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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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Chief Deputy Clerk

ALBERT LEE MAYS,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 90,826

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

ALBERT LEE MAYS,)
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 Petitioner,)
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 vs.)
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 STATE OF FLORIDA,)
)
 Respondent,)

CASE NO. 90,826

STATEMENT OF CASE AND FACTS

Petitioner was charged by information and convicted after jury trial of the offense of aggravated assault in violation of Section 784.021(1)(a), Florida Statutes (1995). (R 6) Pursuant to the sentencing guidelines, petitioner's recommended sentencing range was 50.85 months to 84.75 months in prison with a recommended sentence of 67.8 months in prison. (R 40-42, T 129) Judge Alice Blackwell White, circuit judge, adjudicated petitioner guilty and sentenced him to 70 months in prison with credit for time served. (R 32-33, 51-52, T 126, 131) Petitioner filed a timely notice of appeal on May 21, 1996. (R 62) On appeal to the Fifth District Court of Appeal petitioner argued that the sentence that was imposed was illegal since it exceeded the statutory maximum for a third degree felony. At issue was the application of the 1995 amendment to the sentencing guidelines which provided for a sentence in excess of the statutory maximum if the recommended sentence under the guidelines

exceeded the maximum sentence authorized by law. Petitioner argued that the section was inapplicable when the recommended sentence encompassed within the statutory limits as was the case at bar. The District Court of Appeal issued its opinion affirming petitioner's sentence on the grounds that since a portion of the sentencing range available to the sentencing judge exceeded the statutory maximum the sentencing was not subject to the limitations imposed by the general sentencing statute. Mays v. State, 693 So.2d 52 (Fla. 5th DCA 1997) Petitioner timely moved for rehearing which was denied by order issued May 9, 1997. Petitioner filed a timely notice to invoke the discretionary jurisdiction of this court on June 9, 1997. On October 3, 1997 this Court issued an order accepting jurisdiction and dispensing with oral argument,

SUMMARY OF ARGUMENT

The 1995 amendment to the sentencing guidelines which permits a sentence to be imposed in excess of the statutory maximum if the recommended sentence under the guidelines exceeds the maximum sentence authorized is inapplicable where the permissible range under the guidelines encompasses the statutory maximum. The District Court of Appeal was incorrect in ruling that so long as any portion of the recommended range exceeds the statutory maximum a trial court was limited to the statutory maximum. Petitioner contends that the only constitutional and logical interpretation of this statute would permit a sentence in excess of the statutory maximum only where the entire range under the guidelines exceeds the statutory maximum.

The Fourth District Court of Appeal defines the recommended sentence as the sentence derived by subtracting 28 from the total sentence points. The Fifth and Third Districts define the recommended sentence as the total points minus 28, plus or minus 25 percent. Under either definition, the result is unreasonable when applied to the facts of this case.

Although section 921.001(5) does not expressly amend section 775.082, it does so by implication and creates a situation where the two statutes cannot operate without conflicting. Section 775.082 establishes a maximum penalty of 60 months for a third degree felony; section 921.001(5) expressly authorizes a sentence that exceeds the statutory maximum established in section 775.082. Amendment by implication is not favored and will not be upheld in doubtful cases.

Assuming arguendo that chapter 921 creates an additional maximum penalty, it violates the due process protection afforded by the state and federal constitutions. Under section

921.001(5), the trial court may impose (1) the recommended sentence, (2) a sentence within 25 percent of the recommended sentence, or (3) a sentence that exceeds the statutory maximum established in section 775.082. Section 921.001(5) creates a limitless upward departure if supported by written reasons. Where the trial court is not limited in an upward departure, the notice afforded by chapter 921 is, in effect, no notice,

POINT I

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM.

Petitioner was found guilty of aggravated assault which is classified as a third degree felony. Section 775.082(3)(d), Florida Statutes (1995) provides that the maximum sentence for a felony of the third degree is five years in prison. Petitioner's recommended guidelines called for a sentencing range of 50.85 months in prison to 84.75 months in prison with a recommended sentence of 67.8 months in prison. (R 40-42, T 129) Petitioner was sentenced to 70 months in prison. (R 51-52, T 131)

The 1995 amendment to the sentencing guidelines provide in part:

(26) If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felony offenses, the guideline sentence must be imposed, absent a departure. Such downward departure must be equal to or less than the maximum sentence authorized s. 775.082.

Rule 3.703(d)(26), Florida Rules of Criminal Procedure. This section, however, is inapplicable when the recommended sentence is within the statutory limits, as was the case below. By its very language, the statutory maximum can be exceeded only if the recommended sentence is greater than the maximum. Petitioner contends that this language limits sentencing in excess of the statutory maximum solely to those cases where the entire recommended range exceeds the statutory maximum. This is further borne out by the remaining language which talks about imposing the statutory maximum as a downward departure. Obviously if the recommended range includes the statutory maximum, a sentence to the statutory maximum would not be a departure. Since petitioner's recommended sentence

permitted a sentence not exceeding the statutory maximum and still within the sentencing guidelines range, the trial court was limited to the statutory maximum.

In its opinion below, the Fifth District Court of Appeal interpreted the amendment to permit a sentence in excess of the statutory maximum whenever at least a portion of the sentencing range exceeds the statutory maximum. This is the same interpretation placed upon the amendment by the Third District Court of Appeal in Martinez v. State, 692 **So.2d** 199 (Fla. 3rd DCA 1997). However, petitioner contends that in applying this interpretation to the amendment, the district courts of appeal have violated a cardinal rule of statutory construction which requires penal statutes to be strictly construed, and where susceptible to more than one meaning, construed in favor of the accused. Cabal v. State, 678 **So.2d** 315 (Fla. 1996).

Petitioner further asserts that the district courts of appeal are in conflict on what constitutes the recommended guidelines sentence. The Fifth District in the case below and the Third District in Martinez, supra have concluded that the recommended sentence includes the discretionary twenty five percent increase and decrease. The Fourth District Court of Appeal in Mvers v. State, 696 **So.2d** 893 (Fla. 4th DCA 1997) has held that the recommended sentence is a specific sentence of a precise, fixed number of months, and not the sentencing range, for purposes of the statute requiring sentencing under the guidelines to be imposed, absent a departure, if the recommended sentence under the sentencing guidelines exceeds the maximum sentence otherwise authorized by law. Under the Fourth District's interpretation, the maximum sentence that petitioner could have been sentenced to in the instant case is 67.8 months. The sentence imposed by the trial court in the instant case was 70 months. Petitioner once again reiterates that in applying the rule of lenity as a reviewing court must, the

interpretation of the Fourth District Court of Appeal in Myers is the correct one. If the Fifth District is correct and the recommended sentence is the entire range, then petitioner's sentence had to be limited to the statutory maximum since the range (and thus the recommended sentence) did not exceed the statutory maximum. If, however, this Court accepts the Fourth District's strict interpretation of what constitutes "recommended sentence" petitioner asserts that his sentence is still illegal since it exceeds this recommended sentence.

In summary, petitioner contends that the decision of the Fifth District Court of Appeal below is erroneous. Where the statutory maximum for a particular offense is encompassed within the recommended guidelines range, a trial court is limited to imposing a sentence no greater than the statutory maximum. To allow otherwise would constitute a violation of very basic principles of statutory construction. The decision under review must be quashed and the cause remanded with instructions to resentence petitioner to no more than the statutory maximum,

POINT II

SECTION 921.001(5) AMENDS SECTION 775.082 BY IMPLICATION IN VIOLATION OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION.

Petitioner was convicted of a third degree felony. Under section 775.082, the maximum sentence for a third degree felony is 60 months; however, section 921.001(5) provides:

Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on or after January 1, 1994, must be within the 1994 guidelines unless there is a departure sentence with written findings. 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. If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082. The failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review pursuant to chapter 924. However, the extent of a departure from a guidelines sentence is not subject to appellate review.

Petitioner contends that section 921.001(5) impliedly amends section 775.082 by expressly authorizing a sentence that exceeds the statutory maximum.

The initial inquiry is whether section 921.001(5) amends section 775.082 or whether it merely refers to and incorporates section 775.082. If section 921.001(5) is a reference statute, the two statutes exist as separate, distinct legislative enactments and each has its appointed sphere of action. The alteration, change, or repeal of one does not operate upon or affect the other. See, State v. J.R.M., 388 So. 2d 1227 (Fla. 1980) and cases cited therein.

Article III, section 6 of the Florida constitution provides:

No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection.

Although section 921.001(5) does not expressly amend section 775.082, it does so by implication. Amendment by implication occurs when the latter statute (section 921.001(5)) is intended to revise the subject matter of the former statute (section 775.082) or when there is an irreconcilable repugnancy between the two so that the former statute cannot operate without conflicting with the latter. It is well established that amendment by implication is not favored and will not be upheld in doubtful cases. State v. J.R.M., supra, at 1229.

To determine if the two statutes can co-exist, it is necessary to construe the original and the amendment and to measure the extent of the repugnancy and inconsistency. Cf. Wilson v. Crews, 160 Fla. 169, 34 So. 2d 114 (Fla. 1948). Sections 775.082 and 921.001(5) are clearly inconsistent. Section 775.082 establishes a maximum penalty of 60 months for a third degree felony and cannot operate without conflicting with section 921.001(5), which states that if a recommended sentence under the guidelines exceeds the maximum sentence authorized by section 775.082, the sentence under the guidelines must be imposed absent a departure. In Wilson this court found that where there is no express repeal or modification of existing provisions, the old and new provisions should stand and operate together if it can be done without contravening the intent of the legislature. If section 921.001(5) creates an additional statutory maximum penalty, as discussed infra, such a construction violates the due process protection afforded by the state and federal constitutions.

POINT III

THE AMENDMENT OF SECTION 775.082 BY SECTION 921.001(5) VIOLATES THE NOTICE REQUIREMENT OF THE DUE PROCESS PROTECTION AFFORDED BY THE STATE AND FEDERAL CONSTITUTIONS.

Section 921.001(5) states, in 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.

This provision violates the notice requirement of the due process protection afforded by the state and federal constitutions.

Petitioner acknowledges that the Fifth District Court of Appeal has held that section 921.001(5) does not violate due process. Gardner v. State, 661 So. 2d 1274 (5th DCA 1995). In Gardner, the court concluded that an accused can assess a potential sentence by preparing a guidelines scoresheet in accordance with the provisions of sections 921.0012 and 921.0014, Petitioner respectfully suggests that the district court overlooked the requirement that a criminal statute must clearly set forth the activity which constitutes the crime and the punishment authorized.

Under the plain language of section 921.001(5), a criminal defendant receives notice that a trial court may impose (1) a recommended sentence, (2) a sentence within 25 percent of the recommended sentence, or (3) a sentence that departs from the guidelines and exceeds the statutory maximum established in section 775.082. While the defendant may be able to perform the necessary mathematical calculations under chapter 921, without section 775.082 his maximum sentence is open ended and subject to the discretion of the trial judge. Using the

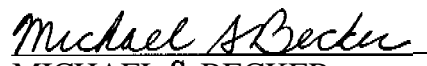
facts of this case as an example and applying a literal interpretation of section **921.001(5)**, the trial court could have imposed a sentence of 65.8 months (the recommended sentence), a sentence between 49.35 and 82.25 (the discretionary 25 percent range), or a limitless downward or an upward departure supported by written reasons. Petitioner submits that where the trial court is not limited by a maximum penalty in an upward departure the notice afforded by section **921.001(5)** is, in effect, no notice.

CONCLUSION

Based on the reasons and authorities cited herein, petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District of Court below and remand the cause with instructions to vacate the sentence and remand for resentencing to no more than the statutory maximum.

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. Albert L. Mays, #165336, Polk Correctional Institution, 10800 Evans Rd., Polk City, FL 33868-9213, this 26th day of November, 1997.


MICHAEL S. BECKER
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