IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

JERRY RANDELL BROXTON,

Appellant,

v. CASE NO. 5D08-4268

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS. 6

ISSUE II

SECTION 893.101 FULLY COMPORTS WITH DUE PROCESS. 11

ISSUE III

THE DEFENDANT WAS PROPERLY SENTENCED. 15

CONCLUSION 19

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE 20

TABLE OF AUTHORITIES

Cases

Burnette v. State,
901 So. 2d 925 (Fla. 2d DCA 2005) 12,13

Dewberry v. State,
905 So. 2d 963 (Fla. 5th DCA 2005) 6,8

Harris v. State,
932 So. 2d 551 (Fla. 1st DCA 2006),
rev. denied, 962 So. 2d 336 (Fla. 2007) 12

Hatcher v. State,
834 So. 2d 314 (Fla. 5th DCA 2003) 9

Ingram v. State,
928 So. 2d 423 (Fla. 1st DCA 2006) 10

Lamore v. State,
983 So. 2d 665 (Fla. 5th DCA 2008) 11

Leach v. State,
957 So. 2d 717 (Fla. 5th DCA 2007) 9

Paey v. State,
943 So. 2d 919 (Fla. 2d DCA 2006),
rev. denied, 954 So. 2d 28 (Fla. 2007) 16,18

State v. Benitez,
395 So. 2d 514 (Fla. 1981) 16

State v. Burns,
698 So. 2d 1282 (Fla. 5th DCA 1997) 8

State v. Giorgetti,
868 So. 2d 512 (Fla. 2004) 12

State v. Gray,
435 So. 2d 816 (Fla. 1983) 12

State v. Louis,
571 So. 2d 1358 (Fla. 4th DCA 1990) 8

State v. Travis,
808 So. 2d 194 (Fla. 2002) 15

Taylor v. State,
929 So. 2d 665 (Fla. 3d DCA 2006),
rev. denied, 952 So. 2d 1191 (Fla. 2007) 12

Trushin v. State,
425 So.2d 1126 (Fla.1982) 11

Wright v. State,
920 So. 2d 21 (Fla. 4th DCA),
rev. denied, 915 So.2d 1198 (Fla. 2005) 12,14

STATEMENT OF FACTS

Appellee submits the following additions/corrections to the Appellant's Statement of Facts:

Officer Adam testified at the suppression hearing that when he initially approached the four fishermen, the Defendant left the pond area and headed toward the vehicles. (R. 147).

Adam further testified that in his experience, people who do not produce identification are often either the subject of an outstanding warrant or are hoping they can avoid a ticket because of the lack of identification. (R. 148).

Adam testified that in his line of work, he usually dealt with people carrying a knife, a gun, or both. (R. 149). Adam had been a law enforcement officer for 10.5 years. (R. 145). He further noted that he was concerned about the bulges in the Defendant's pocket, and he needed to know where any weapons were for his own safety and to keep the situation calm - especially since he was outnumbered four to one. (R. 159-61).

While conducting a pat down for weapons, Adam felt a plastic bag in the Defendant's pocket, and accordingly asked the Defendant what was in the bag. (R. 151). The Defendant stated that it was fishing tackle and voluntarily opened the flap of his pocket to reveal the bag; at that point, Adam saw the pills in the bag. (R. 151, 153-54, 158). Adam did not demand that

the Defendant remove or show him the contents of his pocket until *after* he saw the pills. (R. 153).

Officer Adam testified at trial that he saw four individuals fishing in a pond, so he parked his car and walked over to make sure they were properly licensed. (T.[1] 11-12). As he spoke with the first person, he noticed the Defendant had left the area and was heading toward the cars parked nearby. (T. 13). He wanted to make sure the Defendant did not flee, so he told the others to meet him at the cars and went over to the Defendant. (T. 13).

Officer Adam asked the Defendant if he had a fishing license, and the Defendant said that he did not. (T. 14). He then asked for identification - again, the Defendant had none. (T. 14). Adam, the lone officer with four fishermen, noticed several bulges in the Defendant's pockets; in his experience, most hunters and fishers have a weapon around, so he patted down the Defendant to make sure he was not armed. (T. 14).

Adam felt a bag in one of the pockets, so he asked the Defendant what it was. (T. 15). The Defendant lifted the flap of the pocket, exposing the bag, and told Adam that it was

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[1]As noted in the Initial Brief (at p. ix), the trial transcript is contained in volume II of the Record on Appeal, with pages 1-80 of the November 17 voir dire and pages 1-110 of the November 18 trial. All references herein to "T." are references to the November 18 trial.

fishing tackle. (T. 15). Adam could see that it was a plastic bag with pills inside, so he had the Defendant remove it. (T. 15). Knowing that people usually don't carry pills in a plastic bag, Adam called the Sheriff's Office and asked them to identify the pills - which turned out to be Percocet and Darvocet. (T. 15). The baggie contained 29 Percocet (Oxycodone) and 9 Darvocet pills. (T. 24, 26). FDLE lab tests later confirmed that the pills were Oxycodone, with a total weight of 15.3 grams. (T. 48-49).

The Defendant stated that the pills belonged to his stepfather. (T. 19, 39). Officer John Wilkie, who had arrived to assist Adam after the Defendant was frisked, called the stepfather, who stated that he was on medication, but not that kind. (T. 39). The Defendant then changed his story, stating that he was holding the pills for a friend; he did not know the last name of the friend, and he had no way of getting in contact with him. (T. 21, 23, 39-40). The Defendant never claimed that he had a prescription for these items, nor did he ever claim that he needed them for a medical condition. (T. 21, 39).

The Defendant testified at trial, claiming that he took his stepfather's pills, not knowing what they were, because he wanted to get high. (T. 67-68, 73). The Defendant knew that

his stepfather was on pain medication for his broken back. (T. 74).

The jury found the Defendant guilty of trafficking in Oxycodone, in an amount over 14 grams. (T. 105). He was sentenced to the statutorily required 15 year minimum mandatory sentence. (T. 107-08).

SUMMARY OF ARGUMENT

ISSUE I: The trial court properly denied the Defendant's motion to suppress. The Defendant was properly detained for a civil infraction, was properly frisked for a weapon when the officer had a reasonable basis for doing so, and then voluntarily revealed the contents of his pocket.

ISSUE II: Section 893.101 fully comports with Due Process. The Legislature has the power to create a general intent crime, such as trafficking, and require the defendant to assert an affirmative defense, such as lack of knowledge.

ISSUE III: The Defendant was properly sentenced to the statutorily required minimum mandatory term, where he qualified as a drug trafficker as that term is defined by the statute. His sentence, while severe, is neither cruel nor unusual.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

As his first point on appeal, the Defendant contends that the trial court erred in denying his motion to suppress the pills found in his pocket. A motion to suppress involves mixed questions of law and fact. In reviewing the trial court's ruling on such a motion, an appellate court must determine whether competent, substantial evidence supports the lower court's factual findings, construing all the evidence and reasonable inferences therefrom in a manner most favorable to upholding the trial court's decision. See, e.g., Dewberry v. State, 905 So. 2d 963, 965 (Fla. 5th DCA 2005). The trial court's application of the law to the facts is reviewed de novo. Id. Applying that standard here, the trial court's decision should be affirmed.

The trial court found that Officer Adam's encounter with the Defendant was perfectly legal, as he was entitled to determine if the Defendant had a fishing license and, when he did not, whether he had identification. (R. 37). He also had a right, under the circumstances, to perform a cursory pat down of the Defendant, considering he was alone in a rural area with four fishermen. (R. 37). Additionally, from his experience he knew

that sportsmen typically carry weapons, he saw bulges in the Defendant's pockets, and the Defendant had already acted somewhat suspiciously by trying to leave and then admitting he had neither a proper license nor any identification. (R. 146-49).

During the pat down, Officer Adam felt a plastic bag in the Defendant's pockets, and asked him a simple question - what's in the bag. (R. 37, 151). The Defendant chose to expose the bag, leading the officer to see that it was not fishing tackle, as he claimed, but a bag full of pills. (R. 37, R. 151). This gave Officer Adam a reasonable suspicion that the Defendant was engaged in criminal activity. (R. 37).

The Defendant's contention that an officer can only conduct a pat down in the course of a criminal investigation is not a correct statement of the law. Under section 901.151, Florida Statutes, an officer is authorized to temporarily detain a person encountered under circumstances indicating the person has committed, is committing, or is about to commit a violation of the criminal laws of Florida. This is not, however, the only time[2] an individual can be detained, and the Defendant was not detained under this provision.

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[2]If the statute was all inclusive and the only possible justification for detaining an individual in Florida, an officer could never even stop a car for a traffic infraction.

Rather, the Defendant was detained under the authority of the Fish and Wildlife Conservation Officer to request the production of a fishing license when the Defendant had been fishing. § 379.354(3), Fla. Stat. Once an individual is properly stopped, as the Defendant was here, an officer can conduct a pat down if he has a reasonable belief that the individual is armed with a dangerous weapon and poses a threat to the officer or any other person. See, e.g., Dewberry, 905 So. 2d at 966. See also State v. Louis, 571 So. 2d 1358, 1359 (Fla. 4th DCA 1990) (officer engaged in investigation may conduct limited protective search of suspect for weapons, even without probable cause to believe crime has been committed, as long as officer has reason to believe his safety is in danger).

This determination is made considering "the totality of the circumstances as viewed by an experienced police officer." Dewberry, 905 So. 2d at 966. In considering this matter, courts should consider the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers," as guided by "common sense and ordinary human experience." State v. Burns, 698 So. 2d 1282, 1284 (Fla. 5th DCA 1997) (quotations omitted).

Here, Officer Adam was by himself, outnumbered four to one. He knew from experience that fishermen generally carry guns or knives. He was talking to an individual who was fishing without a license and with no identification, who had attempted to leave the area. Finally, he noticed that this individual had bulging pockets.

Under these circumstances, it was certainly reasonable for Officer Adam to conduct a pat down to see if the Defendant was armed. See Leach v. State, 957 So. 2d 717, 720 (Fla. 5th DCA 2007) (officer properly conducted pat down during traffic stop where he was outnumbered, in a situation where, in officer's experience, weapons were often present); Hatcher v. State, 834 So. 2d 314, 317 (Fla. 5th DCA 2003) (bulge in suspect's clothing is example of type of conduct that supports a reasonable suspicion that suspect is armed). The trial court's ruling on this matter is fully supported by the record and should be affirmed.

Finally, the Defendant contends that once the pat down uncovered no weapons, there was no reason for the search to continue. The State agrees with this proposition. The record demonstrates, however, that the search did not continue. Officer Adam did not reach into the Defendant's pocket or order him to take the item out and show it to him. Instead, the

officer asked what was in the baggie he felt, and the Defendant voluntarily revealed it, presumably unaware that this would also reveal the illegal pills contained therein.

The First District Court of Appeal addressed a similar claim in Ingram v. State, 928 So. 2d 423, 429-430 (Fla. 1st DCA 2006). There, as here, the law enforcement officer asked about the nature of an object evident in the suspect's pocket, and the suspect reached into his pocket and displayed the item. Id. The court concluded that this action indicated a valid consent to the officer viewing the object. Id. The trial court in the instant case properly reached the same conclusion, and its decision should be affirmed.

ISSUE II

SECTION 893.101 FULLY COMPORTS WITH DUE PROCESS.

As his second point on appeal, the Defendant contends that the drug trafficking statute is unconstitutional, because it improperly makes the lack of knowledge of the illicit nature of a controlled substance an affirmative defense, rather than requiring the State to affirmatively prove knowledge. § 893.101, Fla. Stat.

First, the State notes that this due process challenge was never raised below and accordingly was not properly preserved for appeal. While a constitutional challenge to the facial validity of a statute can be presented for the first time on appeal under the fundamental error exception, challenging the "constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level." Trushin v. State, 425 So.2d 1126, 1129-30 (Fla.1982); Lamore v. State, 983 So. 2d 665, 668 (Fla. 5th DCA 2008). Given that this matter would only be at issue under certain factual circumstances - where knowledge was contested - the instant challenge should have been raised below.

Even if the Defendant's claim could be deemed a challenge to the statute on its face, it still has no merit. Every district court that has considered this claim has rejected such

a challenge to this statute. Harris v. State, 932 So. 2d 551, 552 (Fla. 1st DCA 2006), rev. denied, 962 So. 2d 336 (Fla. 2007); Taylor v. State, 929 So. 2d 665 (Fla. 3d DCA 2006), rev. denied, 952 So. 2d 1191 (Fla. 2007); Wright v. State, 920 So. 2d 21 (Fla. 4th DCA), rev. denied, 915 So.2d 1198 (Fla. 2005); Burnette v. State, 901 So. 2d 925 (Fla. 2d DCA 2005).

This Court should follow these well-reasoned decisions. As the Florida Supreme Court has recognized, the Legislature has the power to criminalize conduct without requiring a specific criminal intent. State v. Gray, 435 So. 2d 816, 819-20 (Fla. 1983). While courts will presume that the Legislature intends criminal statutes to contain a knowledge requirement, "an express provision dispensing with guilty knowledge will always control." State v. Giorgetti, 868 So. 2d 512, 516 (Fla. 2004).

Section 893.101 has clearly stated the Legislature's express intent to eliminate the guilty knowledge requirement for chapter 893 offenses and substitute an affirmative defense instead. This provision does not violate the defendant's right to due process of law, as the State is still required to prove all the elements of the crime; requiring the defense to come forward with an affirmative defense is not unconstitutional. As the Second District Court of Appeal explained:

> Due process requires that the State prove an accused guilty beyond a reasonable doubt as to all the

> essential elements of guilt. However, it is the prerogative of the legislature to define the elements of a crime and to determine whether scienter is an essential element of a statutory crime. Placing on the defendant the burden of proving an affirmative defense is not unconstitutional, because it does not relieve the State of its burden to prove beyond a reasonable doubt all the elements of the crime. An affirmative defense does not involve proof of the elements of the offense, but rather concedes the elements while raising other facts that, if true, would establish a valid excuse or justification, or a right to engage in the conduct in question. In other words, "an affirmative defense says, 'Yes, I did it, but I had a good reason.'
>
> Section 893.101 expressly states that knowledge of the nature of a substance is not an element of the offense of possession. A defendant charged under section 893.13 can concede all the elements of the offense, i.e., possession of a specific substance and knowledge of the presence of the substance, and still be able to assert the defense that he did not know of the illicit nature of the specific substance. Thus, the affirmative defense created by section 893.101 does not violate due process by abrogating the State's burden of proving the defendant's guilt beyond a reasonable doubt, and Burnette's constitutional challenge must fail.

Burnette, 901 So. 2d at 927 -928 (citations omitted).

Contrary to the Defendant's argument, enacting this statute was well within the prerogative of the Legislature:

> The statute does two things: it makes possession of a controlled substance a general intent crime, no longer requiring the state to prove that a violator be aware that the contraband is illegal, and, second, it allows a defendant to assert lack of knowledge as an affirmative defense. There is a caveat that, once this door is opened, either actual or constructive possession of the controlled substance will give rise to a permissive presumption that the possessor knew of the substance's illicit nature, and the jury

> instructions will include this presumption. § 893.101(3), Fla. Stat. The knowledge element does not need to be proven, but if the defendant puts it at issue, then the jury is going to hear about it, and the defendant must work to rebut the presumption.
>
> We recognize that a poorly drawn piece of legislation can create an "illusory" affirmative defense, requiring a defendant to attempt to prove the case for his or her innocence, but allowing no chance of success. However, such is not the case in this instance. This statute removes guilty knowledge as an element, but does not require the defendant to prove or disprove knowledge. It is optional to raise lack of knowledge as a defense. The statute simply provides that once this defense is utilized, a permissive presumption attaches, allowing the jury to draw an inference from the facts. It is mandatory and conclusive presumptions that are prohibited. *Fitzgerald v. State*, 339 So. 2d 209, 211 (Fla.1976). Further, there is a rational purpose for this presumption, and it is tied to a legitimate governmental interest. Accordingly, we reject Appellant's substantive due process challenge to the facial constitutionality of section 893.101, Florida Statutes, expressly declaring it valid.

Wright, 920 So. 2d at 24 -25.

This Court should follow the well-reasoned decisions of its sister courts, and the Defendant's second point on appeal should be rejected.

ISSUE III

THE DEFENDANT WAS PROPERLY SENTENCED.

Finally, the Defendant contends that he should not have been subject to the minimum mandatory term of imprisonment where the pills were for his personal use only and he had no intent to distribute them. This argument is contrary to the plain language of the statute and has no merit.

The Florida Legislature has defined "trafficking in illegal drugs" to include any person "who knowingly sells, purchases, manufactures, delivers, or brings into this state, *or who is knowingly in actual or constructive possession of 4 grams or more* of ... oxycodone." § 893.135(1)(c)1, Fla. Stat. (emphasis added). A person acts "knowingly" under this subsection if the person intends to actually or constructively possess the prohibited substance. § 893.135(2), Fla. Stat.

This crime is a first degree felony. § 893.135(1)(c)1, Fla. Stat. Where, as here, the quantity involved is 14 grams or more, but less than 28 grams, the defendant "shall be sentenced to a mandatory minimum term of imprisonment of 15 years." § 893.135(1)(c)1b, Fla. Stat. The weight is determined by the total weight of the mixture containing the controlled substance, in the aggregate. § 893.135(6), Fla. Stat. See also State v. Travis, 808 So. 2d 194 (Fla. 2002).

Under the plain language of the statute, then, a trafficking conviction does not require proof of any intent to distribute the illicit substance, and the minimum mandatory sentence clearly applies to those individuals, such as the Defendant, who possess a certain quantity of Oxycodone. See Paey v. State, 943 So. 2d 919, 921 (Fla. 2d DCA 2006), rev. denied, 954 So. 2d 28 (Fla. 2007).

The Defendant also contends that his sentence is cruel and unusual, based again on the claim that he simply possessed the Oxycodone for his own personal use. As noted previously, this characterization is belied by the plain language of the statute, under which he clearly qualifies as a trafficker.

The Florida courts have consistently upheld minimum mandatory sentences, regardless of their severity, because the Legislature, not the judiciary, determines the appropriate penalties for violating the law. State v. Benitez, 395 So. 2d 514, 517-18 (Fla. 1981) (concluding that penalties imposed by section 893.135 "are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved"). As the Second District Court of Appeal explained in rejecting a similar claim:

> As a reviewing court, we are required to grant substantial deference to the broad authority that the

Florida Legislature possesses in determining the types and limits of punishments for crimes. *See Solem*, 463 U.S. at 290, 103 S.Ct. 3001. Beginning in *Rummel*, the Supreme Court has stressed the important role that a legislature plays in the criminal justice system by noting that for crimes punishable by terms of imprisonment, "the length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S. at 274, 100 S.Ct. 1133. Justice Scalia's discussion in *Harmelin* of why a legislature is in the best position to assess the gravity of a crime is particularly pertinent to Mr. Paey's case:

> But surely whether it is a "grave" offense merely to possess a significant quantity of drugs-thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute-depends entirely upon how odious and socially threatening one believes drug use to be. Would it be "grossly excessive" to provide life imprisonment for "mere possession" of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as "grave" as the possible dissemination of heavy weapons. Who are we to say no? The members of the [ ] Legislature, and not we, know the situation on the streets....

501 U.S. at 988, 111 S.Ct. 2680.

The Florida statutes addressing the subject demonstrate that the legislature considers oxycodone to be a potentially dangerous substance. Section 893.03 contains standards and schedules for controlled substances. Oxycodone, a derivative of opium, is listed as a Schedule II substance. § 893.03(2)(a)(1)(o). "A substance in Schedule II has a high potential for abuse" and "abuse of the substance may lead to severe psychological or physical dependence." § 893.03(2)(a). Because of oxycodone's high potential for abuse and the effects of such abuse, the Florida Legislature could rationally conclude that the threat

> posed to the individual and to society by possession of at least twenty-eight grams of oxycodone is sufficient to warrant the deterrent and retributive effect of a twenty-five-year mandatory minimum sentence.

Paey, 943 So. 2d at 923-24.

The Defendant was properly sentenced based on the crime he committed, as that crime and the penalties therefore are clearly set forth in the Florida Statutes. His final point on appeal should be rejected by this Court.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully requests this honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by U.S. mail to William Mallory Kent, counsel for Appellant, 1932 Perry Place, Jacksonville, Florida 32207, this 28th day of August, 2009.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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