IN THE SUPREME COURT OF FLORIDA

OLIVER BROWN,

Petitioner,

vs. CASE NO. SC00-877

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

RICHARD JORANDBY
Public Defender

David J. McPherrin
Assistant Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Oliver Brown

TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

CASES CITED — PAGE

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee below. In this brief the parties will be referred to as they appear before the Court.

The symbol "R" will denote the record on appeal, which consists of the relevant documents filed below.

The symbol "T" will denote the transcript.

The symbol "ST" will denote the supplemental transcript.

CERTIFICATE OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with burglary of a dwelling in violation of *Florida Statutes* section 810.02(1) and (3)(b) (Supp. 1996). *R 3-4.*[1] The offense was alleged to have occurred on December 31, 1996. After being found guilty as charged, petitioner was sentenced as a violent career criminal to 35 years in prison with a 30 year minimum mandatory. *R 28-31, 58-62, 69-70; T 263-264; ST 53-54.* On appeal to the fourth district, petitioner argued, among other things,[2] that his sentence should be vacated because the session law giving rise to violent career criminal sentencing was passed in violation of the single subject requirement of the Florida Constitution. The district court affirmed petitioner's conviction and sentence, failing to address his guilt issues, but stating, in regard to the sentencing issue:

> Affirmed. *See Salters v. State,* 731 So. 2d 826, 826 (Fla. 4th DCA), *rev. granted,* no.

---

[1] Petitioner was also charged with petit theft. The petit theft charge is not involved in this appeal.

[2] Petitioner also argued that reversible error occurred when the trial court overruled his objection to being tried in jail clothing and when the trial court prohibited him, while representing himself, from taking discovery depositions. Although the district court did not address the additional issues, petitioner raises them because this Court, once it accepts jurisdiction over a cause, may consider issues other than those that gave rise to its jurisdiction. *Feller v. State,* 637 So. 2d 911, 914 (Fla. 1994); *Savoie v. State,* 422 So. 2d 308, 310 (Fla. 1982).

> 95,663(Fla. Dec. 3, 1999). We certify conflict with *Thompson v. State*, 708 So. 2d 315, 317 n.1 (Fla. 2d DCA 1998), *reversed*, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999), as to the window period for the single subject matter constitutional challenge to section 775.084(1)(c), Florida Statutes (1997).

Brown v. State, 25 Fla. L. Weekly D732 (Fla. 4th DCA Mar. 22, 2000).

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. This brief follows.

SUMMARY OF THE ARGUMENT

POINT I

Petitioner, convicted of the December 31, 1996, burglary of a dwelling, was sentenced to prison as a violent career criminal. The chapter law creating career criminal sentencing was passed in violation of the single subject requirement of article III, section 6, of the Florida Constitution. Because petitioner committed his crime before the violent career criminal chapter law was reenacted as part of the biennial reenactment of Florida Statutes, which cured its constitutional infirmity, he was not eligible for violent career criminal sentencing. Therefore, petitioner is entitled to be resentenced in accordance with the valid laws in effect at the time of his offense.

POINT II

Despite his request to change clothing, petitioner was required to proceed to trial in jail clothes. Although the word "jail" did not appear on petitioner's uniform, the clothing readily identified petitioner as a jail inmate, evidenced by a witness identifying him as the man wearing "[b]lue jail clothes." Requiring the accused to appear before a jury in jail clothing undermines the presumption of innocence. Petitioner suffered prejudice by being compelled to appear at trial in a jail uniform.

Accordingly, a new trial is required.

POINT III

Petitioner exercised his right to self-representation. To prepare to meet respondent's charges, petitioner sought to depose the witnesses against him. The court denied petitioner's request because he was incarcerated. Florida law grants an accused the right to represent himself against criminal charges and to participate in pretrial discovery, which includes deposing eyewitnesses to the alleged criminal activity. An accused cannot be required to choose between the two rights, but must be afforded an opportunity to exercise both. The trial court's ruling prevented petitioner from fully exercising his right to self-representation, a structural defect in the constitution of the trial that cannot be deemed harmless. The ruling also infringed upon petitioner's ability to participate in pretrial discovery. A new trial is in order.

ARGUMENT

POINT I

PETITIONER'S CRIME FELL WITHIN THE "WINDOW" PERIOD DURING WHICH THE VIOLENT CAREER CRIMINAL STATUTE WAS IN VIOLATION OF THE "SINGLE SUBJECT" RULE OF THE FLORIDA CONSTITUTION.

Petitioner was charged by information with burglary of a dwelling in violation of *Florida Statutes* section 810.02(1) and (3)(b) (Supp. 1996). *R 3-4.*[3] The offense was alleged to have occurred on December 31, 1996. After being found guilty as charged, petitioner was sentenced as a violent career criminal to 35 years in prison with a 30 year minimum mandatory. *R 28-31, 58-62, 69-70; T 263-264; ST 53-54.* Petitioner did not raise the instant argument before the trial court.[4]

In *State v. Thompson*, 750 So. 2d 643 (Fla. 1999), this Court held that the session law enacting the violent career criminal statute, Chapter 95-182, *Laws of Florida* (1995),[5] was passed in

---

[3] Petitioner was also charged with petit theft. The petit theft charge is not involved in this appeal.

[4] In *State v. Johnson*, 616 So. 2d 1 (Fla. 1993), this Court ruled that a violation of the single subject requirement of article III, section 6, of the Florida Constitution, the argument raised herein, amounted to fundamental error. *Id.* at 3-4. Error deemed fundamental may be raised for the first time on appeal. § 924.051(3), *Fla. Stat.* (Supp. 1996); *J.B. v. State*, 705 So. 2d 1376 (Fla. 1998).

[5] § 775.084(1)(c), *Fla. Stat.* (1995).

violation of the "single subject" requirement of Article III, Section 6 of the Florida Constitution. As a result, Ms. Thompson was entitled to be resentenced in accordance with the valid laws in effect on the date her crimes were committed. *Id.* at 649. This Court left open the question of when the "window" period closed for persons challenging a violent career criminal sentence. *Id.* 645-646.

The Second District Court of Appeal was of the opinion that all persons whose crimes were committed between October 1, 1995, and May 24, 1997, fell within the window period. *Thompson v. State,* 708 So. 2d 317, 317 n.1 (Fla. 2d DCA 1998). The Fourth District Court of Appeal disagreed, concluding that the window closed on October 1, 1996. *Salters v. State,* 731 So. 2d 826 (Fla. 4th DCA 1999). In *Salters v. State,* 25 Fla. L. Weekly S365 (Fla. May 11, 2000), approved the second district's opinion concerning the window period and disapproved of the fourth district's opinion. Resentencing is required for all persons sentenced as a violent career criminal whose crimes were committed between October 1, 1995, and May 24, 1997. Petitioner's crime was committed on December 31, 1996. Accordingly, petitioner must be resentenced in accordance with the valid laws in effect at the time his crime was committed.

POINT II

REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT OVERRULED APPELLANT'S OBJECTION TO BEING TRIED IN JAIL CLOTHING.

Before the commencement of voir dire, petitioner sought permission to change out of his jail clothing. The court denied petitioner's request. *T 5.* A witness subsequently identified petitioner as the man wearing "[b]lue jail clothes." *T 164.*

Due process of law, provided for by the Fourteenth Amendment to the United States Constitution and article I, section 9 of the Florida Constitution, guarantees "that every criminal defendant is entitled to a fair and impartial trial." *Kennedy v. Cardwell*, 487 F. 2d 101, 104 (6th Cir. 1973) *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed. 2d 310 (1973). Central to protecting the right to a fair trial are the principles that one accused of committing a crime is presumed innocent, *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S.Ct. 1930, 1933, 56 L.Ed. 2d 468 (1978), and "'entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial,'". *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, 89 L.Ed. 2d 525 (1986) (citation omitted). The presumption of innocence may be adversely affected

by requiring the accused to appear before the jury in jail clothing. *Topley v. State*, 416 So. 2d 1158, 1159 (Fla. 4th DCA 1982) (footnote omitted). As a result, "[t]he law now recognizes that once the defendant has requested to appear in court in other than prison clothes, the state must make appropriate provisions to this end." *Eberhardt v. State*, 550 So. 2d 102, 104 (Fla. 1st DCA 1989) *rev. denied*, 560 So. 2d 234 (Fla. 1990). Prejudice is established where the defendant objects to being tried in jail clothing and the clothing worn results in the jury identifying him as a prisoner. *See Torres-Arboledo v. State*, 524 So. 2d 403, 409 (Fla. 1988) *cert. denied*, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed. 2d 239 (Fla. 1988); *Eberhardt*, 550 So. 2d at 104.

Petitioner objected to appearing before the jury in his jail uniform.[6] The trial court's refusal to allow petitioner to wear civilian clothing resulted in a witness and, out of necessity, the jury identifying him as a prisoner. Petitioner's presumption of innocence was undermined by the clothing he was compelled to wear during trial, causing him to be wrongly prejudiced in the eyes of the jury. Therefore, petitioner is entitled to a new trial.

---

[6] Although petitioner may not have used the word "object", the court clearly understood what he was requesting and denied that request with equal clarity. *See State v. Heathcote*, 442 So. 2d 955, 956 (Fla. 1983).

POINT III

REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT PROHIBITED APPELLANT, WHO WAS REPRESENTING HIMSELF, FROM TAKING DISCOVERY DEPOSITIONS.

Petitioner, charged with burglary of a dwelling and petit theft, was permitted to represent himself at trial. *R 3-4, 16; ST 3-19*. During the *Faretta* hearing, the court advised petitioner that he would be responsible for taking depositions, filing motions, and doing legal research, and that being in jail would make it very difficult, if not impossible, to do some of those things. *ST 4*. The court denied petitioner's pretrial request to take depositions, stating that it would allow a lawyer to take the depositions, but would not allow a jail inmate to do so. *ST 31-32*.

The rules of criminal procedure permit the accused to depose eyewitnesses to the alleged crime at any time after the charging document is filed. *Fla. R. Crim. P.* 3.220(b)(1)(A)(i) & (h)(1)(A). Depositions are to be taken in the building where the trial will be held or another location agreed to by the parties or ordered by the court. *Fla. R. Crim. P.* 3.220(h)(3). Although the rules do not specifically address the discovery rights of pro se defendants, they do provide:

> (7) Defendant's Physical Presence. A defendant shall not be physically present at a deposition except on stipulation of the parties or as provided by this rule. The

> court may order the physical presence of the defendant on a showing of good cause. The court may consider:
>
> (A) the need for the physical presence of the defendant to obtain effective discovery,
>
> (B) the intimidating effect of the defendant's presence on the witness, if any,
>
> (C) any cost or inconvenience which may result, and
>
> (D) any alternative electronic or audio/visual means available.

Fla. R. Crim. P. 3.220(h)(7).

Persons charged with crimes in Florida have the right to represent themselves at trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *Beaton v. State*, 709 So. 2d 172 (Fla. 4th DCA 1998). Florida law also permits the accused to engage in pretrial discovery, *see Wortman v. State*, 472 So. 2d 762 (Fla. 5th DCA 1985) (reversing conviction where state violated discovery rights of pro se defendant) *rev. denied*, 480 So. 2d 1296 (Fla. 1985), which includes deposing eyewitnesses to the alleged criminal activity. *Fla. R. Crim. P.* 3.220(b)(1)(A)(i) & (b)(1)(A). The accused defendant cannot be forced to choose between exercising his right to self-representation and his right to participate in discovery. *Cf. State v. Frank*, 573 So. 2d 1070, 1071 (Fla. 4th DCA 1991) (defendant cannot be forced to choose between right to speedy

trial and right to participate in discovery). Neither can the accused be penalized for choosing to represent himself at trial. *Cf. Santana v. State*, 677 So. 2d 1339 (Fla. 3rd DCA 1996) (exercising right to trial cannot be punished). While it does not seem unreasonable to prohibit an incarcerated defendant from deposing witnesses in his jail cell, the court could have permitted petitioner to take depositions in open court. That procedure would have protected petitioner's rights to represent himself and to participate in discovery and protected the witnesses from the possible intimidating effect of petitioner's presence. Surely, self-representation constitutes good cause for allowing the defendant to attend a deposition. The court erred by applying its bright-line rule prohibiting petitioner from taking discovery depositions. *Cf. Boykin v. Garrison*, 658 So. 2d 1090 (Fla. 4th DCA 1994) (court must exercise discretion where it is provided by rule).

"The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819, 95 S.Ct. at 2533. Because petitioner was incarcerated and proceeding pro se, his ability to prepare for trial was markedly different than that of an accused capable of posting bond or one represented by

counsel. The court's ruling prohibited petitioner from effectively exercising his right to self-representation. *See McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S.Ct. 944, 950, 79 L.Ed. 2d 122 (1984) (focus is on whether defendant had a fair chance to present case in his own way). Although the harmless-error rule can be applied to many constitutional errors, it is not applicable to "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1265, 113 L.Ed. 2d 302 (1991). Prohibiting the defendant from exercising his right to self-representation is a structural error which cannot be found harmless. *McKaskle*, 465 U.S. at 177 n. 8, 104 S.Ct. at 950 n. 8; *See also Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) (denying indigent defendant right to court appointed counsel per se reversible error). Accordingly, petitioner is entitled to a new trial.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Honorable Court to quash the decision of the district court and remand this cause for a new trial or, in the alternative, for resentencing.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

David J. McPherrin
Assistant Public Defender
Florida Bar No. 0861782

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joseph A. Tringali, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 18th day of May, 2000.

Attorney for Oliver Brown