

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

TYRONE FLEMING,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D10-972

[November 23, 2011]

ON MOTION FOR REHEARING EN BANC

POLEN, J.

Having previously en banc'd this case, in order to recede from our prior opinion in *Marrisette v. State*, 780 So. 2d 1020 (Fla. 4th DCA 2001), we now consider en banc Fleming's issue as to the application of *Shelton v. Secretary, Department of Corrections*, No. 6:07-cv-839-Orl-35-KRS, 2011 WL 3236040 (M.D. Fla. July 27, 2011). Considering the matter en banc, we deny rehearing for the reasons set forth below.

In his motion for rehearing en banc, Fleming raised for the first time that the statute under which he was convicted, section 893.13, Florida Statutes, is facially unconstitutional based on the analysis set forth in *Shelton*. In *Shelton*, the district judge found section 893.13 to be unconstitutional because it removed the element of *mens rea* from drug possession laws, creating a strict liability offense. *Id.* at *4-*5. The *Shelton* court held that in order for such an offense to be constitutional, the defendant cannot be subjected to harsh penalties, substantial social stigma, or regulation of inherently innocent conduct, and that section 893.13 does all three. *Id.* at *7-*12.

This court is aware that *Shelton* issues are now being raised by defendants at various stages of the appellate process. If the *Shelton* issue is raised before a decision on the merits, even if it was not raised at the trial court level, this court will consider the issue. However, if the *Shelton* issue is not raised prior to a decision on the merits, this court will not consider the issue on a motion for rehearing or motion for

rehearing en banc. Here, this court issued an opinion as to the merits of Fleming's case in *Fleming v. State*, No. 4D10-972, 2011 WL 3477056 (Fla. 4th DCA Aug. 10, 2011). Subsequently, Fleming filed a motion for rehearing en banc, raising for the first time an issue as to the constitutionality of section 893.13, Florida Statutes, under the analysis set forth in *Shelton*. Because the issue was not raised prior to a decision on the merits, this court will not take it into consideration. As such, we deny Fleming's motion for rehearing en banc.

Rehearing Denied.

MAY, C.J., WARNER, STEVENSON, GROSS, TAYLOR, HAZOURI, DAMOORGIAN, CIKLIN, GERBER, LEVINE and CONNER, JJ., concur.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kenneth L. Gillespie, Judge; L.T. Case No. 09-20196 CF10A.

Carey Haughwout, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.