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FILED

IN THE SUPREME COURT OF FLORIDA.

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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

ALBERT L. MAYS,
Petitioner,

v.

CASE NO. 90,826

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The State makes the following addition to Petitioner's statement of the case and facts:

In determining that the trial court properly imposed a guidelines sentence of 70 months for a third degree felony, the district court considered the language of Florida Rule of Criminal Procedure 3.703(d) (26), and adopted the reasoning of the Third District Court of Appeal in Martinez v. State, 692 So.2d 199 (Fla. 3d DCA 1997) . Mays v. State, 693 So.2d 52 (Fla. 5th DCA 1997) (Petitioner's Brief, appendix A)

SUMMARY OF ARGUMENT

In accordance with section 921.001(5), Florida Statutes (Supp.1994), and Florida Rule of Criminal Procedure 3.703(d) (26), the district court properly affirmed Petitioner's guidelines sentence in excess of the statutory maximum penalty otherwise authorized by section 775.082, Florida Statutes (1995). Petitioner fails to raise a tenable constitutional challenge to this legislation. First, section 921.001(5) does not operate to amend section 775.082 by implication. The two sections operate harmoniously and must be read together in order to determine whether a departure sentence, or a sentence in excess of the statutory maximum penalty, may be imposed. Secondly, there is no merit to Petitioner's claim that section 921.001(5) violates the notice requirement of the constitution. One is charged with knowledge of all statutes. A defendant can determine his potential sentence by preparing a guidelines scoresheet and considering all statutes relevant to his offense, including section 921.001(5).

Petitioner also fails to establish any ambiguity in the language of section 921.001(5). This Court must assume the legislature intended the plain and obvious meaning of the words used in the statute. Even if this Court looks beyond the literal language of the statute to the legislation which created it, it is clear that the district court construed the statute in the only manner consistent with its legislative intent. For these reasons,

petitioner's arguments should be rejected and the decision below should be affirmed in all respects.

ARGUMENT

THE TRIAL COURT PROPERLY SENTENCED PETITIONER TO A GUIDELINES SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM FOR A THIRD DEGREE FELONY IN ACCORDANCE WITH SECTION 921.001(5), FLORIDA STATUTES (SUPP.1994) AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.703(d)(26).

Prior to January 1, 1994, trial court judges could not sentence defendants in excess of the statutory maximum penalty:

Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review...

§ 921.001(5), Fla.Stat. (1993) (emphasis added) Thereafter, the legislature amended section 921.001(5) so that only departure sentences would be required to remain within the relevant minimum and maximum sentencing limitations. Ch. 93-406, § 5, at 2920, Laws of Fla.

The preamble to chapter 93-406, reads in pertinent part: "An act... amending s. 921.001, F.S.;...providing that a departure sentence must be within any relevant statutory maximum sentence;..." Ch. 93-406, at 2911 (emphasis added) The amended section 921.001(5) currently reads as follows:

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....

§ 921.001(5), Fla.Stat. (Supp.1994)(emphasis added)¹

Petitioner was properly sentenced under the guidelines to a sentence which exceeds the statutory maximum for a third degree felony. Petitioner fails to raise a tenable challenge to the constitutionality of the amended section 921.001(5). Furthermore, the district court properly gave effect to the plain meaning of Florida Rule of Criminal Procedure 3.703(d)(26), which tracks the language of the statute.

Petitioner first contests the constitutionality of the new section 921.001(5) on the ground that it has resulted in an amendment by implication of Florida Statute section 775.082. This argument fails because section 921.001(5) does not intend to revise the subject matter of section 775.082, nor is there "an irreconcilable repugnancy between the two, so that there is no way the former rule can operate without conflicting with the latter." State v. J.R.M., 388 So.2d 1227, 1229 (Fla. 1980) To the contrary, the language of section 921.001(5) indicates that the two statutes must operate together in order to determine whether a departure sentence, or a sentence in excess of the statutory maximum penalty,

¹Section 921.0014(2), Florida Statutes, contains almost identical language, and was also created by chapter 93-406. Ch. 93-406, §12, at 2940, Laws. of Fla.

may be imposed. Where the statutes complement each other and may be read in pari materia, there is no conflict or repugnancy. Id.

Petitioner next argues that section 921.001(5) violates the notice requirement of our state and federal constitutions. This argument is based upon the premise that section 921.001(5) provides for a maximum sentence which is open ended and subject to the discretion of the trial court. (Petitioner's Merit Brief, p. 10) The statute in fact clearly states that a sentence which exceeds the statutory maximum penalty must be within the sentencing guidelines. Hence, this statute cannot be said to deprive Petitioner of adequate notice of the authorized punishment for his crime. The Fourth District Court of Appeal comprehensively addressed this issue in Mvers v. State, 696 So.2d 893 (Fla. 4th DCA 1997) :

Because every defendant is presumed to know the law and has actual knowledge of one's own criminal history, not to mention the facts of the primary and additional sentencing offenses, there is no possible claim of lack of notice as to the guidelines maximum that will be imposed for these offenses...One is charged with knowledge of all the Florida Statutes, not merely the one that favors a party in litigation. We take express note of section 775.082(8), which provides in part that "a reference to this section constitutes a general reference under the doctrine of incorporation by reference." This provision should alert the reader to the likelihood that section 775.082 has been incorporated into other statutes...The mere fact that section 775.082 itself does not expressly refer to sections 921.001(5) or 921.0014(2) does not render any of these statutes indefinite or unclear.

Id. at 898-899; See also Gardner v. State, 661 So.2d 1274, 1276 (Fla. 5th DCA 1995) On this point, Respondent requests that this Honorable Court adopt the reasoning of the district courts cited above.

Regardless of the constitutionality of section 921.001(5), Petitioner argues that the legislation was improperly applied to him in violation of the rule of statutory construction requiring penal statutes to be strictly construed in favor of the accused. (Petitioner's Brief, p. 6) This rule of construction applies only where the language within a statute is susceptible of differing meanings. § 775.021, Fla.Stat. (1995) Because the legislation is clear and unambiguous, this argument also fails.

Although Petitioner argues that the statute should be strictly construed, he cites the language of Florida Rule of Criminal Procedure 3.703(d)(26), as that which is to be interpreted. (Petitioner's Brief, p. 5) The lower court also cited this language in its opinion affirming the guidelines sentence. Mays v. State, 693 So.2d 52 (Fla. 5th DCA 1997) Rule 3.703(d)(26) was created to implement the statutory revisions of chapter 95-184, Laws of Florida,² and the **language of the Rule** follows that of Section 921.001(5) Fla.Stat. (Supp.1994), although

²Amendments to Florida Rules of Criminal Procedure Re Sentencing Guidelines, 660 So.2d 1374 (Fla. 1995)

this subsection was not affected by the 1995 legislation.³ The first sentence in rule 3.703(d) (26) states:

If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felony offenses, the guidelines sentence must be imposed, absent a departure.

This language is consistent with the statutory language of section 921.001(5), which states:

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.

Statutory language should be interpreted according to its common usage, Zuckerman v. Alter, 615 So.2d 661, 663 (Fla. 1993), and this Court must assume the legislature intended the plain and obvious meaning of the words used in the statute. Leisure Resorts, Inc. v. Frank Rooney, Inc., 654 So.2d 911, 914 (Fla. 1995) Furthermore, a provision within a statute must be read within the context of the entire section, with no single provision being read in isolation. Acosta v. Richter, 671 So.2d 149, 154 (Fla. 1996) Regardless, Petitioner, contends that the above stated provision should be construed to mean that a guidelines sentence could exceed the statutory maximum only "where the entire recommended range, exceeds the statutory maximum." (Petitioner's brief, p. 5) (emphasis in original) This strained construction disregards the next sentence in section 921.001(5) which states: "If a departure

³The only changes made to Section 921.001 occurred within subsection (4) (b). Ch. 95-184, § 3, at 1678, laws of Fla.

sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082." ⁴

It is clear from the wording of the statute, that the legislature is only concerned that departure sentences remain within the maximum sentencing limitations delineated in section 775.082. It is another common maxim of statutory construction that the mention of one thing implies the exclusion of another. P.W. Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988) Thus, where a departure sentence must remain within any relevant maximum sentence limitation, a guidelines sentence must not. Trial courts are free to use the full recommended guidelines range, notwithstanding the ordinary statutory maximum sentence. It would be inconsistent for the legislature to allow guidelines sentences to exceed the statutory maximum only where the entire guidelines sentencing range exceeds the maximum, where it has also made clear that any uuidelines sentence may exceed the statutory maximum.

Consideration must be accorded not only to the literal and usual meaning of words, but also to their meaning and effect on the objectives and purposes of a statute. Florida Birth-Related Neurological Iniury Compensation Ass'n v. Florida Div. of Administrative Hearings, 686 So.2d 1349, 1354 (Fla. 1997) The

⁴Similarly, the next sentence in Rule 3.703(d)(26) reads: "Such downward departure must be equal to or less than the maximum sentence authorized by section 775.082."

obligation of the Supreme Court "is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute." Bvrd v. Richardson-Greenshields Securities, Inc. 552 So.2d 1099, 1102 (Fla. 1989) Beyond the plain language of section 921.001(5), this Court should consider the preamble to chapter 93-406, Laws of Florida. The introductory language indicates that section 921.001 was amended for the purpose of "providing that a departure sentence must be within any relevant statutory maximum sentence." Ch. 93-406, at 2911, Laws of Fla. This legislation deleted the language previously contained in section 921.001(5) which stated: "Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute." Ch. 93-406, § 5, at 2940, Laws of Fla. (emphasis added)

Because it is clear that the legislature intended that only departure sentences should be encumbered by the sentencing limitations contained in section 775.082, the State disagrees with that portion of the Fourth District Court of Appeal's decision in Myers v. State, which holds that the statutory maximum sentences provided in section 775.082 may be exceeded only up to the initial guidelines sentencing point total, but not up to the permitted 25% increase. Myers v. State, 696 So.2d 893 (Fla. 4th DCA 1997)" It

⁵Myers is currently pending review before this Court in State v. Myers, Case No. 91,251.

is evident that the recommended sentence under the guidelines includes the 25% variance range under section 921.0014(2). Section 921.001(5) directs that "the sentence under the guidelines must be imposed" if it exceeds the statutory maximum, but states that a departure sentence must be within the maximum. This suggests that by "departure," the legislature anticipated that even with a 25% upward variation, the guidelines sentence did not exceed the statutory maximum. After all, a departure sentence is one beyond 25% over the median number of prison months. See §§ 921.0014(2) & 921.0016(1)(c), Florida Statutes.


In sum, Petitioner has unsuccessfully challenged the constitutionality of section 921.001(5), Florida Statutes, (Supp.1994) and has failed to establish ambiguity within the language of the statute. Accordingly, this Court should affirm the decision of the Fifth District Court of Appeal, which properly applied the sentencing guidelines.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above merits brief has been delivered to Assistant Public Defender Michael S. Becker, counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 16th day of December, 1997.


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