IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,477

JOHN M. McKENDRY

Petitioner

vs.

STATE OF FLORIDA

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE STATE OF FLORIDA,
FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, was the Appellee in the Fourth District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellant and the prosecution, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "PA" will be used to refer to Petitioner's Appendix to his brief.

STATEMENT OF THE CASE AND FACTS

The State accepts the Statement of the Case and Facts set forth in Petitioner's Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal should be affirmed. The clear, unambiguous language of §790.221(2), Fla. Stat. (1989), requires that the mandatory five year sentence be imposed.

THE TRIAL COURT ERRED IN IMPOSING A FIVE YEAR SUSPENDED SENTENCE RATHER THAN SENTENCING PETITIONER TO THE FIVE YEAR MINIMUM MANDATORY SENTENCE REQUIRED BY STATUTE.

Petitioner was found guilty of possessing a short-barreled shotgun in violation of §790.221, Fla. Stat. (1989). Section 790.221(2), provides a mandatory minimum term of five years for such a conviction. The trial court suspended Petitioner's five year sentence and ordered that Petitioner serve one year community control followed by three years probation. In doing so, the trial court relied upon §948.01, Fla. Stat. (1989), which permits the trial court some discretion to impose community control. The Fourth District reversed, finding that the sentencing court was bound to impose the mandatory sentence set forth in §790.221(2). (PA); State v. McKendry, 18 Fla. L. Weekly D517 (Fla. 4th DCA Feb. 17, 1993).

Initially, the State submits that this Court should decline to exercise discretionary jurisdiction over the instant case. Although there are a number of statutory provisions which profess to impose mandatory minimum sentences using various different terminology, the statute at bar is clear and unambiguous. Thus, the case fails to present a question of great public importance.

In any case, the State submits that this Court should affirm the decision of the Fourth District Court of Appeal. Section 790.221(2), Fla. Stat. (1989), provides the penalty upon conviction for possession of a short-barreled shotgun:

> A person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Upon conviction thereof he **shall** be sentenced to a **mandatory** minimum term of imprisonment of 5 years.

In suspending the mandatory five year in the instant case, the trial court relied upon §948.01, Fla. Stat. (1989), which provides in subsection (3):[1]

> If it appears to the court ... that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation.

The Fourth District examined the two statutory provisions and concluded that "the only way that section 948.01 can be reconciled with the sentencing guidelines is to limit its application to those situations where the guidelines themselves permit a suspended sentence." (PA, p. 7). Thus, the court held that "948.01 may now be invoked only when the sentencing guidelines provide for a range of sentencing that includes probation or where appropriate reasons exist to deviate from the guidelines." (PA, p. 7). Relying upon this, Petitioner argues that the trial court did not err in suspending his sentence in the instant case because his guidelines scoresheet allowed a permitted range of any non-state prison sanction up to three and one-half years incarceration.

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[1]Petitioner relies upon §948.01(4), Fla. Stat. (1989), in his Initial Brief on the Merits. However, it would appear that subsection (3) is the operative subsection in the instant case. Furthermore, it was this subsection which was considered by the Fourth District in resolving the issue below. (PA, p. 3).

However, Petitioner's argument ignores Fla. R. Crim. P. 3.701(d)(9), which provides:

> Mandatory Sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. **If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence**. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed. (emp. added).

Thus, as the Fourth District noted, the sentencing guidelines specifically provide for the enforcement of mandatory minimum sentences. Since the statute under which Petitioner was convicted requires a mandatory minimum sentence, the guidelines require that that mandatory minimum sentence, not the lesser guidelines range, be imposed.

Petitioner next argues that even though §790.221(2), Fla. Stat. (1989), does provide a mandatory minimum five year sentence, the statute does not preclude application of the discretionary provisions of §948.01. Petitioner then proceeds to provide excerpts from various statutory provisions within Chapter 790 which set forth minimum sentences. While interesting, these statutory provisions do little more than highlight the difficulties in maintaining consistent language throughout statutory provisions enacted in different years or different circumstances. The clear unambiguous language of §790.221(2), provides that upon conviction for possession of a short-barreled shotgun, the defendant "shall be sentenced to a mandatory minimum term of imprisonment of 5 years."

It is well established that where the language of a statute is clear and unambiguous, the statute must be given its plain and

ordinary effect. Steinbrecher v. Better Construction Co., 587 So. 2d 492, 493 (Fla. 1st DCA 1991). Furthermore, the rules of statutory construction favor according statutes their plain and obvious meaning, and one must assume that the legislature knew the plain and ordinary meanings of words when it chose to include them in a statute. Sheffield v. Davis, 562 So. 2d 384, 386 (Fla. 2d DCA 1990).

In the instant case, the language of the statute is clear and unambiguous in its requirement that a mandatory five year sentence be imposed. The statute not only uses the term "mandatory," but also the term "shall," which itself customarily has a mandatory connotation. Steinbrecher, 587 So. 2d at 494 (citing S.R. v. State, 346 So. 2d 1018 (Fla. 1977)). It also must be assumed that the legislature knew the plain meaning of these terms and intended their effect when it chose to include them in §790.221. This is particularly true since §790.221 was amended in 1989 to include such mandatory provisions.

Prior to 1989, the statute stated:

> Any person convicted of violating this section is guilty of a felony and upon conviction thereof shall be punished by imprisonment ... not to exceed 5 years.

After the 1989 amendment, the statute stated, "Upon conviction thereof he shall be sentenced to a mandatory minimum term of imprisonment of 5 years." (emp. added) §790.221(2), Fla. Stat. (1989). Thus, the legislature specifically amended the statute to delete the permissive language which capped the sentence at five years and mandated that previous maximum sentence now be the

minimum sentence. In doing so, the legislature made the sentence mandatory, thereby removing the sentencing court's discretion. In light of such a clear expression of legislative intent, the Fourth District's interpretation of §790.221 must be affirmed.

Affirmance is also required for an additional reason. It is a general rule of statutory construction that a more specific statute covering a particular subject is controlling over one covering the same subject in general terms. State v. Billie, 497 So. 2d 889, 894 (Fla. 2d DCA 1986), rev. denied, 506 So. 2d 1040 (Fla. 1987). Furthermore, a statute must be interpreted to avoid an unreasonable result where it is open to another interpretation. Department of Professional Regulation v. Durrani, 455 So. 2d 515, 518-19 (Fla. 1st DCA 1984). Applying the foregoing to the instant case, it is clear that the Fourth District's interpretation of §790.221 is correct. Assuming arguendo that Appellant is correct that the two subjects govern the same subject matter, §790.221 is clearly the more specific statute on the particular subject. Whereas §948.01 deals only generally with the trial court's discretion to impose sentence, §790.221 provides a specific "mandatory" five year sentence for a defendant convicted of possession of a short-barreled shotgun. To give the statute the interpretation asserted by Appellant would render the mandatory language of the statute without meaning. Thus, this Court must avoid such an unreasonable interpretation and, as recognized by the Fourth District, require that the mandatory five year sentence be imposed.

The State is aware of this Court's decision in Scates v. State, 603 So. 2d 504 (Fla. 1992), to which Petitioner makes only passing reference. However, the State asserts that Scates is distinguishable. Unlike the statutes involved in Scates, whose purpose was to combat drugs, the statutes at bar lack any specific relationship. Scates, 603 So. 2d at 506. Section 790.221(2) is concerned specifically with the possession of a short barreled rifle, shotgun or machine gun; whereas section 948.01 is concerned generally with sentencing leniency. Unlike §397.12, which made specific reference to Chapter 893, there is no reference in §948.01 to specific offenses or circumstances meriting special treatment. In light of the mandatory language of §790.221(2), the State submits that the five year sentence of §790.221 must control.

The State also submits that §790.221 as the later promulgated statute must control. As the Fourth District noted, §948.01 was first enacted in 1941, well before the sentencing guidelines were adopted as the general sentencing policy in Florida; a time when trial courts still had virtually unlimited discretion in sentencing and most sentencing decisions were immune from appellate review or collateral attack (PA, p. 6). The purpose of §948.01 is to avoid giving a criminal record to those persons whose prospects appear good for rehabilitation. Holland v. Florida Real Estate Commission, 352 So. 2d 914 (Fla. 2d DCA 1977). In contrast, §790.221(2), the later promulgated statute, was amended in 1989 to include the mandatory sentencing language. Although §948.01 was amended that same year on an unrelated issue, there was no mention of §790.221.

Thus, the clear and unambiguous language of §790.221(2), as the last expression of legislative will should control. State v. Ross, 447 So. 2d 1380, 1382 (Fla. 4th DCA 1984), rev. denied, 456 So. 2d 1182 (Fla. 1984).

Based upon the foregoing, the State submits that the opinion of the Fourth District Court of Appeal should be affirmed. Appellant's sentence must be reversed and the case remanded for reinstatement of the five year mandatory sentence which was suspended. To do otherwise would negate the clear and unambiguous language of §790.221(2), which requires the trial court to impose a mandatory five year sentence upon conviction under §790.221 for possession of a short barreled rifle, shotgun or machine gun.

CONCLUSION

Based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests that the decision of the Fourth District Court of Appeal be AFFIRMED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by U.S. Mail to: RONALD B. SMITH Counsel for Defendant, Waxler & Smith, 73 S.W. Flagler Avenue, P.O. Box 111, Stuart, Florida, 34995-0111, this 6th day of May, 1993.

Of Counsel