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SID J. WHITE

OCT 5 1992

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

BY _____
Chief Deputy Clerk

DANIEL TERRENCE SAVOURY,

Petitioner,

v.

Case No. 79,715

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent can give no statement of the case and facts as respondent has no record with which to work. Below this was, apparently, an appeal from a summary Rule 3.850 denial.

SUMMARY OF THE ARGUMENT

As to Issue I: The court should not consider appellant's attack on the validity of the statute **as** it was an issue that could have been raised on direct appeal.

The concerns that prompted the single subject rule are not implicated by the bill that created the revised habitual offender statute. **The** provision relating to repossession of automobile is of criminal significance and **was** properly included with the statute that is **now** subject to question.

As to Issue 11: The habitual offender statute punished for conduct not status. In California v. Robinson, **the** Court was careful to distinguish between the two. It has no application to this statute. The other cases relied on by the appellant are likewise distinguishable.

As to Issue III: **The** statute does not run the risk of enhancement being premised on uncounseled convictions. **The** case law is clear that the offender must be given the opportunity to show this to the sentencing court.

ARGUMENT

ISSUE I

WHETHER CHAPTER 89-280, LAWS OF FLORIDA
VIOLATED THE SINGLE **SUBJECT** PROVISION
OF THE FLORIDA CONSTITUTION?

(As restated by respondent)

Appellant contends that the chapter 89-280, Laws of Florida amending the habitual offender statute is unconstitutional on the ground that it violates the single subject rule of the constitution. Appellant also makes other constitutional attacks as well. Aside from the fact that these attacks are without merit, this *court* should not consider them. The facial validity of a statute is one of those issues that can be raised on direct appeal regardless of whether it was presented to the trial court. Thrushin v. State, 425 So.2d 1126 (Fla. 1983). Because it is a matter that could have been raised on direct appeal and was not it **has** been procedurally defaulted. E.g., Thomas v. State, 486 So.2d 577 (Fla. 1986).

Although the merits should not be reached, **the** State will address the issue. To withstand an attack alleging the inclusion of more than one subject, various topics within a legislative enactment must be "properly connected," Art. 111, g6, Fla. Const. This term has been addressed many times, most recently in Burch v. State, 558 So.2d 1 (Fla. 1990). In upholding a broad criminal statute, this Court found that each of the "three basic areas"¹ addressed by Ch. 87-243, Laws of Florida, **bore** a "logical

The three areas were: (1) comprehensive criminal regulations and procedures, (2) money laundering, and (3) safe neighborhoods. *Id.* at 3.

relationship to the single subject of controlling crime." *Id.* at 3.

Chapter 89-280 contains **two** basic areas: (1) policies and penalties as to career criminals and habitual felons; **and** (2) repossession of motor vehicles. Both relate to controlling crime. They are properly connected and do not violate Art. 111, §6 of the Florida Constitution.

Elaboration is useful. Article III, §6 has **long been** extant in Florida's constitutions.² It is "designed to prevent various abuses commonly encountered in the **way** laws were passed . . . [such as] logrolling, which resulted in hodgepodge or omnibus legislation." *Williams v. State*, 459 So.2d 319 (Fla. 5th DCA), *dismissed*, 458 So.2d 274 (Fla. 1984). *See, Burch, supra* at 2 (noting that the purpose of Art. 111, §6 is to prevent duplicity of legislation and to prevent **a** single enactment from becoming a cloak for dissimilar legislation).

At the outset, the problems of logrolling are not so compelling or frequent in criminal legislation. To the contrary, the fact that Ch. 87-243 was designed to be a comprehensive response to burgeoning drug crime led the Burch court to uphold that act. *See id.* at 3 (simply because "several different [e.s.] statutes are amended does not mean that one subject is involved").

² *See*, the Commentary to Art. 111, §6, noting that the 1968 version is "close in substance to Sections 15 and 16 of Art. III of the 1885 Constitution." 25A Fla. Stat. Annon. 656 (1991 ed.)

The repossession provisions of Ch. 89-280 amend Part I of Ch. 493, Florida Statutes.³ That part, entitled "Investigative and Patrol Services," addresses private conduct (i.e., investigative and security services) normally provided by law enforcement officers.

The changes in the second basic area of Ch. 89-280 were necessitated by problems with repossession conducted by private individuals. The problems **rose** to criminal significance, as violations of Part I of Chapter 493 are first-degree misdemeanors. **See**, §493.321, Fla. Stat. (1989).

Chapter 493, Part I, is also designed to protect the public against abuse by repossessors, etc., and provides criminal **penalties**.⁴ The habitual felon statute is also designed to protect the public against repeat felons.

This Court has consistently held that the Legislature must be accorded wide latitude in the enactment of laws. Therefore, Art. 111, §6 of the Florida Constitution must not be used to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. State v. Lee, 356 So.2d 276, 282 (Fla. 1978). **See**, Smith v. City of St.

³ Chapter 493 was repealed, reenacted and renumbered by ch. 90-364, Laws of Florida. For convenience, all cites to Ch. 493 are to the 1989 version, thus corresponding to the statutory section numbers in ch. 89-280.

⁴ Part I also addresses investigative and patrol issues, and detection of deception. For example, §493.30(4) defines "private investigation" to include, among other activities, the obtaining of information relating to certain crimes; the location and recovery of stolen property; the cause, origin, or responsibility for fires, **etc.**; and the securing of evidence for use in criminal (and civil) trials. These duties are quasi-law enforcement in nature.

Petersburg, 302 So.2d 756, 758 (Fla. 1974) "For a legislative enactment to fail, the conflict between it and the Constitution must be palpable.").

In Bunnell v. State, 459 So.2d 808 (Fla. 1984), this Court invalidated §1, Ch. 82-150, Laws of Florida, as having "no cogent relationship" (id. at 809) with the remainder of that act. Specifically, the subject law reduced membership of the Florida Criminal Justice Council, **and** created **the** criminal offense of obstructing justice through false information. Chapter 89-280, in contrast, includes no such disparity. There is a cogent relationship between its habitual or career felon provisions and its repossession provisions. Both respond to frequent incidence of criminal activity; both seek to deter repeat offenses. Both seek to protect the public. Repossessors and investigators, although private individuals, are performing the quasi-law enforcement duties. **The** parts of Ch. 89-280 are sufficiently related to survive a two-subject challenge, even though Ch. 89-280 is not a comprehensive crime bill like the one upheld in Burch, *supra*. Chapter 89-280 contains but one subject.

ISSUE II

WHETHER SECTION 775.084(4)(e), FLORIDA STATUTES (1991)
IS FACIALLY UNCONSTITUTIONAL AS PUNISHING A PERSON
BASED ON HIS OR HER STATUS?

(As restated by respondent)

Appellant contends that the habitual offender statute punishes him for his status. He relies on Robinson v. California, 370 U.S. 660, 82 L.Ed.2d 1417, 8 L.Ed.2d 758 (1962) and certain state **cases**. Neither Robinson nor the state **cases** he cites compel a finding that appellant is being punished for his status.

The short answer is that he is being punished for his offense not his status. The Fourth District summarily rejected a similar challenge in Mitchell v. State, 575 So.2d 798 (Fla. 4th DCA 1991). This court should do likewise. It is not violation of the constitution to **make** punishment for recidivist more sever. Eutzy v. State, 458 So.2d 755 (Fla. 1984).

The kind of status that can not be criminalized was set out in Robinson. It held that California could **not criminalize** a person's simply being addicted to narcotics. In addressing the statute in question the Supreme Court was careful to distinguish between acts and status. Robinson, 370 U.S. at 662. This distinction is crucial. It is a offender's act, criminal offense, that is being punished in light of his previous acts, criminal offenses.

Neither L.S. v. State, 553 So.2d 345 (Fla. 4th DCA 1989) nor Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987) require a different result. L.S. is simply an application of the principle

that a revocation of probation can not be based on a simple arrest. Potts held a statute making the penalty for carrying a concealed firearm more sever for a person under indictment. Neither case is authority for finding the being a habitual felony affender a the kind of status that can not be criminalized.

ISSUE III

WHETHER SECTION 775.084, FLORIDA STATUTES (1991)
IS FACIALLY UNCONSTITUTIONAL AS A VIOLATION OF
ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION?

(A3 restated by respondent)

Appellant contends that section 775.084 denies him due process of law. The specific contention is that it could condone the use of unconstitutional convictions. The truth of the matter is that it specifically excludes pardoned or improperly secured convictions from consideration.


Sections 775.084(1)(a) 3 and 4 specifically provide that the court find the "qualified offense" not have been pardoned or set aside in any post-conviction proceeding. The appellant's concern that an unconstitutionally obtained conviction might be used is not worth any consideration by this court. **It is** the offender that is in the best position to know if a conviction is subject to collateral attack. That he or she has not successfully collaterally attacked a conviction is reason enough for it to be considered. Appellant's concern about uncounseled convictions being used was addressed in Broderick v. State, 564 So.2d 622 (Fla. 4th **DCA** 1990). Broderick ruled that a defendant must be given the right at sentencing to show that he did not have counsel for convictions for which he or **she** had a right to counsel and did not waive it. Appellant's concern that a uncounseled conviction might be used **as** a basis for a habitual offender sentence is illusory.

CONCLUSION

WHEREFORE Respondent asks the court to affirm the decision of **the** district court on the basis of the above and foregoing reasons, arguments, and authorities.

Respectfully Submitted,

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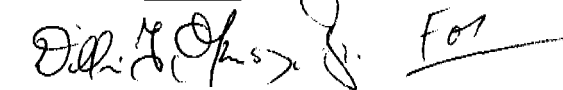
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondent on Jurisdiction has been furnished to, Daniel T. Savoury, DOC # 237288, DeSoto Correctional Institution, Arcadia, Florida 33821, Petitioner, by United States Mail, postage prepaid, this 2nd day of October, 1992.

 For
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