IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY 17, 2018

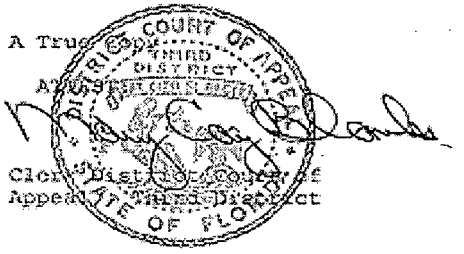
BRUCE L. SMALL,
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA,
Appellee(s)/Respondent(s),

CASE NO.: 3D**18-1401**

L.T. NO.: 04-35108

Following review of the petition for writ of habeas corpus, it is ordered that said petition is hereby denied.

ROTHENBERG, C.J., and SUAREZ and LINDSEY, JJ., concur.



cc: Office Of Attorney General Bruce L. Small Hon. Stacy D. Glick

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

vs.

BRUCE SMALL,
Defendant.
_____/

CASE NO.: F04-35108-A

JUDGE: HON. PETER ADRIEN

APPLICATION OF THE EX POST FACTO DOCTRINE TO MR. SMALL'S HABITUAL OFFENDER STATUS

In the case at hand, the State of Florida argues that Mr. Small qualifies as a habitual offender. The State intends to use as one of the prior convictions to establish Mr. Small's habitual offender status, a conviction which occurred prior to October 1, 1988, the effective date of Florida Statues, Section 775.084, as amended. In *Weaver v. Graham*, 450 U.S 24 (1981), the United States Supreme Court invalidated a change in Florida State law with respect to good time or gain time credits as violating the ex post facto prohibition of the United States Constitution. In explaining its rationale, the *Weaver* Court stated:

> "The *ex post facto* prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). See *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325, 25 S.Ct. 264, 265-266, 49 L.Ed. 494 (1905); *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798). Through this

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> prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977); *Kring v. Missouri*, 107 U.S. 221, 229, 2 S.Ct. 443, 449, 27 L.Ed. 506 (1883); *Calder v. Bull, supra*, 3 Dall. at 387. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S.Ct. 507, 508, 59 L.Ed. 905 (1915); *Kring v. Missouri, supra*, 107 U.S., at 229, 2 S.Ct., at 449; *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L.Ed. 162 (1810); *Calder v. Bull, supra*, at 395, 396 (Paterson, J.); the Federalist No. 44 (J. Madison), No. 84 (A. Hamilton).
>
> In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. *Lindsey v. Washington, supra*, 301 U.S., at 401, 57 S.Ct., at 799; *Calder v. Bull, supra*, at 390."
>
> (Footnotes omitted)

It is Mr. Small's position that the application of habitual offender status to him on the given facts violates the ex post facto prohibition of the Constitution because a prior conviction being used to establish his habitual offender status occurred prior to the effective date of the enhancement law. The State will contend that there is no ex post facto violation because the habitual offender statute punishes the most recent crime of which Mr. Small has been convicted, which most recent crime is aggravated by all of his prior convictions. In that regard, the State will be relying upon ancient Supreme Court precedent, the first of which is *McDonald v. Massachusetts*, 180 U.S 311 (1901). The *McDonald* rule was followed by the Supreme Court in *Gryger v. Burke*, 374 U.S 728 (1948). The United States Supreme Court recognized (in the decade after *Gryger*)that the United States Constitution is an evolving document and that constitutional rights are to be construed in terms of modern societal notions as of the time of the case, *Brown v. Broad*

of Education, 347 U.S 483 (1954). *Brown v. Board of Education, supra*, the landmark school desegregation case, overturned what, until that point in time, had been United States Supreme Court precedent, that "separate but equal" facilities for black and white students were constitutional, and that segregation was legal. *Plessey v. Ferguson*, 163 U.S 537 (1896). It should be noted that the *McDonald* case was decided only five years after *Plessey v. Ferguson* by essentially the same Supreme Court. The Supreme Court explained its rationale in *Brown* at pages 492-493:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
>
> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra (339 U.S. 629, 70 S.Ct. 850), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on those qualities which are incapable of objective measurement but which make for greatness in a law school. In McLaurin v. Oklahoma State Regents, supra (339 U.S. 637, 70 S.Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'

A similar finding was made in the Delaware case: I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated. 87 A.2d 862, 865.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is

> amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.
>
> K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).
>
> We conclude that in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment."

At the time of the *McDonald* decision, the prosecutor would not have been authorized to even vote, let alone enter into the legal profession, as in 1901, women had not yet been given the right to vote under the United States Constitution. In fact, the noted Suffragette, Susan B. Anthony, was convicted of the felony of illegally voting. Moreover, in 1948, at the time of *Gryger*, prior to the passage of the Civil Rights Acts, it is counsel's understanding that no blacks had yet been admitted to the Florida Bar. Accordingly, in that era, the prosecutor's supervisor, Mr. Walker, would have been disqualified from appearing. Moreover, all of the landmark decisions of the Fifties and Sixties, which

rewrote the laws of criminal procedure (rights to counsel, rights to privacy, right to remain silent, protection against excessive negative publicity, etc.) occurred after *Gryger*.

Until very recently, criminal law and incarceration were typically only imposed upon persons in poverty and members of ethnic and racial minority groups. Rarely were middle class whites even charged with crimes. At the time of *Gryger*, in 1948, notions of a harsh criminal law were deemed appropriate by "respectable" voters, because those harsh laws were directed against "undesirables". In view of the vast number of drug-related crimes that had been charged, beginning with the so-called "war on drugs" in the 1980's, as well as the phenomenon that thousands of urban black males are drawn like moths into light into the criminal justice system, the Court should update *McDonald*, in light of changed times, and rule that applying the habitual offender enhancement to convictions which occurred prior to the effective date of the statue, in the case of an urban black male, would be a violation of the ex post facto prohibition of the United States Constitution.

Respectfully submitted,

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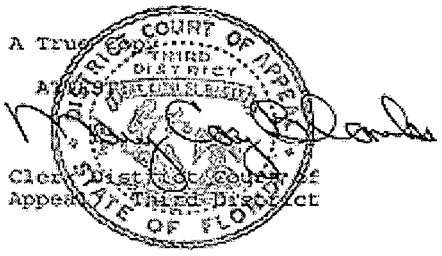
CASE NO.: 3D**18-1401**

L.T. NO.: 04-35108

Upon consideration, appellant's motion for rehearing is hereby denied. ROTHENBERG, C.J., and SUAREZ and LINDSEY, JJ., concur.



cc: Office Of Attorney General

Bruce L. Small

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