand trial in prison clothing must make a timely objection and establish on the record that he was identified by a juror as being a prisoner by reason of his wearing the prison uniform. Eberhardt v. State, 550 So.2d 102, (Fla.1st DCA 1989).

With respect to the issue of jail clothing, the real issue in any case is whether a defendant was compelled to go to trial in jail clothing. See: Mansfield v. State, 430 So.2d 586 (Fla.4th DCA 1983); Topley v. State, 416 So.2d 1158 (Fla. 4th DCA 1982). In that regard, the facts of the case at bar are virtually identical to those in Torres-Arboledo *v. State,* 524 So. 2d 403 (Fla.) cert. denied ___ U.S. ___, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988), where, according to this Court, it was "clear from the record that no objection was raised concerning the prison attire; nor did defense counsel seek a continuance until civilian clothing could be obtained. Counsel merely placed on the record the fact that the defendant was clad in a blue jumpsuit with the words "County Jail" written on the back." In rejecting the defendant's argument on appeal, this Court held "[s]uch a factual recitation unaccompanied by an objection or request for a continuance until more appropriate attire could be obtained was insufficient to support a finding of compulsion on the part of the state."

Respondent respectfully submits the same factual recitation and lack of objection occurred in the case at bar, and the same result should apply.

Finally, Respondent respectfully submits the error, if any, was harmless. There is no evidence here that Petitioner's clothing

deprived him of a fair trial. See: Torres-Arboledo, supra. The victim testified she chased Petitioner after he took her money (T 159-162) and readily identified him when she caught up with him and at trial (T 161; 164). Petitioner was likewise seen taking the victim's money and identified by both of the victim's daughters (T 197; 218-220) and identified by her friend, Barbara Gillis (T 206-207; 210). Thus, the record contains compelling and overwhelming evidence of Petitioner's guilt, and any error with respect to Petitioner's clothing at trial must be considered harmless under the doctrine of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

POINT III

THE TRIAL COURT DID NOT REVERSIBLY ERR WHEN IT PROHIBITED THE *PRO-SE* PETITIONER FROM TAKING DISCOVERY DEPOSITIONS (Restated).

In his third point on appeal, Petitioner contends the trial court reversibly erred by allowing Petitioner to represent himself at trial and prohibiting him from taking discovery depositions. Once again, Respondent strongly disagrees.

In American Southern Co. v. Tinter, Inc., 565 So. 2d 891 (Fla. 3d DCA 1990), the Third District Court of Appeal noted that "[g]enerally, a trial court possesses broad discretion in granting or refusing discovery motions and in protecting the parties. Only an abuse of this broad discretion would constitute 'fatal error.'" The Court went on to hold that "[u]nless an abuse of the trial court's wide discretion in its treatment of requests for discovery is shown, the court's ruling will not be disturbed."

It is well settled that there is no general constitutional right to discovery in a criminal cases, and neither the Sixth Amendment nor due process compels pre-trial disclosure. State v. Pinder, 678 So. 2d 410, 418 (Fla. 4th DCA 1996). Indeed, the Fourth District Court of Appeal noted that "[i]n many jurisdictions, a criminal defendant is not allowed to take discovery depositions of potential witnesses." Id., at n7.

Florida courts have spoken of discovery depositions in terms of a right granted by the legislature. See, e.g.: Johnson v. Feder, 485 So. 2d 409 (Fla. 1986). And although Florida law gives defendants the right to depose potential witnesses, it specifically limits that right in criminal cases and when dealing with prisoners. Thus, for example, Rule 3.220(h)(7) of the Florida Rules of Criminal Procedure limits a defendant's right to be physically present at a deposition, and Rule 1.310(a) of the Florida Rules of Civil Procedure provides that "[t]he deposition of a person convicted in prison may be taken only by leave of court on such terms as the court provides."

Appellate courts have occasionally reversed convictions where a defendant has not been given the opportunity to depose a witness, but only where the court found that denial actually prejudiced the defendant's ability to adequately prepare for his defense. Cook v. State, 595 So. 2d 994, (Fla. 3d DCA 1992).

In the case at bar, the trial court offered Petitioner the opportunity to have an appointed attorney take depositions in his behalf prior to trial, but that offered was rejected (ST 31-32). In light of the case law and the specific language of the rules of criminal and civil procedure, Petitioner cannot show the trial court abused its discretion in offering him the services of an

appointed attorney to take depositions for him. Accordingly, the trial court did not reversibly err, and its judgment should be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Honorable Court AFFIRM Petitioner's convictions and remand for resentencing as aforesaid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished to: DAVID J. McPHERRIN, Esq., Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on this ___ day of June, 2000.

_____
Of Counsel

APPENDIX