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SID J. WHITE

OCT 15 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ROBERT F. WILKINS,)
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Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 90,864

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

AMENDED MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

ROBERT F. WILKINS,)
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Petitioner,)
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vs.)
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STATE OF FLORIDA,)
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Respondent.)

CASE NO. 90,864

MERIT BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

Petitioner pled no contest to vehicular homicide, a third degree felony under Section 782.071(1), Florida Statutes. (R 1-10) Pursuant to the sentencing guidelines, Petitioner's recommended sentencing range was 55.65 months to 92.75 months in prison. (R 96-97) Petitioner was adjudicated guilty and sentenced, over defense objection, to 85 months in prison. (R 44-5, 47, 100-1)

On Appeal to the Fifth District Court of Appeal, Petitioner argued that the sentence was illegal inasmuch as it exceeded the statutory maximum of **five** years imprisonment for a third degree felony designated in Section 775.082(3)(d), Florida Statutes. The issue on appeal was the interpretation of the 1994 amendment to the sentencing guidelines in Section 921.001(5), Florida Statutes, which corresponds with Rule 3.702(d)(19), Florida Rules of Criminal Procedure. Petitioner contended that, if the statutory maximum is within the recommended

range, the amendment to Section 921.001(5) does not apply. The District Court disagreed and affirmed the petitioner's sentence citing the Third District Court of Appeal decision in Martinez v. State, 692 So.2d 199 (Fla. 3d DCA 1997) and also the Fifth District Court of Appeal decision in Green v. State, 691 So.2d 502 (Fla. 5th DCA 1997.) See Wilkins v. State, 693 So.2d 62 (Fla. 5th DCA 1997).

Petitioner timely sought rehearing which was denied on May 15, 1997. A timely notice to invoke this Court's discretionary jurisdiction was filed on June 13, 1997. Jurisdiction was granted by this Court in an order dated September 9, 1997.

SUMMARY OF ARGUMENT

The Fifth District Court of appeal incorrectly affirmed the Petitioner's 85 month incarceration sentence for the offense of vehicular homicide, Specifically, the 85 month incarceration sentence exceeds the maximum 60 month incarceration term authorized under Section **775.082(3)(d)**, Florida Statutes.

Petitioner's sentence cannot be upheld on the basis of Section **921.001(5)**, Florida Statutes, for several reasons, the **first** of which is that Section **921.001(5)** is an invalid "amendment by implication" of Section 775.082 prohibited under Article III, Section 6, of the Florida Constitution, This is because Section **921.001(5)** improperly attempted to revise the subject matter of Section 775.082 concerning the permissible statutory maximum penalties for third, second and first degree felonies and there now remains an "irreconcilable repugnancy" between the two sections.

The second problem with Section **921.001(5)**, Florida Statute is that it fails to provide adequate notice to the Petitioner and the public at large as to the maximum statutorily authorized penalty for a third degree felony, in particular, the offense of vehicular homicide as defined in Section 782.07 1(l), Florida Statutes, which specifies only that the offense is punishable as a third degree felony as provided in Sections 775.082, 775.083, or 775.084, Florida Statutes. Thus, because Sections 775.082, 775.083, and 775.084, all fail to **make** any reference to Section 921 .**001(5)**, the petitioner and the public in general are denied any type of adequate notice of the potential for any other penalty to be imposed in violation of the due process requirements outlined in the Fifth and Fourteenth Amendments to the United States Constitution, as well as outlined in Article I, Section 9, of the Florida Constitution.

Thirdly, Section **921.001(5)**, runs afoul of the Florida Constitutional prohibition under Article I, Section 17, of indefinite imprisonment. Due to the fact that Petitioner's sentence could not be definitely determined under Section **921.001(5)**, and Florida Rule of Criminal Procedure 3.702, until the sentencing hearing, Section **921.001(5)** is constitutionally impermissible. This is particularly true where Sections 775.082, 775.083, and 775.084 and 782.07 1(l), all fail to mention any maximum penalty for a third degree felony other than **five** years imprisonment or habitual felony offender sentencing which is not applicable to the instant case.

A fourth problem with the Fifth District Court of Appeal's affumance of Petitioner's 85 month incarceration term, according to Section **921.001(5)**, is that the very wording of the section does not permit a trial court to impose an incarceration sentence in excess of the statutory maximum unless the recommended **guidelines** sentence exceeds the **applicable maximum sentence authorized under Section **775.082****. The Fifth District Court of Appeal chose to interpret the statutory language of Section **921.001(5)**, in a manner which would permit the imposition of **any** sentence within the recommended guidelines sentencing range, even if the statutory maximum is included with the guidelines recommended sentencing range. Such an interpretation, however, clearly violates the well established principles of statutory construction outlined in Section **775.021(1)** requiring that criminal statutes be strictly construed, and when the language is susceptible of differing constructions, to be construed most favorably to the accused. Accordingly, this Court should reverse the Fifth District's affumance of petitioner's sentence and remand for resentencing within the applicable five-year statutory maximum under Section **775.082(3)(d)**, Florida Statutes for a third degree felony.

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM FOR A THIRD DEGREE FELONY.

Petitioner pled no contest to the offense of vehicular homicide, a third degree felony. Section **775.082(3)(d)**, Florida Statutes, provides that the maximum sentence for a third degree felony is five (5) years imprisonment. The guidelines scoresheet applicable to the Petitioner called for a sentencing range of 55.65 to 92.75 months imprisonment. (R 120-121) Petitioner received a sentence of 85 months incarceration over defense counsel's specific objection that the sentence imposed by the trial exceeding the statutory maximum of 60 months imprisonment. (R 44-45, 47, 100)

Section **921.001(5)**, Florida Statutes (1994), provides the following:

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.

See also Rule 3.702(d)(19).

Initially, it should be pointed out that the legislature's enactment of Section **921.001(5)**, amounted to an invalid and unconstitutional "amendment by implication" in violation of Article III, Section 6, of the Florida Constitution. Such an "amendment by implication" is

clearly disfavored in Florida and even in doubtful cases will not stand constitutional muster.

Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (1946); State v. J.R.M., 388 So.2d 1227, 1229 (Fla. 1980).

The definition of an amendment by implication is “. . . when it appears the latter statute [here Section 921.001(5)] was intended as revision of the subject matter of the former [here 775.0821 or when there is an irreconcilable repugnancy between the two, so that there is no way the former rule can operate without conflicting with the latter. [citations omitted].” Id. at 1229, Petitioner would submit that Section 921.001(5) is clearly an amendment by implication of Section 775.082. This is because it is an attempt to “revise” the sentencing limits in Florida, which is the heart of the subject matter of Section 775.082, and its enactment by the legislature has left in its wake a sea of confusion as to just what are the statutory maximum sentencing limits for felonies in Florida and whether Section 775.082 or Section 921.001(5) will be applied by the trial court at a defendant’s sentencing hearing. Further evidence of the resulting repugnant confusion is borne out by the fact that, at the present time, the Fifth District Court of Appeal has “rewritten” Section 921.001(5) in Green v. State, 691 So.2d 502, 504 (Fla. 5th DCA 1997), and the Fourth District court of Appeal in Myers v. State, 696 So.2d 893 (Fla. 4th DCA 1997), has disagreed with Green, supra, as well as with the Third District Court of Appeal’s decision in Martinez v. State, 692 So.2d 199 (Fla.3d DCA 1997).

Moreover, as this Court explained in Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962), “. . . when the new act as amended is a revision of the entire original act or is an amendment of a section, sections, subsection of a section or paragraph of a subsection of a section, that the new act, section, subsection of a section, or paragraph of a subsection of a

section, as the case may be, shall be set forth at length, so that the provisions as amended may be seen and understood in their entirety by the Legislature. ” [citations omitted] Id. at 74 1-2. If this is not done, the offending new act violates Article III, Section 6, of the Florida Constitution. Id., 741-2; J.R.M., supra. In effect, when the new act is unintelligible and necessitates reference to the prior act or statutory section it **preports** to amend, the new act cannot pass constitutional muster under Article III, Section 6. Libe, supra; J.R.M., supra. The introductory language of Chapter 93-406, Laws of Florida, which enacted the revisions to Section **921.001(5)**, interestingly does not even reference Section 775.082. In addition, the amended language in Chapter 93-406, Section 5, pertaining to Section **921.001(5)**, merely indicates: “[i]f 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 supplied]. Consequently, because one must refer to both Sections 775.082 and **921.001(5)**, in order to determine the full provisions and meaning of Section **921.001(5)**, Chapter 93-406 should have specifically set out at length the language of Section 775.082 being amended in Section **921.001(5)** in order to meet the requirement of Article III, Section 6, of the Florida Constitution. Libe, supra, 742. [citations omitted]

A second problem with the Legislature’s enactment of Chapter 93-406, Section 5, pertaining to Section **921.001(5)** is that it fails to provide adequate notice to the Petitioner and public at large as to the maximum statutorily authorized penalties for a third degree felony. In particular, the offense of vehicular homicide, defined in Section **782.071(1)**, Florida Statutes, specifies only that the offense is punishable as as third degree felony as provided in Sections 775.082, 775.083, or 775.084, Florida Statutes. Further, Section 775.082 makes no mention

of the imposition of any other sentence apart from the maximum sentence of five years imprisonment or habitual felony offender sentencing which is not applicable to the instant case.

Under the due process requirement of Article I, Section 9, of the Florida Constitution, as well as under the Fifth and Fourteenth Amendments to the United States Constitution, an accused is entitled to sufficient notice as to potential penalties assigned to the violation of a particular criminal statute. Thus, because neither Sections 775.082 nor 782.07 (1) provide notice of the possible imposition of a penalty in excess of five years by operation of Section 921.001(5) and corresponding Florida Rule of Criminal Procedure 3.702(d)(19) and 3.990(a), it certainly cannot be said that the petitioner was provided with adequate due process of law via notice that any other penalty outside of those specified under Section 775.082 would be imposed at sentencing.

A third aspect of Section 921.001(5)'s unconstitutionality is that it violates Article I, Section 17, of the Florida Constitution prohibiting indefinite imprisonment. Based on the very language of Section 921.001(5), a defendant's maximum possible sentence will not be determined until the time of the sentencing hearing. In addition, when the statutory maximum specified under Section 775.082, Florida Statutes is within a defendant's recommended guidelines sentencing range, as determined under Florida Criminal Rules of Procedure 3.702(d)(19) and 3.990(a), whether the trial court imposes a sentence in excess of the statutory maximum is similarly not determined until the time of sentencing.

Even if this Court ultimately upholds the constitutionality of Section 921.001(5), the Fifth District Court's **affirmance** of the petitioner's sentence, based on the statutory interpretation of Section 921.001(5) by the Fifth District in Green, supra and on the Third

District Court's statutory interpretation in Martinez, supra, is violative of well established statutory construction principles set out in Section 775.021(1). This is because the Fifth District Court was required by Section 775.021(1) to strictly interpret the statutory language of Section 921.001(5) most favorably to the petitioner. The specific language of Section 921.001(5) at issue states: " [i]f a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by Section 775.082, the sentence under the guidelines must be imposed.. ." [emphasis added] Applying the statutory construction utilized by the Fifth District Court in Green, supra, however, is one which construes Section 921.001(5) in the light most favorably to the state, rather than the petitioner. Petitioner would submit that the proper "strict" construction of Section 921.001(5) would only permit a guidelines sentence to exceed the statutory maximum specified in Section 775.082 when the entire guidelines recommended sentencing range, including the permitted 25% increase or decrease, calculated according to Section 921.0014(1), Florida Statutes, and Florida Rules of Criminal Procedure 3.702(d)(19) and 3.990(a), exceeds the applicable statutory maximum.

The very fact that the Fifth District Court chose to rewrite "for purposes of clarity" Section 921.001(5) in Green, not only indicates that the language of Section 921.001(5) is susceptible of differing constructions, but it also indicates that the Fifth District Court applied a statutory construction in a manner which strictly favor-, instead of the petitioner. Id., 504. Petitioner would therefore respectfully submit that this Court must reverse the Fifth District Court's **affirmance** of the petitioner's sentence based on an improper and invalid statutory construction of Section 921.001(5). As this Court noted in Cabal v. State, 678 So.2d 315 (Fla. 1996), "[r]ules of statutory construction require penal statutes to be strictly

construed. Further, when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. ” **Id.** at 3 18. (citations omitted)

The following rationale for such a strict statutory construction was also reaffirmed by this Court in Cabal:

One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Id. at 318 (citations omitted). Unfortunately, the chaotic state of guidelines sentencing beyond the statutory maximums designated in Section 775.082, Florida Statutes was not remedied by the Fourth District Court of Appeal’s decision in **Myers, supra**. This is because, although the Fourth District Court disagreed with both the Fifth District Court and the Third District Court’s statutory interpretation of Section **921.001(5)**, it still held that the statutory maximums provided in Section 775.082 could be exceeded up to the initial guidelines sentencing point total, but **not** up to the permitted increase of 25% making up the highest portion of the recommended guidelines sentencing range under Florida Rules of Criminal Procedure **3.702(d)(19)** and **3.990(a)**. **Id.**, 889-90. See also Green supra; Martinez supra. No doubt, as long as the statutory language of Section **921.001(5)** continues not to be interpreted strictly in favor of accused individuals, Florida courts will persist in “reinterpreting” its meaning as to what is the permissible “wandering” maximum possible sentence to be employed based on the 1994 revision of the sentencing guidelines. Myers, supra, 898. Accordingly, Petitioner respectfully requests that this Court declare Section **921.001(5)**, Florida Statutes (1994 **Supp**),


unconstitutional, based upon the aforementioned arguments, and reverse the Fifth District Court of Appeal's decision below which improperly affirmed petitioner's illegal incarceration sentence in excess of the statutory maximum for a third degree felony specified in Section 775.082(3)(d). If this Court, however, determines Section 921.001(5), Florida Statutes to be constitutional, Petitioner would alternatively respectfully request that this Court reverse the Fifth District Court's decision below which incorrectly affirmed Petitioner's sentence in excess of the maximum statutory incarceration designated in Section 775.082(3)(d), Florida Statutes, based on the invalid statutory construction applied to Section 921.001(5) in the decisions of Green, supra, and Martinez, supra, as well as in Myers, supra.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court of Appeal, Fifth District, and remand this case for resentencing within the statutory maximum designated in Section 775.082(3)(d), Florida Statutes.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT


SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
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112-as Orange Avenue
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118 by delivery to his basket at the Fifth District Court of Appeal; and by mail to the Robert F. Wilkins, No. 441285 B-2-09-lower, Washington C. I., 4455 Sam Mitchell Drive, Chipley, FL 32428 on this 13th day of October, 1997.


SUSAN A. FAGAN
ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

ROBERT F. WILKINS,)
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Petitioner,)
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vs.)
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STATE OF FLORIDA,)
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Respondent .)
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CASE NO. 90,864

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

APPENDIX

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

Q: What about in terms of the application itself? You have simply placed on the application as beneficiary the name of Harriet Geiser. Were there any other options that you were aware of as an agent at that time which you could have filled in to perhaps accomplish his goal without having a formal trust set up?

A: Not that I know of or not that I was aware of at that time.

It is regrettable that Mr. Geiser's intent was not able to be effectuated because of his almost immediate death. The lower court's decision to give effect to his plan is understandable, but a constructive trust on the proceeds of the insurance is not available on the evidence presented. The court is bound to leave the parties as it finds them. The evidence shows Mr. Geiser understood that until the trust was created, his mother would stand as the beneficiary. If he chose her as interim beneficiary because he trusted her more than anyone else to care for his children with this money, it can only be hoped that his confidence was not misplaced.

REVERSED and REMANDED with instructions to enter judgment for appellant, Harriet Geiser,

THOMPSON, J., and PERRY, B.,
Associate Judge, concur.



1

Robert WILKINS, Appellant,

v.

STATE of Florida, Appellee.

No. 96-1622.

District Court of Appeal of Florida,
Fifth District.

April 4, 1997.

Rehearing Denied May 15, 1997.

Appeal from the Circuit Court for Orange
County; Dorothy J. Russell, Judge.

James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Fred McMahan and Jennifer Meek, Assistant Attorneys General, Daytona Beach, for Appellee.

PER CURLAM.

AFFIRMED. See *Green v. State*, 22 Fla. L. Weekly D614, 1997 WL 95157 (Fla. 5th DCA 1997); *Martinez v. State*, 22 Fla. L. Weekly D305, 1997 WL 30812 (Fla. 3d DCA 1997).

W. SHARP, GOSHORN and AN'TOON,
JJ., concur.



2

Patricia VICKERS, Appellant/Cross-
Appellee,

v.

UNITY OF LAKE WORTH and Commer-
cial Union Insurance Company, Ap-
pellees/Cross-Appellants.

No. 96-0122.

District Court of Appeal of Florida,
First District.

April 9, 1997.

Rehearing Denied May 5, 1997.

Workers' compensation claimant applied for and Steven P. Cullen, Judge of Compensation Claims, denied his claim for increased attendant care benefits. Claimant appealed and employer-carrier cross-appealed. The District Court of Appeal held that order prohibiting ex parte communications by employer and insurance carrier with workers' compensation claimant's physicians was improper in light of statutory provision requiring rea