

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2010

JOSHUA VAN ENS,

Appellant,

v.

Case No. 5D09-1693

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed December 3, 2010

Appeal from the Circuit Court
for Orange County,
Stan Strickland, Judge.

Michael S. Herring of Michael S. Herring,
P.A., Sanford, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General, Daytona
Beach, for Appellee.

MONACO, C.J.

The appellant, Joshua Van Ens, appeals the trial court's denial of his motion to dismiss a charge of trafficking in more than 28 grams of hydrocodone, in violation of section 893.135(6) and (7), Florida Statutes (2009). He asserts that the minimum mandatory sentencing scheme associated with this crime violates the equal protection clauses of the United States and Florida Constitutions as applied to him, a trafficker of

Lorcet, a hydrocodone tablet. He contends that the statutory requirement that the aggregate weight of the Lorcet tablets be used to determine his sentence is unconstitutional because other brands of hydrocodone tablets weigh less than Lorcet tablets by virtue of the fact that lesser amounts of analgesics are contained in other brands of tablets that contain hydrocodone, thereby subjecting him to a harsher sentence than those who traffic those other brands. While we reject the constitutional argument made by Mr. Van Ens, we do recognize that there is some sense to his position.

Section 893.135(6) and (7), Florida Statutes sets forth:

(6) A mixture, as defined in s. 893.02, containing any controlled substance described in this section includes, but is not limited to, a solution or a dosage unit, including but not limited to, a pill or tablet, containing a controlled substance. For the purpose of clarifying legislative intent regarding the weighing of a mixture containing a controlled substance described in this section, **the weight of the controlled substance is the total weight of the mixture, including the controlled substance and any other substance in the mixture.** If there is more than one mixture containing the same controlled substance, the weight of the controlled substance is calculated by aggregating the total weight of each mixture.

(7) For the purpose of further clarifying legislative intent, the Legislature finds that the opinion in *Hayes v. State*, 750 So. 2d 1 (Fla. 1999) does not correctly construe legislative intent. The Legislature finds that the opinions in *State v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996) correctly construe legislative intent.

(Emphasis added).

Section 893.135(1)(c)1., Florida Statutes (2009), which supplies the punishment calculus for the commission of these crimes, reads as follows:

c) 1. 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 any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c) 3., or (3)(c)4., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 28 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of \$500,000.

Mr. Van Ens was apprehended and charged with trafficking in more than 28 grams of hydrocodone, possession of Alprazolam, and possession of cocaine. He pleaded no contest to trafficking in hydrocodone and possession of Alprazolam, reserving his right to appeal the trial court's denial of his motion to dismiss the trafficking in hydrocodone charge.

At the hearing on the motion to dismiss a pharmacist testified that while all Lorcet tablets weigh 660 milligrams, only five or ten milligrams of the 660 milligrams are hydrocodone. The remainder of the 650 or 655 milligrams consists of acetaminophen, an over-the-counter analgesic packaged with the hydrocodone in an attempt to reduce

the side effects of the controlled narcotic. The pharmacist then compared Lorcet with other products that contain hydrocodone. For example, a Norco tablet that contains 10 milligrams of hydrocodone is combined with only 315 milligrams of acetaminophen, for a total tablet weight of 325 milligrams. Thus, while a Norco tablet and a Lorcet tablet can have the same amount of hydrocodone, the overall weight of each is different because of the amount of acetaminophen contained in each tablet. Accordingly, it would require twice as many 10mg Norco tablets to equal the gross weight of 10mg Lorcet tablets. Similarly, Vicoprofen tablets contain 7.5 milligrams of hydrocodone in a 200 milligram tablet made up of mostly ibuprofen, and a generic hydrocodone/ibuprofen tablet containing 10mg of hydrocodone might weigh less than a third of a Lorcet tablet. In other words, it would take three times as many of the generic tablets to equal the same overall weight as Lorcet tablets. Therefore, while one tablet of Lorcet weighing 660 milligrams is the same overall weight of three tablets of the generic, there is obviously more hydrocodone in the three smaller tablets that weigh the same as one Lorcet tablet.

Mr. Van Ens argues that the mandatory minimum sentencing scheme of section 893.135(1)(c)1.c, which focuses on the gross weight of the tablets, rather than the quantity of hydrocodone within the tablets, violates due process and his right to equal protection because it is not applied equally and uniformly to other persons within the same class and bears no reasonable and just relationship to a legitimate state objective. We disagree with this position because we conclude that there was a rational basis for the legislature to adopt this sentencing schedule. The legislature has recognized the widespread use and abuse of hydrocodone as an area of special concern and has acted accordingly. See Fla. S. Comm. on Crim. Just., CS for SB 231 (2001) Staff

Analysis (March 7, 2001); see also *United States v. Crowell*, 9 F.3d 1452 (9th Cir. 1993), *cert. denied*, 513 U.S. 845 (1994); *United States v. Young*, 992 F.2d 207, 209-10 (8th Cir. 1993); *State v. Leicht*, 402 So. 2d 1153 (Fla.1981), *cert. denied*, 455 U.S. 989 (1982); *State v. Yu*, 400 So. 2d 762 (Fla. 1981); *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996), *review denied*, 694 So. 2d 737 (Fla. 1997). Moreover, the statute applies equally and uniformly to all persons within the class and bears a reasonable relationship to the legitimate state objective of controlling the abuse of hydrocodone. The appellant presumably knew the rules and chose to traffic in a form of hydrocodone that weighed more than other forms. We do not think the punishment he received based on his personal choice of trafficking in a particular drug delivery system rises to constitutional proportion. We, therefore, find no legal fault with the fact that the legislature chose to punish this offense based on the gross weight of the tablets containing the substance intended to be controlled.

Nevertheless, we note that the federal government amended its sentencing guidelines in 2003 to modify the way in which oxycodone is measured for federal sentencing purposes. See U.S.S.G. App. C, Vol. II, Amend. 657; *United States v. Muza*, 232 Fed. Appx. 934 (11th Cir. 2007) (unpublished), *cert. denied*, 552 U.S. 968 (2007). The amendment directed the courts to use the actual weight of the oxycodone contained within the tablet for sentencing purposes. *Id.* The reason for the amendment was to deal with "proportionality issues in the sentencing of oxycodone offenses." See *id.* Essentially the same issue that we address today. While certainly not dispositive of the issue before us, it does suggest that our Florida Legislature may wish to reexamine its sentencing scheme created to deal with hydrocodone and similar drugs.

We affirm the judgment and sentence in all respects.

AFFIRMED.

GRIFFIN and ORFINGER, JJ., concur.