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Abstract

On June 6, 1980, Governor Graham signed House Bill 1749, creating Florida Statute §903.133 which prohibits bail on appeal to any person found guilty of a first degree felony drug offense.

KEYWORDS: Legislature, Denial of Bail, Drug Felons

1980 Florida Legislature—Denial of Bail to Drug Felons: Florida Statute 903.133.

On June 6, 1980, Governor Graham signed House Bill 1749,¹ creating Florida Statute §903.133,² which prohibits bail on appeal to any person found guilty of a first degree felony drug offense.³

The enactment of this law raises several questions which require examination: (1) is there a constitutional right to bail subsequent to conviction?; (2) has the legislature, in creating a law denying such bail, infringed upon the powers of the judiciary?; (3) is such a law tantamount to harsh, cruel, and unusual punishment?; and (4) are persons affected by the law deprived of equal protection and due process of law?

The Legislature had three primary reasons for adopting this law: (1) first degree felony drug offenses have had a severely adverse affect on the citizenry of the state; (2) persons who commit these offenses use the proceeds obtained therefrom to further the existence of the drug trade in the state; and (3) a person adjudged guilty of such an offense has committed a serious crime and, consequently, is likely to flee justice

1. This bill passed the House by a vote of 103-3 and the Senate by a vote of 27-1.

2. Section 903.133 provides:

Bail on appeal; absolute prohibition: first degree felony adjudication under the Florida Comprehensive Drug Abuse Prevention and Control Act. —Notwithstanding the provision of s. 903.132, no person adjudged guilty of a first degree felony for a violation of s. 893.13 or s. 893.135 shall be admitted to bail pending appellate review.

3. A first degree felony under section 893.13, Florida Statutes, is the sale, delivery, or possession of more than 10 grams of certain Schedule I drugs or the delivery by a person over 18 to a person under 18 of certain Schedule I and II drugs. Fla. Stat. § 893.13 (1979).

A first degree felony under section 893.135, Florida Statutes, is the sale, manufacture, delivery or possession of: “(1)(a) . . . an excess of 100 pounds of cannabis. . . , (b)(1) . . . 28 grams or more of cocaine or of any other mixture containing cocaine. . . , [or] (c) . . . 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin. . . .” FLA. STAT. § 893.13 (1979).

and disappear upon conviction.⁴ The Legislature determined that "the mere forfeiture of bond on appeal does not serve the ends of justice."⁵

(1) CONSTITUTIONAL PROTECTIONS

Although there is a Florida constitutional provision that all persons "shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great,"⁶ this provision has long been held to have no application to a defendant's right to bail after conviction.⁷ The reasoning used by the courts in reaching this conclusion is clearly expressed in the United States Supreme Court decision of *Stack v. Boyle*.⁸ There, the Court ruled that once a defendant has been found guilty, the reasons for granting bail, such as the opportunity thereby afforded the defendant to actively participate in the preparation of his defense and the postponement of imprisonment until conviction, are no longer applicable.⁹

Therefore, it was early settled in Florida¹⁰ that "admission to bail, after conviction, is not a matter of right but rests in the sound judicial discretion of the trial court."¹¹ The state supreme court established a fair and reasonable standard to be applied by trial courts in making their decisions on this issue.¹² If an appeal is taken merely for delay, bail should be refused; but if the appeal is taken in good faith, on fairly arguable and non-frivolous grounds, bail should be granted.¹³ Recognizing that the purpose of bail is to insure the attendance of the defendant to answer the charge against him, it was decided that if there are situations that indicate the accused will flee and thus elude punishment if his conviction is affirmed, the trial judge may correctly use his discre-

4. Chapter 80-72, 1980 Fla. Sess. Law Serv. 284 (West).

5. *Id.*

6. FLA. CONST. art. I, § 14 (1968), amending prior § 9.

7. *De Conongh v. City of Daytona Beach*, 103 So. 2d 233, 236 (Fla. Dist. Ct. App. 1958); *Greene v. State*, 238 So. 2d 296, 298 (Fla. 1970).

8. 342 U.S. 1 (1954).

9. *Id.* at 4.

10. *See Younghans v. State*, 90 So. 308 (Fla. 1956).

11. *Id.* at 309.

12. *Id.* at 310.

13. *Id.*

tion against the granting of bail.¹⁴ One such situation is the harshness of the sentence imposed for the crime, this being pertinent to the issue of whether the person would be incited to flee the jurisdiction of the court.¹⁵

In light of the severe penalties incurred upon conviction of a first degree felony,¹⁶ the presumed availability of large sums of money to persons convicted of drug offenses,¹⁷ and the consequent likelihood of their flight to avoid justice,¹⁸ it would seem that a trial judge could deny bail in such a case. However, in some cases, judicial discretion may dictate that the availability of bail is necessary for the ends of justice to be met.

(2) SEPARATION OF POWERS

This raises the question of whether the removal of bail from judicial purview by statutory regulation is a proper function of the state Legislature. In *Greene v. State*,¹⁹ the Supreme Court of Florida had to determine whether a statute denying bail upon appeal from a convic-

14. *Id.*

15. *Sims & Wainwright*, 307 F. Supp. 116 (S.D. Fla. 1969).

16. FLA. STAT. § 775.082 (1979) provides:

Penalties. -

. . . .

(3) A person who has been convicted of any other designated felony may be punished as follows:

. . . .

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years, or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment. . . .

FLA. STAT. § 775.083 (1979) provides:

Fines. -

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in section 775.082. . . . Fines for designated crimes and for noncriminal violations shall not exceed:

. . . .

(b) \$10,000, when the conviction is of a felony of the first or second degree.

17. *See* note 4 *supra*.

18. *Id.*

19. 238 So. 2d 296 (Fla. 1970).

tion of a felony, to persons previously convicted of a felony,²⁰ represented a legislative encroachment upon the powers of the judiciary.²¹ Analogizing this question to the wide discretion trial courts historically exercised in deciding the severity of punishment given to the convicted offender, it was pointed out that the boundaries of this discretion were changed whenever the Legislature increased or decreased the minimum or maximum punishment allowable for a particular crime.²² In addition, the court stated that the Legislature long ago superseded judicial discretion when it fixed compulsory life imprisonment or death sentences for rape and first degree murder²³ and said that the Legislature has gone no further in enacting the statute under attack in this case.²⁴ The court held that the statute did not encounter the infirmity of encroaching upon the separation of powers doctrine.²⁵

The federal courts' stance was also discussed by the state supreme court in *Greene*. The court stated that generally the federal courts have agreed that there is no absolute constitutional right to bail after conviction guaranteed by the eighth amendment to the United States Constitution.²⁶ The court went on to say:

20. Fla. Stat. § 903.132 (1979) provides:

Bail on appeal; conditions for granting; appellate review. -

(1) No person may be admitted to bail upon appeal from a conviction of a felony unless the defendant establishes that the appeal is taken in good faith, on grounds fairly debatable, and not frivolous. However, in no case shall bail be granted if such person has previously been convicted of a felony, the commission of which occurred prior to the commission of the subsequent felony and such person's civil rights have not been restored or if other felony charges are pending against him and probable cause has been found that the person has committed the felony or felonies at the time the request for bail is made.

21. 238 So. 2d at 299.

22. *Id.*

23. FLA. STAT. § 794.01 (1969) provided: "imprisonment in the state prison for life, or for any term of years within the discretion of the judge" for rape.

FLA. STAT. § 782.04 (1969) provided the death penalty for murder in the first degree (i.e., premeditated murder or murder "committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping . . .").

24. 238 So. 2d at 299.

25. *Id.*

26. *Id.*

Even those federal courts that have expressly held or assumed, *arguendo*, that the bail provision of the eighth amendment to the United States Constitution applies directly to state action, have recognized that a state may constitutionally by statute or exercise of judicial discretion grant release on bail in some cases and deny it in others, as long as the state acts reasonably and not arbitrarily or discriminatorily.²⁷

This presents the question of whether the Legislature acted in a reasonable and non-arbitrary manner in creating section 903.133. It would seem the Legislature did act in such a manner since the Legislature's motive, the prevention of flight by an accused free on bail subsequent to a conviction,²⁸ was accepted earlier by the state supreme court in *Greene*. There, the court held that the statutory denial of bail after conviction pending appeal, because of the likelihood that the accused would be a poor bail risk, could not be said to be an arbitrary or unreasonable action on the part of the state.²⁹

(3) *CRUEL AND UNUSUAL PUNISHMENT*

Could the constitutionality of section 903.133 be successfully challenged on the ground that denial of bail is tantamount to harsh, cruel, and unusual punishment? This constitutional claim was examined in the Louisiana case of *State v. James*.³⁰ James was convicted of unlawful possession of a narcotic drug (one morphine tablet). According to a Louisiana statute,³¹ bail pending appeal was denied to offenders who had received a sentence of five years or more in a felony case. Under another statute,³² the minimum sentence for the illegal possession of narcotics was five years. Therefore, the defendant was denied bail pending appeal. The Supreme Court of Louisiana held that the denial of bail pending appeal to a narcotic offender based upon the length of his sentence did not constitute cruel or unusual punishment. Consequently, the defendant's attack upon the constitutionality of the state's

27. *Id.*

28. *See* note 4 *supra*.

29. 238 So. 2d at 299.

30. 246 La. 1053, 169 So. 2d 89 (1964), *rev'd on other grounds*, 382 U.S. 36 (1965).

31. LA. REV. STAT. ANN. §15:85 (West 1964).

32. LA. REV. STAT. ANN. §40:981 (West 1964).

Uniform Narcotic Act failed.³³ If the reasoning of the Louisiana Supreme Court is followed, a similar attack on section 903.133 would be equally unsuccessful.

(4) *EQUAL PROTECTION AND DUE PROCESS OF LAW*

Could section 903.133 be held unconstitutional on the grounds that it denies a person convicted of a first degree felony equal protection and due process of law as guaranteed by the constitutions of the United States and Florida?³⁴ Such a result would seem unlikely in light of the Supreme Court of Florida's response to this question in *Gallie v. Wainwright*³⁵ and *Kelly v. State*.³⁶ These two cases follow *Greene*³⁷ in supporting section 903.132³⁸ a law similar to section 903.133 in its effect on a specialized group of offenders. The defendants in these cases challenged the constitutionality of section 903.132 on due process and equal protection grounds. Gallie also argued that he had a fundamental right to be heard on the issue of bail risk. The court declared he had no such right since it was well settled that there is no absolute constitutional right to bail pending appeal of any state criminal conviction, whether first or subsequent, misdemeanor or felony.³⁹ Since no fundamental right was affected, and the defendant conceded the state's interest in assuring the attendance of the defendant at the end of the appeal was a compelling interest, it was clear that section 903.132 did not run

33. 169 So. 2d at 92.

34. U.S. CONST., amend XIV, §1 provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

FLA. CONST. art. I, § 2 provides: "[a]ll natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. . . ."

FLA. CONST. art. I, § 9 provides: "[n]o person shall be deprived of life, liberty or property without due process of law. . . ."

35. 362 So. 2d 936 (Fla. 1978).

36. 362 So. 2d 945 (Fla. 1978).

37. 238 So. 2d 296 (Fla. 1970).

38. See note 20 *supra*.

39. 362 So. 2d at 941.

counter to any constitutional ideas of equal protection.⁴⁰

Further authority for the proposition that a statute may specifically enumerate classes of defendants not entitled to bail on appeal may be found in *State v. Flowers*⁴¹ and *Swain v. State*.⁴² In *Flowers*⁴³ the defendant was found guilty of possession with intent to deliver heroin in violation of a state statute.⁴⁴ After trial and pending a pre-sentence investigation he was released on bail.⁴⁵ The state then moved to revoke the bail on the basis of an amendment to the Delaware Constitution⁴⁶ which provided that in the case of an investigation for an offender convicted of such a narcotic violation, the offender would immediately be remanded to the Delaware Correctional Center during the time the investigation was being conducted. The trial court granted the state's motion and the defendant then filed a petition for a writ of habeas corpus, contending his confinement was unlawful because the statute was unconstitutional.⁴⁷ The Delaware Supreme Court held that the statute was constitutional since there was no constitutional right to bail in the period subsequent to conviction but prior to sentencing.⁴⁸ Rather, bail during that interim period was a matter of discretion with the court which the state legislature could limit or eliminate by statute.⁴⁹

Likewise, in *Swain*,⁵⁰ the Tennessee Supreme Court upheld a statute⁵¹ which denied the petitioner bail pending appeal from his conviction for selling a controlled substance (phencyclidine). Here again, it was recognized that the constitutional assurance of bail for criminal defendants prevails only prior to conviction and there is no federal assurance of bail subsequent to conviction.⁵² The court noted that a de-

40. *Id.*

41. 330 A.2d 146 (Del. 1974).

42. 527 S.W.2d 119 (Tenn. 1975), *appeal dismissed*, 423 U.S. 1041 (1975).

43. 330 A.2d at 147.

44. DEL. CODE tit. 16, § 4751 (1978).

45. 330 A.2d at 147.

46. DEL. CODE tit. 11, § 4331(a) (1979).

47. 330 A.2d at 147.

48. *Id.* at 148.

49. *Id.* at 149.

50. 527 S.W.2d 119.

51. TENN. CODE ANN. § 40-3406 (1980).

52. 527 S.W.2d at 120.

defendant convicted of unlawful possession of heroin under a New York criminal procedure law could not be admitted to bail.⁵³

CONCLUSION

In *United States v. Miranda*,⁵⁴ the District Court for the Southern District of Florida pointed out the need for a law such as section 903.133 of the Florida Statutes. The court noted that "substantial drug trafficking is itself a sufficient danger to the community to justify denying bond pending appeal to a defendant found guilty of being a dealer in drugs."⁵⁵ And "if any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. Questions as to wisdom, need or appropriateness are for the legislature."⁵⁶

Since there is no constitutional right to bail subsequent to a conviction, and bail at that time is a matter of judicial discretion which the state may limit or eliminate by statute as long as it acts reasonably, it appears that section 903.133, Florida Statutes, should be able to withstand any constitutional challenge.

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53. *Id.* at 121.

54. 442 F. Supp. 786 (S.D. Fla. 1977).

55. *Id.* at 792.

56. *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977).