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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN M. McKENDRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,477

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and the Appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the Appellant below. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" will denote Record on Appeal.

All emphasis is added.

STATEMENT OF THE CASE AND FACTS

Petitioner was tried and convicted by jury for possession of a short-barrelled shotgun, in violation of §790.221, Fla. Stat. (1989). (R. 43, 44). Petitioner's permitted sentencing guidelines range was any non-state prison sanction to three and one-half years in prison. Petitioner's recommended sentence was community control or twelve to thirty months in prison. (R. 6, 21). Florida Statute §790.221(2) (1989) provides that a person convicted under §790.221 shall be sentenced to a mandatory minimum term of imprisonment of five years.

The Honorable Dwight L. Geiger, Circuit Judge, was concerned about the mandatory minimum language of §790.221(2) because he did not believe that the Petitioner's crime under the facts of this case, coupled with Petitioner's lack of a prior record, warranted a five year prison sentence. (R. 15).

Petitioner's counsel researched the law and legislative intent and submitted a memorandum of law to the trial court and argued that the trial court must sentence Petitioner to the required five years in prison, however, when Florida Statutes §790.221(2) and §948.01 are read in pari materia, there is no conflict among them and suspension or deferral of all or any part of the five year prison sentence is permissible at the discretion of the trial judge. (R. 9-15). This is especially clear when other mandatory minimum statutes are examined.

The sentencing date was continued in order for Petitioner's

counsel to listen to tapes of legislative sessions and to provide those tapes to counsel for the Respondent. (R. 16).

Upon being called up again for sentencing, the Respondent announced that its counsel had listened to legislative tapes and could not find anything to indicate whether or not the legislature intended to take away or limit the trial court's discretion to suspend or defer all or part of the mandatory sentence required under §790.221(2). (R. 23). Petitioner's counsel maintained that the trial court continued to have such discretion. (R. 23).

After testimony of Petitioner's father and argument of Petitioner's counsel and counsel for the Respondent, the trial judge sentenced Petitioner to the mandated term of five years in the Department of Corrections, however, because §790.221(2) does not prohibit it, the trial judge suspended the five year prison term and placed Petitioner on community control to be followed by probation with certain special conditions. (R. 38-39; 43-52). The Respondent appealed. (R. 53).

On appeal, the Fourth District Court of Appeal reversed the trial court's sentence, holding that Section 948.01, Fla. Stat. (1989) did not operate to avoid the enforcement of the mandatory minimum term of imprisonment of five years upon violation of Section 790.221(2), Fla. Stat. (1989). However, because of the conflicting provisions of the statutes and the substantial effect thereof on a large number of persons across the state, the appellate court certified the following question to be one of great

public importance:

DO THE PROVISIONS OF SECTION 948.01, FLORIDA STATUTES (1989), AUTHORIZE THE IMPOSITION OF A SENTENCE OTHER THAN AS PROVIDED IN SECTION 790.221(2), FLORIDA STATUTES (1989)?

This Court postponed its decision on jurisdiction in an order dated March 30, 1993, and set a briefing schedule.

SUMMARY OF THE ARGUMENT

This Court should exercise its discretion, granted by Article V, Section 3(b)(4) of the Florida Constitution, in favor of answering the certified question presented here in the affirmative. The decision of the Fourth District Court of Appeal should be quashed.

While Section 790.221(2), Fla. Stat. (1989) calls for a mandatory minimum five year sentence, the trial court was within the authority granted to it by the legislature when it employed Section 948.01, Fla. Stat. (1989) to implement its decision to suspend the balance of Petitioner's five year sentence and place him on community control. This sentence was consistent with the sentence called for by the sentencing guidelines and was not a departure sentence.

When Section 790.221(2), Fla. Stat. (1989) is examined and compared with other mandatory minimum statutes, and when the rules of statutory construction are applied in conjunction with Section 775.021(1), Fla. Stat. (1989), the sentence of the trial court must be upheld.

ARGUMENT

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN IMPOSING A FIVE YEAR PRISON SENTENCE AND THEN SUSPENDING SAID SENTENCE AND PLACING PETITIONER ON COMMUNITY CONTROL.

Petitioner was found guilty of being in possession of a short-barrelled shotgun in violation of §790.221, Fla. Stat. (1989). In compliance with the statute's requirement, the trial judge committed Petitioner to a term of imprisonment of five years. After hearing all the evidence presented at the trial and the sentencing hearing, the trial judge felt that the facts, circumstances and prior record of Petitioner did not justify such a harsh sentence. The trial judge determined that Petitioner was an excellent candidate for the application of Chapter 948. Because §790.221 does not preclude the trial court from exercising its discretion, the trial judge suspended the balance of the prison term and placed Petitioner on community control followed by probation.

The issue presented to the Fourth District Court of Appeal was whether the trial court erred in utilizing §948.01, Fla. Stat. (1989) in order to suspend the balance of Petitioner's five year prison sentence imposed for a violation of §790.221, Fla. Stat. (1989), and placing Petitioner on community control followed by probation in accord with the sentence guidelines. The court reversed the trial court but found that there are conflicting provisions of certain statutes that have a substantial effect on a large number of persons across the state and therefore certified

the following question as being one of great public importance:

DO THE PROVISIONS OF SECTION 948.01, FLORIDA STATUTES (1989), AUTHORIZE THE IMPOSITION OF A SENTENCE OTHER THAN AS PROVIDED IN SECTION 790.221(2), FLORIDA STATUTES (1989)?

Section 790.221(2), Fla. Stat. (1989) provides:

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

Section 948.01(4), Fla. Stat. (1989) provides:

> If, after considering the provisions of subsection (3) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to imprisonment, the court may place the offender in a community control program. Or, in a case of prior disposition of a felony commitment, upon motion of the offender or the department or upon its own motion, the court may, within the period of its retained jurisdiction following commitment, suspend the further execution of the disposition and place the offender in a community control program upon such terms as the court may require. . . .

The Fourth District Court of Appeal held that Section 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. Under this criteria, the trial court did not err or abuse its discretion because the Petitioner's sentencing guidelines score sheet allowed a permitted range of any non-state prison sanction up to three and one-half years in prison and the recommended range was community control or twelve to thirty months in prison. (R. 6, 21). This was not a

departure sentence.

The appellate court held that the application of Section 948.01 has now been limited by Rule 3.701(d)(9) of the Florida Rules of Criminal Procedure that states that if the statute violated provides for a mandatory sentence and if the calculated guidelines sentence is less than the mandatory, then the mandatory sentence takes precedence. We now know that this is not always the case as determined by this court in Scates v. State, 603 So.2d 504 (Fla. 1992).

Because of the conflicting provisions of the statutes concerning minimum mandatory sentences and the substantial effect thereof on a large number of people and institutions throughout the state, not the least of which are our overcrowded prisons, this court should exercise its discretion, granted by Article V, Section 3(b)(4) of the Florida Constitution, in favor of answering the certified question presented here.

While Section 790.221(2), Fla. Stat. (1989) does call for a minimum mandatory five year sentence, when it is read in conjunction with the other sentencing provisions of Chapter 790, it does not absolutely preclude trial judges from exercising their discretion to suspend all or any part of the sentence. Three other sections in Chapter 790 contain either mandatory minimum sentences or preclusive language or both.

Section 790.07(4), Fla. Stat. (1989) provides that the sentence provided for "shall not be suspended or deferred. . . ." Section 790.161(2), Fla. Stat. (1989) provides that "the person

shall be required to serve a term of imprisonment of not less than 5 calendar years before becoming eligible for parole." Section 790.161(3), Fla. Stat. (1989) provides that "the person shall be required to serve a term of imprisonment of not less than 10 calendar years before becoming eligible for parole." Section 790.161(4), Fla. Stat. (1989) provides that "such person shall be required to serve a term of imprisonment of not less than 25 calendar years before becoming eligible for parole." Section 790.165(3), Fla. Stat. (1989) provides that:

> "Any person violating the provisions of this subsection shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of §948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld."

Another statute involving weapons that provides for a mandatory minimum sentence is construed in State v. Ross, 447 So.2d 1380 (Fla. 4th DCA), rev. denied, 456 So.2d 1182 (Fla. 1984). Section 775.087(2)(a), Fla. Stat. (1981) provides that any person convicted of certain specified offenses while having a firearm in his possession shall be sentenced to a three year minimum term of incarceration and further:

> Notwithstanding the provisions of §948.01, adjudication shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under §944.27 or §944.29, prior to serving such minimum sentence.

There are other criminal statutes, not involving firearms, but involving minimum mandatory type sentences. Section 893.13(1)(c), Fla. Stat. (1989) provides that "imposition of sentence shall not

be suspended or deferred, nor shall the person so convicted be placed on probation." Section 893.135, Fla. Stat. (1989) expressly includes provisions for mandatory minimum sentences and includes the following provision:

> Notwithstanding the provisions of §948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

Section 775.0823, Fla. Stat. (1989) provides for a "mandatory minimum sentence without possibility of early release. . ." and further provides:

> Notwithstanding the provisions of §948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

It is well-settled that a statute must be construed together and in harmony with any other statute relating to the same subject matter. Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation Dist., 274 So.2d 522 (Fla. 1973); Mann v. Goodyear Tire & Rubber Co., 300 So.2d 666 (Fla. 1974); V.C.F. v. State, 569 So.2d 1364 (Fla. 1st DCA 1990); see also, Markham v. Blount, 175 So.2d 526 (Fla. 1965) (in construing a statute, courts must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering same general field). This rule has been applied in several cases involving criminal statutes. See, e.g., Carroll v. State, 251 So.2d 866 (1971), conformed to, 252 So.2d 396 (Fla. 1971) (statutes

or rules providing for automatic stays must be read in pari materia with speedy trial statute); Davis v. State, 146 So.2d 892 (Fla. 1962) (statute prohibiting carrying of pistols and repeating rifles without license should be read in pari materia with statute restricting issuance of licenses); Genung v. Nuckolls, 292 So.2d 587 (Fla. 1974) (statute providing that subsequent arrest on felony charge of parolee or probationer shall be prima facie evidence of conditions of parole or probation must be read in pari materia with statutes governing proceedings requisite to revocation of probation).

When the legislature uses the same word or phrase on the same subject, even in different chapters of the Florida Statutes, it is presumed to have intended the same meaning for those identical formulations. Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1958).

The legislature is presumed to know the meaning of the words it employs in the statutes it writes and to have expressed its intention in the precise words employed. Thayer v. State, 335 So.2d 815 (Fla. 1976).

There is also a presumption that the legislature passes statutes with knowledge of other existing statutes. State v. Dunmann, 427 So.2d 166 (Fla. 1983). Clearly, the legislature was cognizant of this rule when it specifically provided in §790.165(3) that the provisions of §948.01 relating to the suspension, deferral or withholding of adjudication of guilt or imposition of sentence and eligibility for parole, would not apply to "any person

violating the provisions of this subsection." This same observation can be made for the inclusion by the legislature of a similar yet more inclusive statement under §775.087(2)(a), and the specific provisions in §893.13(1)(c), §893.135, §775.0823, and §790.07(4).

The legislature did not intend to preclude the application of §948.01 to §790.221, as evidenced by the omission of preclusive language. The use of different terms in different statutes on the same subject matter is strong evidence that different meanings were intended by the legislature. Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984). Rules of statutory construction and the legislature's failure to expressly prohibit the application of §948.01, Fla. Stat. (1989) to the punishment prescribed under §790.221(2), Fla. Stat. (1989) require that these statutes be read in pari materia.

The restrictive language contained in the other mandatory minimum statutes cannot be implied against the instant statute which does not utilize it. As stated in St. George Island Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989):

> Where the legislature uses exact words in different statutory provisions, the court may assume they were intended to mean the same thing. . . Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted.

Since it must be presumed that the legislative inclusion of the prescription against suspending, deferring or withholding sentence

has meaning where it is added to a penal statute, the exclusion of that sentence from a similar penal statute likewise must have meaning, namely, that such suspension, deferral, or withholding of the sentence is not precluded.

The trial judge was faced below with two equally plausible readings of legislative intent, one requiring a mandatory minimum five years imprisonment without possibility of suspension or deferral, the other allowing probation or community control. When a criminal statute is susceptible of different equally plausible interpretations, it must be interpreted in the way that favors the defendant. §775.021(1), Fla. Stat. (1989); Lambert v. State, 545 So.2d 838 (Fla. 1989). The trial judge found that under the facts and circumstances of this case the minimum mandatory sentence called for was too harsh and, although he imposed the required sentence, he relied upon §948.01 as authority to suspend the balance of the prison sentence. This was not error or abuse of discretion.

The Fourth District Court of Appeal held that:

> "The discretionary application of Section 948.01, in all cases, without consideration of the guidelines, would negate the complex and comprehensive provision of the sentencing guidelines and their underlying policy to standardize sentencing throughout the state . . . . We conclude 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."

In reversing Petitioner's sentence, the Fourth District Court of Appeal appears to have misconstrued the legislative will and misconstrued what actually occurred in the trial court. The trial judge did not utilize Section 948.01 to negate the sentencing guidelines. In fact, the trial judge utilized the sentencing guidelines in conjunction with Section 948.01 to avoid the harsh sentence called for in Section 790.221(2). The guidelines permitted the trial judge to sentence Petitioner within the range of any non-state prison sanction up to three and one-half years in prison. As required by the minimum mandatory language of 790.221(2), the trial judge sentenced Petitioner to five years in prison, however, because the legislature did not prohibit it and because the facts and circumstances of the case warranted it, he suspended the balance of the prison sentence and placed Petitioner on community control.

The legislature knows how to limit the discretionary power of judges to avoid minimum mandatory sentences as evidenced by §790.07(4), §790.161, §790.165(3), §775.087(2)(a), §893.13(1)(c), §893.135 and §775.0823 of the Florida Statutes. It did not limit such power in §790.221(2), and thus the trial judge acted within his discretion and did not err in this case. Because the legislature has, in many instances, specifically used language in statutes providing for minimum mandatory sentences, declaring that the minimum mandatory provisions of the statute take precedence over Section 948.01, it is obvious that the legislature intended §948.01 to control or to be able to be utilized unless specifically

prohibited.

Consequently, the trial judge did not err or abuse his discretion. Pursuant to §790.221(2), Petitioner was committed to the Department of Corrections for the term of five years. The trial judge then properly read §790.221(2) in conjunction with all other minimum mandatory statutes and in conjunction with §948.01, and determined that he was empowered to suspend Petitioner's mandatory sentence and place him on community control. Petitioner's sentence is in conformity with statutory construction and legislative intent and must therefore be upheld. The certified question should be answered in the affirmative and the decision of the Fourth District Court of Appeal reflecting Petitioner's argument should be quashed.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court affirm the trial court below.

DATED this 23rd day of April, 1993.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by United States Mail, to Melvina Racey Flaherty, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299, on this 23rd day of April, 1993.

_____
RONALD B. SMITH