IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1812

STATE OF FLORIDA,

Petitioner,

vs.

VICTOR GIORGETTI,

Respondent.

* *

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ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

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PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Seventeenth Judicial Circuit, in and for Broward County. The Respondent was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appeared before the trial court.

The symbol "T" refers to the transcript of the trial proceedings contained in the record on appeal previously forwarded to this Court by the clerk of the Fourth District Court of Appeal. The symbol "A" refers to the Appendix attached to this brief, which includes a copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Defendant, a sexual offender, was charged with failing to report his change of address within 48 hours, contrary to §§943.0435(4), 943.0435(9), and 944.607(9),Fla. Stat. Following a jury trial, Defendant was found guilty as charged, and was subsequently sentenced to 77.25 months in state prison with credit for time served.

At trial, during defense counsel's cross-examination of Deputy Simmons, the arresting officer, counsel questioned the officer extensively about Defendant's cooperativeness with the deputy just prior to his arrest. (T 442-447). During this examination, *inter alia*, defense counsel elicited testimony that Defendant voluntarily told the deputy where and how long he had been residing at a residence, that he never attempted to run from the deputy, and that he was extremely cooperative with the deputy. (T 442-447).

On appeal to the Fourth District Court of Appeal, Defendant challenged, *inter alia*, the propriety of the trial court's special instruction to the jury that the State was not required to prove the "element of intent" or that "Defendant acted with a malicious or wrongful mental attitude." (A 2). Defendant also asserted that the trial court reversibly erred by not granting his mistrial motion based on the prosecutor's

questioning of Deputy Simmons on cross-examination concerning Defendant's response when told that he had failed to register at the driver's license office. (A 4). While the Fourth District initially affirmed Defendant's conviction without a written opinion, Giorgetti v. State, 27 Fla. L. Weekly D227 (Fla. 4th DCA Jan. 16, 2002), the court subsequently granted Defendant's motion for rehearing with a written opinion reversing Defendant's conviction and remanding for a new trial. Giorgetti v. State, 27 Fla. L. Weekly D1234 (Fla. 4th DCA May 22, 2002).

Thereafter, the State filed a motion for rehearing or certification of an issue of great public importance to this Court. The district court thereupon issued a corrected opinion denying the rehearing motion but granting certification of the following question as being of great public importance:

> Does Chicone[1] apply to the crime created by the sexual offender registration statutes and thus compel the court to presume a scienter or mens rea requirement even though the statutory text fails to contain an explicit requirement of such guilty knowledge?

(A 1-5); Giorgetti v. State, 27 Fla. L. Weekly D1663 (Fla. 4th DCA July 17, 2002).

Upon the State's filing of a notice to invoke the discretionary jurisdiction of this Court, this Court postponed

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[1] Chicone v. State, 684 so 2d 736 (Fla. 1996).

acceptance of discretionary jurisdiction pending the filing of the parties’ briefs.

SUMMARY OF THE ARGUMENT

POINT I

This Court's decision in Chicone v. State, 684 so 2d 736 (Fla. 1996), does not apply to the regulatory offense created by the sexual offender registration statute, §943.0435, Fla. Stat., so as to compel the trial court to presume a scienter or mens rea requirement, especially in light of the fact that the statute does not explicitly require such guilty knowledge. First of all, the Fourth District's instant decision reading an intent requirement into the State's burden of proving a violation of §943.0435, Fla. Stat. (2000), is clearly in conflict with their prior decisions. Furthermore, given the fact that the Legislature has recently provided in §893.101, Fla. Stat. (2002), that guilty knowledge is not an element of the purely *criminal* drug offenses under chapter 893, Fla. Stat., it reasonably follows that the Legislature did not intend that the element of guilty knowledge be proven by the State in a prosecution for the *regulatory* offense involved here. Additionally, the decision of the Fourth District overlooked the settled rule of statutory construction that a statute enacted for the public benefit should be construed liberally in favor of the *public*, not in favor of a *defendant*, even though it contains a penal provision. Moreover, the Fourth District's decision clearly overlooked the established

proposition that a court, in construing a statute, may not invade the province of the legislature and add words which change the plain meaning of the statute. By adding the element of intent and mens rea to the State's burden of proving a violation of §943.0435, Fla. Stat. (2000), the district court improperly altered the meaning of the statute.

POINT II

The trial court did not abuse its discretion in denying Defendant's motion for mistrial due to the prosecutor's questioning of Officer Simmons on redirect examination since the defense "opened the door" to this testimony by its questioning on cross-examination. If any error occurred, it was clearly harmless given the clear evidence of Defendant's guilt, including most notably Defendant's own *admission* during his testimony on cross-examination that he did not timely report to the driver's license office after changing his address.

ARGUMENT

POINT I

THIS COURT'S DECISION IN CHICONE V. STATE, 684 So 2d 736 (Fla. 1996), DOES NOT APPLY TO THE REGULATORY OFFENSE CREATED BY THE SEXUAL OFFENDER REGISTRATION STATUTE, §943.0435, FLA. STAT., SO AS TO COMPEL THE TRIAL COURT TO PRESUME A SCIENTER OR MENS REA REQUIREMENT, ESPECIALLY IN LIGHT OF THE FACT THAT THE STATUTE DOES NOT EXPLICITLY REQUIRE SUCH GUILTY KNOWLEDGE.

Fist of all, the Fourth District's instant decision reading an intent requirement into the State's burden of proving a violation of §943.0435, Fla. Stat. (2000), is clearly in conflict with their prior decisions in Quinn v. State, 751 So. 2d 627 (Fla. 4th DCA 1999) and Simmons v. State, 753 So. 2d 762 (Fla. 4th DCA 2000). In Quinn, the court expressly recognized the power of the legislature "to dispense with the element of intent and punish particular acts without regard to a malicious or wrongful mental attitude." Id. at 628. Significant to the court's holding in Quinn was its proper finding that §943.0435, Fla. Stat., is a "regulatory statute," which fact prompted the court to reject Quinn's argument that the statute's registration requirement was punishment or a sentence. Therefore, the Fourth District's reliance on Chicone v. State, 684 So. 2d 736 (Fla. 1996), which clearly involved a "criminal" statute as opposed to a "regulatory" statute, as involved here, was misplaced.

Significantly, in Simmons, the Fourth District reiterated that §943.0435 is a regulatory statute and importantly observed that, "Regulatory statutes do not constitute punishment." Id., 753 So. 2d at 763. The observations made by the Simmons Court are of critical importance because the Fourth District, in its instant decision and in stark contrast with its prior holding in Simmons, premised its decision to read an intent element into the statute based on its finding that the statute imposed punishment, and that the statute's reporting requirement was not merely procedural in nature. As Judge Farmer opined in the majority decision *sub judice*:

> These statutes [§943.0435 and §944.607] **create no mere informational reporting requirement**, the violation of which is punished with a small fine. **In this case the penalty for the offense turned out to be more than six and one-half years imprisonment**. In spite of the failure of the legislature to include an explicit element of intent in the statutory text, the authorities cited above require the courts to read a "broadly applicable" intent requirement into the state's burden of proof. We do so now, thus requiring a new trial. (Opinion, p. 4).

(A 4); Giorgetti v. State, 27 Fla. L. Weekly D1663 (Fla. 4th DCA July 17, 2002) (corrected opinion on motion for rehearing). Hence, in short, while Simmons expressly held that §943.0435 is not a statute involving punishment, the district court's instant

decision adds an intent element to the statute based solely on the amount of punishment imposed. In other words, while Simmons treated the statute as not being punitive, the Fourth District's decision *sub judice* clearly treats the statute as being punitive. These decisions are therefore in direct conflict and should be reconciled.

By its certified question, the Fourth District asks this Court to interpret Chicone and determine whether its requirement of guilty knowledge in drug possession cases extends to the sexual offender registration statutes. However, by its recent enactment of §893.101, Fla. Stat. (2002), our Legislature expressly found that the Chicone decision holding that guilty knowledge is an element that must be proved by the State in a drug possession case was contrary to legislative intent. Given the fact that the Legislature has announced that guilty knowledge is not an element of the purely *criminal* drug offenses under chapter 893, Fla. Stat., it reasonably follows that the Legislature did not intend that the element of guilty knowledge be proven by the State in a prosecution for the *regulatory* offense involved here. Indeed, had the Legislature intended that an intent/mens rea element be included in the sexual offender registration offenses, the State submits that it would have stated as such. At most, similar to §893.101(2), Fla. Stat., the

State believes that the lack of guilty knowledge is an affirmative defense to the sexual offender registration offenses.

Moreover, the State further submits that the district court's decision *sub judice* is inconsistent with decisions holding that the analogous Sexual Predators Act, §775.21, Fla. Stat., is not punitive in nature and, therefore, is not required to be construed in favor of a defendant. See Walker v. State, 718 So. 2d 217, 218 (Fla. 4th DCA 1998)(rejecting defendant's argument that sexual predator registration statute was penal in nature and was required to be construed in favor of defendant); Ortega v. State, 712 So. 2d 833, 833 (Fla. 4th DCA 1998) (registration provisions of sexual predator statute were regulatory, not punitive); State v. Carrasco, 701 So. 2d 656, 656 (Fla. 4th DCA 1997) (same); see also Andrews v. State, 792 So. 2d 1274 (Fla. 4th DCA 2001).

Furthermore, the decision of the Fourth District overlooked the settled rule of statutory construction that a statute enacted for the public benefit should be construed liberally in favor of the *public*, not in favor of a *defendant*, even though it contains a penal provision. See State v. Hamilton, 388 So. 2d 561, 563 (Fla. 1980); see also Walker, 718 So. 2d at 218 (Fla. 4th DCA 1998) (rejecting defendant's argument that sexual predator

registration statute was required to be construed in favor of defendant).

Here, as in Hamilton, it is clear that the statute in question was intended by the legislature to operate in the public interest and protect the public welfare. The statute not being located in the penal code but rather in the chapter dealing with the Department of Law Enforcement, the purpose of the statute is to protect citizens from sex offenders. It provides for the registration of sex offenders and the release of information to the public concerning sex offenders. See §943.0435, Fla. Stat. (2000). The preamble to Chapter 97-299 Laws of Florida, states in part:

> WHEREAS, the Legislature and law enforcement agencies recognize that the release of criminal history information or other information regarding criminal offenders is essential to the public safety and welfare, and
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> * * *
>
> WHEREAS, the Legislature finds that the public is especially concerned about certain sex offenders, and
>
> * * *
>
> WHEREAS, The Legislature intends to enhance public access to information regarding certain sex offenders by creating a public access telephone number for releasing information . . ..

See also Carrasco, 701 So. 2d at 656 (registration requirements of sexual predator statute are designed to protect the public from sexual predators who are widely regarded as having a high rate of recidivism). As the Fifth District Court of Appeal opined in Johnson v. State, 795 So. 2d 82 (Fla. 5th DCA 2000), with regard to the legislative intent behind the enactment of §943.0435:

> [T]he legislative intent of the Florida Sexual Offender notification and registration requirement is not intended to be punitive, but is designed to be remedial in nature by protecting the public from sexual offenders and protecting children from sexual activity and the information collected and disseminated as a result of sexual offender status is public information to which the public is entitled to access.

Id. at 87-88. At bar, by reading an intent or guilty knowledge element into the statute, the district court necessarily construed the statute in favor of the defendant and not the public welfare, in derogation of the foregoing well-established case law.

Most importantly, the Fourth District's decision clearly overlooked the established proposition that a court, in construing a statute, may not invade the province of the legislature and add words which change the plain meaning of the statute. See Johnson, 795 So. 2d at 85, citing State v. Elder, 382 So. 2d 687 (Fla. 1980). Here, by adding the element of

intent/mens rea to the State's burden of proving a violation of §943.0435, Fla. Stat. (2000), the court clearly altered the meaning of the statute. This alteration therefore violated the settled principle of statutory construction set forth above. In this regard, as Associate Judge Roby aptly noted in his special concurring opinion:

> The legislature did not include the explicit element of intent into the statutory text and **I do not believe that the court should rewrite the laws of this state. The legislature is constitutionally charged with this task**. The previously rendered opinion of this court correctly reflects the law of this state on the issues raised in this appeal except as noted below. *See Simmons v. State*, 753 So. 2d 762 (Fla. 4th DCA 2000); *Quinn v. State*, 751 So. 2d 627 (Fla. 4th DCA 1999).

(A 5); Giorgetti v. State, 27 Fla. L. Weekly at D1665. Consistent with Judge Roby's opinion, it is established that the legislature has the power to define what is an element of a crime and what is an affirmative defense. See Patterson v. New York, 432 U.S. 197, 205-207 (1977) (upholding a New York statute that required the defendant, at the guilt stage, to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance). Indeed, the Chicone Court itself observed that "the legislature is vested with the authority to define the elements of a crime." Id., 684 So. 2d at 741. Here,

by adding the element of scienter or mens rea to the sexual offender registration offense proscribed by §943.0435(9), Fla. Stat. (2000), the district court improperly encroached upon the province of the Florida Legislature.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR MISTRIAL DUE TO THE PROSECUTOR'S QUESTIONING OF OFFICER SIMMONS ON REDIRECT EXAMINATION SINCE THE DEFENSE "OPENED THE DOOR" TO THIS TESTIMONY BY ITS QUESTIONING ON CROSS-EXAMINATION.

It is well settled that a motion for mistrial is addressed to the sound discretion of the trial judge. Florida has continuously adhered to the long established rule that "the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done *only* in cases of absolute necessity." Salvatore v. State, 366 So. 2d 745, 750 (Fla. 1978). As this Court instructed in Duest v. State, 462 So. 2d 446, 448 (Fla. 1985), a mistrial should be granted *only* in circumstances where the "error committed was so prejudicial as to vitiate the entire trial." Thus, a trial court's denial of a mistrial motion is reviewed for an abuse of discretion. Id.

At bar, the Fourth District also held that the trial court reversibly erred by not granting Defendant's mistrial motion based on the prosecutor's questioning of Deputy Simmons on cross-examination concerning Defendant's response when told that he had failed to register at the driver's license office. Since, *inter alia*, the defense opened the door to this testimony by virtue of

defense counsel's cross-examination of the deputy, the State submits that no reversible error occurred.

In an obvious attempt to enhance Defendant's credibility with the jury, during defense counsel's cross-examination of Deputy Simmons, counsel questioned the officer extensively about Defendant's cooperativeness with the deputy just prior to his arrest. (T 442-447). During this examination, *inter alia*, defense counsel elicited testimony that Defendant voluntarily told the deputy where and how long he had been residing at a residence, that he never attempted to run from the deputy, and that he was extremely cooperative with the deputy. (T 442-447). In view of the questioning by defense counsel, it was proper for the prosecution to have asked the deputy on redirect examination concerning Defendant's response when told that he had not registered at the driver's license office As Professor Ehrhardt teaches concerning matters which may be addressed on redirect examination, "The cross-examination may 'open the door' to the admission of certain testimony so that it will not be excluded during the redirect examination." Ehrhardt, *Florida Evidence* §612.3 (2001 Edition); see Metropolitan Dade County v. Zapata, 601 So. 2d 243 (Fla. 3d DCA 1992) (although evidence of a mock drowning drill was inadmissible under section 90.404(2) because of the dissimilarities, the evidence was admissible because

counsel opened the door during cross-examination of the witness. "As a general rule, a party may re-examine a witness about matters brought out on cross-examination ... Testimony is admissible on redirect examination which tends to qualify, limit or explain testimony elicited on cross-examination."); State v. Trujillo, 748 So. 2d 326 (Fla. 3d DCA 1999) (introduction of certain evidence can often open the door to the introduction of otherwise inadmissible evidence).

Unlike the case of State v. Hoggins, 718 So. 2d 761 (Fla. 1998) relied on by Defendant below, which involved a comment on the defendant's *post*-arrest silence, the complained-of questioning and Defendant's responses thereto occurred *prior* to his arrest. (T 436-447). Moreover, since Defendant never invoked his right to silence, it was not error for the prosecutor to have questioned Deputy Simmons concerning Defendant's response when told that he had not registered at the driver's licence office. See Thomas v. State, 726 So. 2d 357 (Fla. 1st DCA 1999).

Furthermore, in accordance with the foregoing, the State maintains that the prosecutor's complained-of questioning of Officer Simmons on redirect examination was essentially an "invited response" to defense counsel's examination of the officer on cross examination. Analogously, in Rodriguez v.

State, 753 So. 2d 29, 38-39 (Fla. 2000), this Court distinguished from the rule prohibiting comments on the failure of the defendant to testify a category of cases involving "invited response." Indeed, it is clear that this Court in Rodriguez acknowledged an exception for an invited response arising from the context in which the prosecutor's statement is presented. See Rich v. State, 756 So. 2d 1095, 1096 (Fla. 4th DCA 2000); see also Brown v. State, 771 So. 2d 603 (Fla. 4th DCA 2000) (prosecutor's comments during closing argument that nobody testified that victim's death was a suicide were permissible as invited response where defense counsel argued throughout entire trial that victim's death was a suicide).

Given the clear evidence of Defendant's guilt, including most notably Defendant's own *admission* during his testimony on cross-examination that he did not timely report to the driver's license office after changing his address (T 598-599), any error committed by the trial court in not declaring a mistrial due to Officer Simmons' testimony was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), clarified in Goodwin v. State, 751 So. 2d 537 (Fla. 1999). The State submits that there exists no *reasonable* possibility the jury's verdict would have been any different even without the prosecutor's complained-of questioning of Officer Simmons.

DiGuilio, 491 So. 2d at 1139 (in harmless error analysis, "[t]he focus is on the effect of the error on the trier-of-fact); see also §59.041, Fla. Stat. (2001) (no judgment shall be reversed, or new trial granted, on the ground of erroneous admission of evidence unless the error complained of has resulted in a "miscarriage of justice"); §924.33, Fla. Stat. (2001) ("No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. *It shall not be presumed that error injuriously affected the substantial rights of the appellant*.").

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court vacate the decision of the Fourth District Court of Appeal and remand this cause to the district court for further proceedings consistent therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by U.S. Mail to Dea Abramschmitt, Asst. Public Defender, Counsel for Respondent, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on this ____ day of October, 2002.

_____
DOUGLAS J. GLAID
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

_____
DOUGLAS J. GLAID
Assistant Attorney General

APPENDIX