

IN THE SUPREME COURT OF FLORIDA

MICHAEL CLEMENT JOHNSON,
Petitioner,

v.

CASE NO. SC10-1286

STATE OF FLORIDA,
Respondent.

_____ /

On Discretionary Review from the First
District Court of Appeal: NON-Certified Conflict

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS¹

Case--Johnson seeks discretionary review of the First District's decision in his direct appeal. That decision, which did not certify conflict, was rendered June 22, 2010. The notice to invoke this court's discretionary jurisdiction was filed June 30.

Facts--Johnson was convicted for sale or delivery of cocaine. This is the only fact appearing in the opinion below.

SUMMARY OF ARGUMENT

The decision below does not expressly and directly conflict with Chicone v. State, 684 So.2d 736 (Fla.1996). Instead, it correctly recognizes the legislature clarified statutory intent in response to Chicone. The decision also correctly recognizes the legislature, in §893.101, changed a defendant's knowledge of the illicit nature of a substance from a prima facie element--to the affirmative defense of lack-of-knowledge. Nothing in the decision or in §893.101, Fla. Stat., purports to overrule this court's authority to decide whether that statute is constitutional.

Because the statutes and facts were materially different in Sult and Wyche, the decision below did not conflict with those cases. This court lacks jurisdiction to review the decision below.

¹The State objects to Johnson's self-serving account of the argument he made below. Such account is not factual, and not necessary to the procedural history. The State objects to his parsing of the decision below as unnecessary to the facts or procedural history, and argumentative.

If this court concludes otherwise, it still should not review this case. Nothing on the face of the decision below indicates Johnson disputed his knowledge that the substance he sold or delivered was cocaine. In light of that circumstance, and the absence of any other facts in the decision below, this court should not exercise jurisdiction.

ARGUMENT

ISSUE

DOES THIS COURT HAVE JURISDICTION TO REVIEW THE DECISION BELOW; WHICH HELD §893.101, FLA. STAT., DID NOT VIOLATE DUE PROCESS BY CHANGING "KNOWLEDGE" A SUBSTANCE WAS ILLICIT FROM A PRIMA FACIE ELEMENT TO AFFIRMATIVE DEFENSE? (Restated).

A. Standard of Review

This court must decide whether the decision below conflicts with Chicone, etc. Such determination is jurisdictional, and thus a question of law answered *de novo*. Cf. State v. Glatzmayer, 789 So.2d 297,306 n.7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to *de novo* review."); Jacobsen v. Ross Stores, 882 So.2d 431, 432 (Fla. 1st DCA 2004) (questions of subject matter jurisdiction are reviewed *de novo*).

B. Merits

No Jurisdiction

Section 893.101, Fla. Stat., provides:

(1) The Legislature finds that the cases of Scott v. State, Slip Opinion No. SC94701 (Fla. 2002) and Chicone v. State, 684 So.2d 736 (Fla. 1996), holding that the

state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter. [e.s.].

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

On its face, this statute does not altogether eliminate *mens rea* from prosecutions for offenses under ch. 893. Instead, subsection (2) changes the defendant's knowledge of the illicit nature of a substance from a *prima facie* element, to the affirmative defense of lack-of-knowledge. Innocent conduct is not punished.

Nothing in §893.101 affects this court's power to rule upon constitutionality of statutes. Because §893.101 was not enacted until after Chicone, that court could not possibly have been passing on the question of whether the change wrought by subsection (2) violated due process. Johnson engages in semantic sleight of hand. He incorrectly assigns constitutional dimension to the interpretation of earlier law announced in Chicone, to imply any

variance would be unconstitutional. Because the decision below upholds current law (§893.101), he contends there is conflict.

To reach such result, Johnson advances this interpretation of Chicone:

In Chicone v. State, this Court held that the felony offense of possession of cocaine would be unconstitutional (violate due process) if it did not include the mens rea element of knowledge of the illicit nature of the substance.

(juris. brief, p.6). In actuality, Chicone concluded:

In short, we conclude that good sense and the background rule of the common law favoring a scienter requirement should govern interpretation of the two statutes in this case. We believe it was the intent of the legislature to prohibit the knowing possession of illicit items and to prevent persons from doing so by attaching a substantial criminal penalty to such conduct. Thus, we hold that the State was required to prove that Chicone knew of the illicit nature of the items in his possession. [FN13 omitted]. As all agree, including the State, the legislature would not ordinarily criminalize the "innocent" possession of illegal drugs. Silence does not suggest that the legislature dispensed with scienter here. [e.s.].

684 So.2d at 743-44.

Nowhere in this language, or in all of Chicone, do the words "due process" appear. At no time did the court say the "Due Process Clause," the "U.S. Constitution," or the "Florida Constitution" required proof of guilty knowledge; much less proof as a prima facie element, rather than rebuttal of an affirmative defense.

Chicone was a case of statutory interpretation. Based on common law, this state's jurisprudence, etc. the court concluded *mens rea* was part of the State's case for the criminal offenses

being tried.² It simply did not address, and did not conclude, this result was constitutionally required.

Continuing to mis-read Chicone, Johnson argues:

By its reliance on Liparota, this Court adhered to a rule of federal constitutional law: The imposition of felony punishment for an offense lacking mens rea, and therefore criminalizing a broad range of innocent conduct, violates due process.

(juris. brief, p.6). However, like Chicone, the Liparota decision turned on statutory interpretation. It did not conclude due process required proof of *mens rea*. See Liparota v. U.S., 471 U.S. 419, 425 n.6 (1985) ("Of course, Congress must act within any applicable constitutional constraints in defining criminal offenses. In this case, there is no allegation that the statute would be unconstitutional under either interpretation."). The cite to Liparota did not give constitutional dimension to Chicone.

Because Chicone was based on statutory interpretation, not due process, it did not and could not hold later-enacted §893.101 was unconstitutional. By holding §893.101 constitutional, the decision below did not conflict with Chicone.

In passing, Johnson next asserts the decision below conflicts with Sult v. State, 906 So.2d 1013 (Fla.2005). There, this court

²Chicone was convicted for cocaine possession under §893.13(1)(f), Fla. Stat. (1991), and possession of drug paraphernalia under §893.147(1), Fla. Stat. (1991). Neither statute expressly required guilty knowledge. See 684 So.2d at 737-8 at n.1 & 2 (quoting statutes).

held §843.085, Fla. Stat. (2001) was overbroad, vague, and violated substantive due process. *Id.* at 1014. The overbreadth and vagueness holding have no bearing on this case.

Read correctly, the substantive due process was not a separate ground, but part of the holding as to "vagueness." Assuming otherwise does not establish conflict. As Sult reasoned:

With no specific intent-to-deceive element, the section extends its prohibitions to innocent wearing and displaying of specified words. The reach of the statute is not tailored toward the legitimate public purpose of prohibiting conduct intended to deceive the public into believing law enforcement impersonators. [e.s.].

906 So.2d at 1021. Alone, this language shows Sult involved far different facts, and a plainly different statute. No conflict arises from its different result.

Sult entered a entered a convenience store while wearing a black T-shirt bearing "a large [official] star and five-inch letters spelling the word SHERIFF." She had a Pinellas County Sheriff's Office ID card clipped to her wallet, although she was no longer employed by that office. *Id.* at 1014. These facts are not remotely similar to Johnson's sale or delivery of cocaine. Also, Sult was convicted under §843.085(1), Fla. Stat., which made it unlawful to:

wear or display any authorized indicia of authority, including any badge, insignia, emblem, identification card ... of any ... law enforcement agency ... which could deceive a reasonable person into believing that such item is authorized

There is no similarity between this statute and the one at issue here. Notably, §843.085(1) was invalidated for proscribing conduct not inherently illegal, such as wearing highly realistic police badges and "uniforms" as a Halloween costume; whereas §893.101 entails never-legal drug offenses under ch.893.

In the context of this case, it is always illegal to possess cocaine for sale or delivery. When the State, under prior law, failed to prove knowledge; or, under current law, fails to rebut the defense of lack-of-knowledge, the successful defendant does not get his or her cocaine back. Sale or delivery is not made legal; instead, criminal culpability does not attach.

The same logic precludes conflict between the decision below and Wyche v. State, 619 So.2d 231 (Fla.1993), which addressed a loitering ordinance. Reprising Wyche, the Sult court said:

We also find section 843.085(1) to be vague and in violation of substantive due process. Section 843.085(1), because of its imprecision, again as with the ordinance that was the subject of the Wyche decision, fails to give fair notice of what conduct is prohibited. The statute fails to delineate when the displaying or wearing of the prohibited words will subject the person to prosecution, thus inviting arbitrary and discriminatory enforcement and making entirely innocent activities subject to prosecution. Wyche, 619 So.2d at 237. [e.s.].

906 So.2d at 1022.

Section 893.101 does not inadvertently make innocent conduct criminal. With the possible exception of doctors or researchers under highly regulated conditions, possession of cocaine is illegal; possession for sale is never legal. Instead, culpability

is excused when the defendant has no knowledge of the illicit nature of the substance. There is no conflict with Wyche.

Jurisdiction Should Not Be Exercised

Johnson dramatically urges this case "strikes at that heart of the most basic principles of government and of the separation of powers essential to our constitutional democracy." (juris. brief, p.8). He adds: "The effect on the public confidence in the administration of justice will be devastating." (juris. brief, p.9). The spectre of heart-striking devastation is highly speculative at best. This court, if it concludes it has bare jurisdiction to review the decision below, should not exercise that jurisdiction based on hyperbole.

To buttress his argument jurisdiction should be exercised, Johnson contends §893.101 "could not have overruled [italics original] any expression in Chicone based upon constitutional considerations." (juris. brief, p.9). This observation is disingenuous, as Chicone turned on statutory interpretation, not constitutional considerations. Neither §893.101 nor the decision purports to "overrule" this court's interpretation of the Florida or U.S. Constitution. To the contrary, the legislature specifically found Scott and Chicone were "contrary to legislative intent" (§893.101(1)) implying a statutory-level disagreement.

The only facts disclosed by the decision below were that Johnson was convicted for [1] sale or delivery of [2] cocaine.

Under these two facts, the decision below cannot be characterized as involving a case where the defendant was charged with inadvertent, actual possession of a substance not commonly known to be illegal; or with constructive possession under facts not of themselves criminally culpable.

Nothing in the decision below indicates or implies Johnson's knowledge was contested. If this court has bare jurisdiction to review the decision below, it still should not do so; but should wait for a decision which observes that knowledge was disputed.

CONCLUSION

This court lacks jurisdiction to review the decision below. If bare jurisdiction exists, review should still be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this JURISDICTIONAL BRIEF has been sent by U.S. mail to Petitioner's attorney: **RICHARD M. SUMMA**, Assistant Public Defender, Leon County Courthouse Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; on July ___, 2010. I also certify this brief complies with Fla.R.App.P. 9.210.

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APPENDIX

(DECISION UNDER REVIEW)