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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,352

THE STATE OF FLORIDA,

Petitioner,

vs.

LIVINGSTON MILBRY,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The respondent, Livingston Milbry, was the appellant and defendant in the those same courts. The parties shall be referred to as petitioner and respondent in this brief.

The "A" designates the attached appendix and shall be accompanied by an appropriate page number.

STATEMENT OF THE CASE

On March 3, 1983, the respondent was charged with robbery and second degree grand theft, in violation of Section 812.13 and 812.014, Fla.Stat. (1983). (R. 1-2). On that same date, a plea of not guilty was entered on the respondent's behalf. (R. 3).

After a non-jury trial, the respondent was found guilty on the theft count only. (R. 20-21). At sentencing, the respondent was classified as a youthful offender under the provisions of Chapter 958 of the Florida Statutes and incarcerated for a period four (4) years, to be followed by two (2) years of service in a community control program. (R.

24). On appeal, the respondent contended that the six (6) year combination of imprisonment and community control pursuant to Section 958.05, Fla.Stat. (1983), exceeded the five (5) year statutory maximum for theft. Sections 812.014 (2)(b), 775.082 (3)(d), Fla.Stat. (1983).

The Third District Court of Appeal agreed with the respondent's argument and reversed the sentence. In doing so, the Third District Court of Appeal concluded that a youthful offender could not be incarcerated for a period that exceeded the statutory maximum set by the Legislature:

> "This court is committed to the principle that the Youthful Offender Act [ch. 958, Fla.Stat. (1983)] may not be invoked to impose a sentence which exceeds the statutory maximum set for the offense for which an accused stands convicted. Saunders v. State, 405 So.2d 1037 (Fla. 3d DCA 1981); contra Dunlap v. State, 433 So.2d 631 (Fla. 1st DCA 1983). The Act was obviously designed to impose more lenient sanctions on a youthful offender who meets the statutory requirements, not to aggravate the sanctions which would ordinarily apply."
>
> (A. 2).

The petitioner sought discretionary review in this court based on the conflict between the present decision and that of the First District Court of Appeal in Dunlap. This court accepted jurisdiction and dispensed with oral argument on April 2, 1985.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN COMMITTING THE RESPONDENT TO THE DEPARTMENT OF CORRECTIONS AS A YOUTHFUL OFFENDER FOR A PERIOD THAT EXCEEDED THE MAXIMUM AUTHORIZED BY LAW FOR THE OFFENSE OF SECOND DEGREE GRAND THEFT?

SUMMARY OF THE ARGUMENT

The Third District's ruling that the Youthful Offender Act cannot be invoked to impose a sentence which exceeds the statutory maximum set for an offense ignores the plain language of Section 958.05, Fla.Stat. (1983), and provides a prime example of judicial legislation contrary to the direct will of the people.

The Legislature's mandate that individuals meeting the criteria of §958.05 be sentenced pursuant to Chapter 958 and "in lieu of other criminal penalties authorized by law" was utterly ignored by the Third District Court of Appeal. Enacted after Chapters 812 and 775, the Youthful Offender Act is the exclusive remedy under law for those who meet its requirements.

The opinion below represents a blatent effort to engraft an exception to §958.05 for individuals who commit third degree felonies. If such a result is necessary, it is for the Legislature and not the courts to decide.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN COMMITTING THE RESPONDENT TO THE DEPARTMENT OF CORRECTIONS AS A YOUTHFUL OFFENDER FOR A PERIOD THAT EXCEEDED THE MAXIMUM AUTHORIZED BY LAW FOR THE OFFENSE OF SECOND DEGREE GRAND THEFT.

The petitioner candidly acknowledges that the respondent's sentence pursuant to Section 958.05, Fla.Stat. (1983), exceeded the period of imprisonment generally applicable when one is convicted of second degree grand theft. See, Section 812.014 (2)(b), 775.082 (3)(d), Fla.Stat. (1983). A review of the Youthful Offender Act, however, demonstrates that the Legislature intended the sanctions of Section 958.05, Fla.Stat., to apply instead of other criminal penalties where certain factors have been established. Under such circumstances, the trial court correctly sentenced the appellant and the Third District Court of Appeal erred in reversing that sentence.

Section 958.05, Fla.Stat. (1983), provides in pertinent part:

> "If the court classifies a person, a youthful offender, in lieu of other criminal penalties authorized by law, the court shall dispose of the criminal case as follows:
>
> '(1) The court may place the youthful offender on probation in a community control program,

> with or without an adjudication of guilt for a period not to exceed two years or extend beyond the 23rd birthday of the defendant.
>
> (2) The court may commit the youthful offender to the custody of the department for a period not to exceed 6 years. The sentence of the court shall specify a period of not more than the first 4 years to be served by imprisonment and a period of not more than 2 years to be served in a community controlled program. The defendant shall serve the sentence of the court unless sooner released as provided by law.'"

In the present case the respondent did not challenge his classification as a youthful offender, but instead successfully argued that his sentence under Section 958.05, Fla.Stat., was contrary to the requirement that an individual not be sentenced to longer than five years for the crime of second degree grand theft. This argument, adopted by the Third District Court of Appeal, ignores the plain language of the Youthful Offender Act and its direction that sentencing be accomplished pursuant to Section 958.05, Fla.Stat. in lieu of other criminal penalties authorized by law.

In Dunlap v. State, 433 So.2d 631 (Fla. 1st DCA 1983), the First District Court of Appeal held the sentencing provisions of the Youthful Offender Act to be the exclusive

sanction for defendants who met its criteria. In Dunlap, the youthful offender was sentenced pursuant to Section 958.05, Fla.Stat., to a term of four years imprisonment followed by two years in a community control program. On appeal, the defendant contended that such a sentence was statutorily impermissible because it exceeded the maximum term of imprisonment applicable to an adult when convicted of second degree grand theft. The First District Court of Appeal held that the Youthful Offender Act preempted general sentencing provisions for those who so qualified:

> "Dunlap was sentenced as a youthful offender pursuant to chapter 958, Florida Statutes, which expressly provides that such disposition is 'in lieu of other criminal penalties authorized by law. . .' See Section 958.05. While Section 958.05 (2) indicates that the offender shall serve the entire sentence 'unless sooner released as provided by law,' we construe this language as referring to the possibility of early release, such as by parole, consistent with a sentence imposed. Insofar as chapter 958 circumscribes the penalties for qualifying offenders, thereby precluding the application of other sanctions, see, Whitlock v. State, 404 So.2d 795 (Fla. 3d DCA 1981), general sentencing provisions external to chapter 958 do not constrain the term of Dunlap's confinement as a youthful offender."
>
> Dunlap v. State, supra. 433 So.2d at 631.

The Fourth District Court of Appeal came to a similar conclusion in Andrews v. State, 448 So.2d 551 (Fla. 4th DCA 1984). In Andrews, the defendant was convicted of attempted manslaughter, a third degree felony possible imprisonment for not more than five years. The trial court sentenced the defendant under the Youthful Offender Act to a six year commitment to the Department of Corrections, the first two years of which were to be served in prison and the last four on probation.

On appeal, the defendant attacked the legality of his sentence, urging that he could only be sentenced to the Department of Corrections for a maximum period of five years, since attempted manslaughter was a third degree felony which may be punished by imprisonment for not more than five years. In rejecting that argument, the Fourth District Court of Appeal followed the Dunlap decision:

> "The First District Court of Appeal, in Dunlap v. State, 433 So.2d 631 (Fla. 1st DCA 1983), rejected a substantially identical contention, upon a holding that sentencing for any felony, including a third degree felony, must be accomplished in accordance with section 958.05, Fla.Stat., which provides that a court is to follow that section 'in lieu of other penalties authorized by law' in disposing of criminal cases involving persons the court classifies as youthful offenders. We affirm the 6 year commitment to the Department of Correction upon

> authority of Dunlap v. State, supra."
>
> Andrews v. State, supra., 448 So.2d at 552.

Ignoring the plain language of Section 958.05, Fla. Stat., the Third District Court of Appeal held that the Youthful Offender Act could not be invoked to impose a sentence which exceeded the statutory maximum set for the offense in Chapter 775. To support this outcome, the Third District Court of Appeal found the Youthful Offender Act "obviously designed to impose more lenient sanctions on the youthful offender who meets the statutory requirements, not to aggravate the sanctions which were ordinary applied." (A. 2). This blatent effort to judicially draft an exception to the applicability of Section 958.05 ignores the Third District's previous opinion as to the purpose for Section 958.05:

> "Section 958.05 of the Act expressly provides that youthful offenders may be sentenced 'in lieu of other criminal penalties authorized by law,' and enumerates three alternatives sanctions which may be levied on such offenders. This section plainly circumscribes the penalties for youthful offenders and provides the imposition of sanctions other than those provided herein. We find support for this conclusion in the legislative intent behind enactment of the statute. As stated in Section 958.021, the Legislature's goal was to improve the chances of correction and successful return to the community of

> youthful offenders sentenced to imprisonment by preventing their association with more experienced criminals during their terms of confinement. . .
>
> We hold that the sentencing provisions of the Youthful Offender Act are the exclusive sanctions for defendants who meet its criteria..."
>
> Whitlock v. State, 404 So.2d 795, 796 (Fla. 3d DCA 1981).

The sole authority relied upon by the Third District to support its result was Saunders v. State, 405 So.2d 1037 (Fla. 3d DCA 1981). In Saunders, the defendant was sentenced to four years imprisonment followed by two years in a community control program pursuant to Section 958.05, Fla. Stat. (1979) for the commission of battery, a first-degree misdemeanor. In reversing the sentence, the Third District held:

> "We find error in the court's sentence for battery imposed in Count II. According to section 784.03 (2), Florida Statutes (1979), battery is a misdemeanor of the first degree. The punishment for a misdemeanor of the first degree is a term of imprisonment not exceeding one year. §775.082(4)(a), Fla.Stat. (1979). The sentence of four years imprisonment followed by two years in a community control program with a mandatory minimum of one year imprisonment, imposed in accordance with the youthful offender statute, section 958.05, Florida Statutes

> (1979), exceeds the lawful maximum for the crime of battery.
>
> Saunders v. State, supra, 405 So.2d at 1038.

The opinion in Saunders was eminently correct, but is utterly inapplicable to the present case. The sentence pursuant to Section 958.05, Fla.Stat., was unlawful because an individual who commits a first degree misdemeanor, such as battery, is excluded from the act's applicability. See, §958.04(1)(b), Fla.Stat. (1979). The crime committed by the respondent, however, plainly falls within the ambit of chapter 958.

Although the Legislature intended to improve the chances of correction and successful return to the community of youthful offenders by preventing their association with more experienced criminals during their incarceration, it was equally the purpose of the Legislature to provide an additional sentencing alternative to be used in the discretion of the trial court when youthful offenders have demonstrated that they can no longer be handled safely and therefore require substantial limitations to insure the protection of society. See, Section 958.021, Fla.Stat. Nothing in the legislative intent suggests that the Legislature desired an exception to the applicability of Chapter 958 for individuals who only commit third degree felonies. To the

contrary, the language utilized throughout chapter 958 suggests that the Youthful Offender Act is applicable to all individuals who meet its criteria. The Legislature enacted chapter 958 long after chapter 812 and chapter 775. The Legislature, in promulgating chapter 958, could have no more clearly stated that individuals classified as youthful offenders were to be sentenced pursuant to chapter 958, regardless of the other criminal penalties authorized by law.

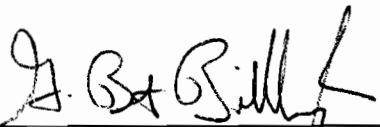
The penalty for the commission of a third degree felony is not chiseled in stoned. Indeed, the Legislature could modify that penalty to make such a violation a more serious or less serious offense. Because of the importance of correcting the behavior of youthful offenders, the Legislature has made such a modification in chapter 958. Having done so, it is not for the courts of this State to engraft an exception on otherwise plain and clear language. Under such circumstances, this court should disapprove of the Third District Court of Appeal's opinion in the present case and remand the proceedings to that court with directions to reinstate the respondent's sentence.

CONCLUSION

Based on the foregoing rationale and authority, the petitioner respectfully requests this court to reverse the opinion of the Third District Court of Appeal and remand the proceedings in the present case with directions to reinstate the initial sentence in this case.

Respectfully submitted,

JIM SMITH
Attorney General



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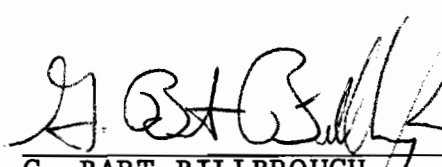
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to RORY S. STEIN, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 22nd day of April, 1985.



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