IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ISAAC C FLAGG ,

Appellant,

v.

STATE OF FLORIDA ,

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-2372

Opinion filed October 14, 2011.

An appeal from the Circuit Court for Alachua County.
James P. Nilon, Judge.

Nancy A. Daniels, Public Defender, and Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Dixie Daimwood, Assistant Attorney General, Tallahassee, for Appellee.

WETHERELL, J.

Appellant, Isaac Flagg, appeals his conviction and sentence for possession of crack cocaine and drug paraphernalia. He contends 1) that the trial court erred in

denying his dispositive motion to suppress, and 2) that the statute under which he was convicted is facially unconstitutional. We reject both claims and write only to address Flagg's constitutional challenge to section 893.13, Florida Statutes. We affirm the trial court's denial of the motion to suppress without further comment.

On October 11, 2010, at 1:14 a.m., Flagg was stopped in a high drug crime area by a Gainesville police officer for riding a bicycle without a light. Flagg acted aggressively towards the officer after he was stopped. The officer then asked Flagg to open his hand because he appeared to be concealing something and the officer was concerned that it might be a weapon. When Flagg opened his hand, the officer saw what turned out to be two pieces of crack cocaine fall to the ground. Flagg was arrested, and during a search incident to arrest, a crack pipe was discovered in Flagg's pocket.

Flagg was charged with possession of a controlled substance in violation of section 893.13(6)(a), a third-degree felony, and possession of drug paraphernalia in violation of section 893.147(1)(b), a first-degree misdemeanor Flagg filed a motion to suppress the drugs and crack pipe on the basis that the stop was illegal. The trial court denied the motion, and Flagg thereafter pled no contest to the charges, reserving the right to appeal the denial of his dispositive motion to suppress. The trial court accepted the plea and sentenced Flagg to 24.975 months in prison for the possession offense and to time served for the paraphernalia

offense. This timely appeal follows.

In addition to challenging the denial of the motion to suppress, Flagg argues for the first time on appeal[1] that section 893.13(6)(a) is unconstitutional because the mens rea requirement in the statute was eliminated by section 893.101, which provides in pertinent part that:

> 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.

§ 893.101(2), Fla. Stat. This, according to Flagg, converted his drug possession offense into a strict liability crime that violates due process because of the felony punishment provided for the offense.

This exact same argument has been rejected many times by this court and the other district courts of appeal. See, e.g., Williams v. State, 45 So. 3d 14, 16 (Fla. 1st DCA 2010) (citing cases), rev. denied, 53 So. 3d 1022 (Fla. 2011); Johnson v. State, 37 So. 3d 975 (Fla. 1st DCA 2010), rev. denied, 51 So. 3d 465 (Fla. 2010); Wright v. State, 920 So. 2d 21 (Fla. 4th DCA 2005), rev. denied, 915 So. 2d 1198 (Fla. 2005). Flagg acknowledges this contrary authority, but contends that we should recede from our prior decisions and adopt the reasoning of Shelton v. Secretary, Department of Corrections, 2011 WL 3236040 (M.D. Fla. July 27,

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[1] A facial challenge to the constitutionality of the statute under which a defendant is convicted may be raised for the first time on appeal. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993).

2011), which held section 893.13 facially unconstitutional based on the same argument presented here.

Shelton is not binding on this court or any other state court,[2] and we see no reason to recede from our settled precedent simply because one federal judge has a different view of the law than this court. Moreover, we do not find the analysis in Shelton persuasive because, among other reasons, the decision misperceives the operation of the affirmative defense in section 893.101. The statute does not, as Shelton implied, require the defendant to establish his innocence by proving a lack of knowledge, see Wright, 920 So. 2d at 25 (explaining that section 893.101 "does not require the defendant to prove or disprove knowledge"); rather, the statute provides that if the defense is raised, the state has the burden to overcome the defense by proving beyond a reasonable doubt that the defendant knew of the illicit nature of the drugs. Id.; see also Fla. Std. Jury Instr. (Crim.) 25.7 (explaining that the jury should find the defendant not guilty if they "have reasonable doubt on the question of whether (defendant) knew of the illicit nature of the controlled substance"). Furthermore, because lack of knowledge is not a defense to a true strict liability crime,[3] the availability of the affirmative defense in section 893.101

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[2] See State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976) ("Even though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts.").

[3] See, e.g., Feliciano v. State, 937 So. 2d 818 (Fla. 1st DCA 2006) (noting that statutory rape is a strict liability crime to which a defendant's lack of knowledge of

undermines the essential premise in Shelton that the offenses in section 893.13 are strict liability crimes that may not be constitutionally punished as felonies.

We recognize that the Second District recently certified the constitutional issue raised in this case to the Florida Supreme Court for immediate resolution pursuant to Florida Rule of Appellate Procedure 9.125. See State v. Adkins, 2011 WL 4467637 (Fla. 2d DCA Sept. 28, 2011). Although we agree that the uncertainty caused by Shelton is affecting the administration of justice around the state and that an expeditious decision from the supreme court addressing the constitutionality of section 893.13 is needed, we do not see any reason not to reaffirm our view that the statute is constitutional. Indeed, we believe that a definitive statement from this court reaffirming the constitutionality of section 893.13 notwithstanding Shelton will promote the consistent administration of justice by resolving the issue for the trial courts, thereby allowing drug prosecutions to proceed, at least until the supreme court or another district court weighs in on the issue. Of course, defendants remain free to raise the constitutional argument to preserve the issue for appellate or federal review, but this decision will at least preserve the status quo until the supreme court addresses the issue, and it should also address the Second District's legitimate concern in Adkins that, without a definitive ruling from a higher court, different circuits (or

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the victim's age is not a defense).

even different judges in the same circuit) may continue to take opposite positions on the issue. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (recognizing that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts").

In sum, for the reasons stated above, we reject Flagg's claim that section 893.13 is facially unconstitutional and affirm his conviction and sentence.

AFFIRMED.

SWANSON, J., CONCURS; MARSTILLER, J., CONCURS IN RESULT ONLY.