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IN THE FLORIDA SUPREME COURT

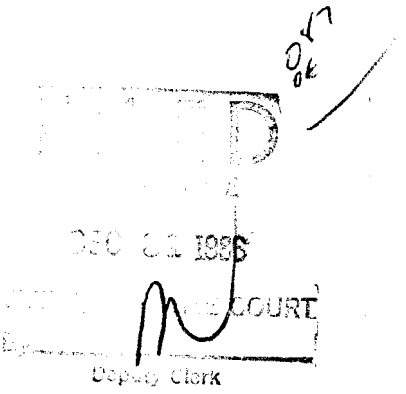
DILAR S. BOOKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



Case No. 68,400

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

This brief is filed pursuant to this Court's order of December 3, 1986.

SUMMARY OF ARGUMENT

Chapter 86-273, Section 1, Laws of Florida does not affect the appellate jurisdiction of any Florida court. It merely purports to limit the scope of judicial review for matters within the appellate courts' jurisdiction.

Prior to the enactment of the Sentencing Guidelines, Florida appellate courts did not review the length of sentence imposed by the trial judge for abuse of discretion. There were two reasons for this policy: 1) there was no statutory provision for appellate review of legal sentences, and 2) parole authorities were empowered to grant relief from overly harsh sentences. Both of these circumstances are now changed. Review of a trial court's discretion is within the power accorded to the judiciary by the governmental separation of powers doctrine.

Chapter 86-273, Section 1, Laws of Florida is an unconstitutional encroachment upon the judicial power by the legislature. The scope of appellate review is more accurately classified as procedural rather than substantive law once the appellate court has jurisdiction over the case. This Court has struck down statutes in the past which conflicted with court rules governing procedural matters.

It may be possible to determine the case at bar without reaching the constitutional question.

ARGUMENT

ISSUE III.

THE ENACTMENT OF CHAPTER 86-273, SECTION 1, LAWS OF FLORIDA DOES NOT AFFECT JUDICIAL REVIEW OF PETITIONER'S SENTENCING.

A. JURISDICTION OF THIS COURT

This Court accepted jurisdiction over the case at bar pursuant to Article V, Section 3(b)(4), Florida Constitution (certified question of great public importance). Petitioner had further invoked this Court's jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution (express and direct conflict with a decision of the Supreme Court on the same question of law).[1/]

Clearly, the legislature has no power to revoke appellate jurisdiction where there is a constitutional basis for this jurisdiction. See e.g. Sun Insurance Office ,Ltd. v. Clay, 133 So.2d 735 (Fla.1961). Moreover, Section 86-273, Section 1, Laws of Florida does not even purport to change the jurisdiction of appellate courts over appeals from sentencing outside the guidelines recommendations. Section 924.06 (1)(e), Florida Statutes (1985) which authorizes such appeals by a defendant remains intact. Appeal of a sentence imposed outside the range recommended by the guidelines is an appeal as a matter of right. Section 924.05, Florida Statutes (1985).

1/ Petitioner's brief on jurisdiction setting forth this basis was returned March 7, 1986, as the Court accepted jurisdiction on the certified question. Argument on this point is contained in Issue I of Petitioner's Brief on the Merits.

Therefore, Chapter 86-273, Section 1, does not affect this Court's (or any other appellate court's) jurisdiction. Its sole objective is to limit the scope of appellate review over matters where the appellate court has incontrovertible jurisdiction.

B. A BRIEF HISTORY OF JUDICIAL REVIEW OF SENTENCING IN FLORIDA

No discussion of judicial review of sentencing in Florida's appellate courts can ignore the leading decision of this Court in Brown v. State, 152 Fla.853, 13 So.2d 458 (1943). The Brown court held that a sentence imposed within the statutory limits cannot be cruel and unusual, "no matter how harsh and severe it may appear to be in a particular case." 13 So.2d at 461. The power to declare what punishment may be imposed upon those convicted of crime is legislative, not judicial. Accordingly, this Court in Brown concluded that appellate courts should not review sentences which appear to be excessive, noting that the then-existent Board of Pardons had authority to commute sentences.

Prior to the adoption of the sentencing guidelines, the only permissible ground for appeal by a criminal defendant of his sentence was illegality. Section 924.06(1)(d), Florida Statutes (1981). In conjunction with creation of a Sentencing Commission [Section 921.001, Florida Statutes (1983)], the legislature authorized a criminal defendant to appeal his sentence when it fell outside the range authorized by the guidelines. Section 924.06(1)(e), Florida Statutes (1983).

Subsequently in Albritton v. State, 476 So.2d 158 (Fla. 1985) this Court held that the extent of departure from the recom-

mended sentence range was reviewable by appellate courts for abuse of the sentencing judge's discretion. Notably, in Albritton, the State agreed that under the guidelines, sentence length was reviewable. In fact, the State argued for the standard which this Court adopted. The legislative enactment of Chapter 86-273, Section 1, Laws of Florida must be viewed as an abrogation of the Albritton holding.

C. CHAPTER 86-273, SECTION 1, LAWS OF FLORIDA IS AN UNCONSTITUTIONAL ENCROACHMENT BY THE LEGISLATURE ON THE JUDICIAL POWER.

In Sun Insurance Office, Ltd. v. Clay, 133 So.2d 735 (Fla.1961), this Court declared:

> "It is a fundamental principle of Constitutional law that each department of government, whether federal or state, "has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution."

133 So.2d at 742. With regard to legislative attempts to direct the judicial power, this Court has asserted:

> Statutes cannot direct or control the judicial judgment of the trial or the appellate court in the exercise of the judicial power vested in the court by the constitution when such judicial power is duly exerted within the limitations prescribed by the constitution in defining the powers and jurisdiction of the courts respectively.

In re Alkire's Estate, 144 Fla.606, 198 So.475 (1940).

The question presented squarely by Chapter 86-273, Section 1, is whether once an appellate court acquires jurisdiction to decide the propriety of a sentencing deviation from the guidelines

recommendation, can the legislature restrict the nature of the judicial review exercised. Clearly, appellate courts have historically reviewed abuse of judicial discretion as well as erroneous application of an existing rule of law. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980). The pre-Albritton refusal of Florida appellate courts to review the propriety as distinguished from the legality of a sentence was not attributable to lack of judicial power to review abuse of trial court discretion. Rather, the decisions indicate two reasons for declining judicial review of sentencing: 1) Lack of express statutory authorization, and 2) Existence of alternative sources of sentence length review. See Brown, supra.; Infante v. State, 197 So.2d 542 (Fla.3d DCA 1967).

Since the advent of the sentencing guidelines, these reasons for declining review have lost their viability. First, appellate review of a guidelines departure sentence is expressly provided in Sections 921.001 (5) and 924.06 (1)(e), Florida Statutes (1985). Secondly, the elimination of parole review for persons sentenced pursuant to the guidelines severely restricts the avenues of relief from an excessively harsh (but legal) sentence. Section 921.001(8), Florida Statutes (1985). If the legislative restriction imposed by Chapter 86-273, Section 1, on the scope of appellate review of sentencing stands, the courts will be hampered in their exercise of jurisdiction and ability to achieve a just result where their jurisdiction has been expressly authorized.

In Benyard v. Wainwright, 322 So.2d 473 (Fla.1975), this Court discussed the separation of powers with reference to substan-

tive and procedural law. This Court wrote:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions.

322 So.2d at 475. While punishment for a criminal offense is clearly substantive law, Benyard, supra., whether judicial review may include an inquiry into the proper exercise of a sentencing court's discretion is more accurately classified as procedural law. Review of judicial discretion is after all one of the "means...to apply and enforce those duties and rights" pertaining to appellate review, in the words of Benyard.

Fla.R.App.P. 9.040(a) provides:

> (a) Complete Determination. In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause.

The Committee Note explains:

> This provision is intended to guarantee that once the jurisdiction of any court is properly invoked, the court may determine the entire case to the extent permitted by substantive law.

Since the jurisdiction of an appellate court is properly invoked when a criminal defendant is sentenced outside the guidelines range, it follows under this Rule that the court should completely determine the propriety of the departure sentence.

When the legislature has passed statutes which encroach upon the rule making province of this Court, the statutes have been held unconstitutional or interpreted to conform with the court rules. For instance, in Huntley v. State, 339 So.2d 194 (Fla.1976), the legislature passed a statute which purported to make pre-sentence investigation reports mandatory in all felony cases. This Court held that the means to assure informed exercise of judicial discretion in sentencing was a procedural matter governed by court rules. Accordingly, the Rule of Criminal Procedure making presentence investigations optional for repeated felony offenders over 18 years of age was given precedence and the statute declared unconstitutional insofar as it attempted to make reports mandatory.

Similarly, In Hamel v. Danko, 82 So.2d 321 (Fla.1955), this Court struck down a statute which purported to establish the legal effect to be given denial of a petition for certiorari. Calling the statute "a clear invasion upon functions exclusively vested in the judiciary," the Hamel court held the statute void as a violation of the separation of powers doctrine. 82 So.2d at 322.

Chapter 86-273, Section 1, Laws of Florida suffers from the same defect because it purports to dictate standard and scope of appellate review to be applied in cases clearly within the jurisdiction of the appellate courts. Hence, this Court should declare it unconstitutional.

D. DETERMINATION OF THE CASE AT BAR

This Court need not reach the constitutional question if it finds in Petitioner's favor on Issue I. of Petitioner's initial brief. Finding the reasons for departure invalid would merely require remand for resentencing within the guidelines by the trial court.

Assuming that this Court does not affirm the Second District's analysis of the extent of sentencing guidelines departure issue, the constitutional question could still be avoided by merely answering the certified question and disapproving the Second District's result. It would then be up to the Second District to decide whether the case could be remanded to the circuit court for resentencing directly or whether the effect of Chapter 86-273, Section 1, Laws of Florida upon judicial review of sentencing must be first determined.

CONCLUSION

Petitioner continues to request the relief specified in his initial brief. If this Court finds that Chapter 86-273, Section 1, Laws of Florida purports to bar relief for the Petitioner, this statute should be declared unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, this 29th day of December, 1986.

Douglas S. Connor
DOUGLAS S. CONNOR