

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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JUN 2 1997

CLERK, SUPREME COURT
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Chief Deputy Clerk

DENO S. GREEN,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

FSC Case No.

90,696

Fifth DCA Case No. 96-394

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

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CASES CITED:

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OTHER AUTHORITIES CITED:

Article V, Section 3(b)(3), Florida Constitution 4

Section 775.081, Florida Statutes 2

Section 775.092, Florida Statutes 2

Section 921.001(5), Florida Statutes 1, 3, 5

Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure 4

IN THE SUPREME COURT OF FLORIDA

DENO S. GREEN,)	
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Petitioner,)	
)	FSC Case No.
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)	Fifth DCA Case No. 96-394
STATE OF FLORIDA,)	
)	
Appellee.)	
_____)	

STATEMENT OF CASE AND FACTS

On September 20, 1994, Deno Green (Petitioner) shared a house with his cousin, Ryan Moffett. Around 9:30 that evening, Petitioner arrived home and found his cousin on the telephone. Petitioner wanted to use the telephone, and an argument ensued. Petitioner was armed with a handgun, and Moffett was armed with an axe handle. During the argument Moffett was shot.

The State charged Petitioner with attempted first degree murder with a firearm. The matter was tried to a jury, and Petitioner was convicted of attempted voluntary manslaughter with a firearm. Petitioner scored 93.8 points and was sentenced to 72 months which exceeds the statutory maximum for a third degree felony. Petitioner timely appealed to the Fifth District Court of Appeal.

On appeal, Petitioner argued that the trial court erred by imposing a sentence in excess of the five-year statutory maximum for a third degree felony. He acknowledged that Section

921.001(5), Florida Statutes, authorizes a trial court to exceed the maximum sentence otherwise permitted by Section 775.092, but suggested that where the recommended range encompasses the statutory maximum, the statutory maximum constitutes the allowable sentence. The district court affirmed the sentence.

Petitioner moved for rehearing, rehearing en banc, and/or certification and argued that the district court overlooked the rules of statutory construction that require penal statutes to be strictly construed and, where susceptible to more than one meaning, construed in favor of the accused. Petitioner further argued that the district court's opinion effectively rendered Section 775.081 meaningless and/or repealed the statute by implication. The district court denied rehearing on April 17, 1997, and Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

By holding that from a grammatical standpoint the articles in Section 921.001(5), Florida Statutes, were misplaced in the printed statute and by rewriting the statute to support its conclusion, the district court violated the time-honored principle of Florida law that it is not the role of a court to rewrite a statute.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court or another district court of appeal on the same point of law. Art. V § 3(b)(3), Fla. Const., Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN SARASOTA HERALD-TRIBUNE V. SARASOTA COUNTY, 632 So. 2d 606 (Fla. 2d DCA 1993) and STATE V. GLOBE COMMUNICATIONS CORP., 622 So. 2d 1066 (Fla. 4th DCA 1993), aff'd, 648 So. 2d 110 (Fla. 1994).

Section 921.001(5), Florida Statutes, provides in pertinent part:

If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure. [Emphasis added.]

The district court affirmed Petitioner's sentence and held that a departure from a recommended guidelines sentence occurs when the sentence imposed varies by more than 25 percent from a calculated specific number of 12 or above, arrived at by subtracting 28 points from the total sentence points. A sentence which deviates from this specific number by less than 25 percent is a permissible variation, not a departure. To supports its conclusion, the district court rewrote Section 921.001(5) as follows:

If the recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.081, a sentence under the guidelines must be imposed, absent a departure. [Emphasis the court.]

The district court held that from a grammatical standpoint, the underlined articles were misplaced in the printed statute. By rewriting the statute, the district court violated the time-honored principle of Florida law that it is not the role of a court to rewrite a statute and placed its decision in express and direct conflict with State v. Globe Communications Corp., supra and cases cited therein; see also, Sarasota Herald-Tribune Co. v. Sarasota County, supra, (courts are not authorized to embellish legislative requirements with their own notions of what

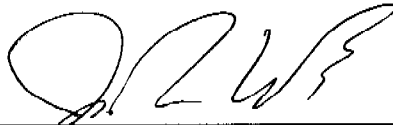
might be appropriate; if additional requirements are to be imposed, they should be inserted by the legislature).

CONCLUSION

This Court has discretionary jurisdiction to review the decision below and should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Deno S. Green, DC #457863, Putnam Correctional Institution, P.O. Box 279, East Palatka, FL 32131, this 29th day of May, 1997.



For:

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