IN THE SUPREME COURT OF FLORIDA

ROBERT WILKINS,

Petitioner,

v. CASE NO. 90,864

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 AND FACTS

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

Petitioner's total sentence points, as calculated on his sentencing guidelines scoresheet, was **102.2**, resulting in a recommended prison sentence of 74.2 months or 6.18 years. (R 97) Petitioner was sentenced to 85 months, or 6 years, in prison. (R 100)

SUMMARY OF ARGUMENT

In accordance with section 921.001(5), Florida Statutes (Supp.1994), 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, in fact 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 claims that section 921.001(5) violates the notice requirement of the constitution, nor that it violates the prohibition against indefinite imprisonment. 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. Petitioner asks this Court to disregard the canons of statutory construction by isolating a single provision from section 921.001(5), and considering it without the context of its remaining language. Petitioner further provides additional language and revisions to the statute. It is only by manipulating section 921.001(5) in this manner that Petitioner is able to reach the construction he now asks this Court to adopt. This argument 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.

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 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, &Tent a departure. f a departure sentence, with written findings, is imposed, such sentence must he 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 language of the statute is clear, and the district court properly gave effect to its plain meaning.

Petitioner first argues that the 1994 amendment of section 921.001(5), resulted in an amendment by implication of Florida Statute section 775.082, which delineates the maximum penalties to be imposed for crimes. 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

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'Section 921.0014(2), Florida Statutes, contains almost identical language, and was also created by chapter 93-406. Ch. 23-406, §12, at 2940, Laws. of Fla.

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

Because section 921.001(5) does not operate to amend section 775.082, it was unnecessary, as Petitioner suggests, for the legislature to specifically set out the language of section 775.082 in chapter 93-406, Laws of Florida. The present case is distinguishable from Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962) where the statute in question expressly amended another, but did not set forth the act to be amended. 'It was never intended by the constitution that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length." Id. at 742

Petitioner's additional constitutional criticisms of section 921.001(5) are without merit. This statute cannot be said to deprive Petitioner of adequate notice of the authorized punishment for his crime, nor does it violate the constitutional prohibition against indefinite imprisonment. The Fourth District Court of Appeal comprehensively addressed these issues in Myers 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. Moreover, there is nothing indefinite about sections 921.001(5) and 921.0014(2), and certainly no uncertainty of the kind forbidden by article I, section 17 of the Florida Constitution.

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

Regardless of the constitutionality of section 921.001(5), Petitioner insists that this statute was improperly applied to him, in violation of section 775.021(1). This rule of construction applies only where the language within a statute is susceptible of differing meanings. Because the language of section 921.001(5) is clear and unambiguous, Petitioners final argument also fails.

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) Petitioner has overlooked these precepts, and has disengaged one sentence from the whole of section 921.001(5) in order to interpret it in an oblique manner which thwarts the plain meaning of the statute.

The sentence in question reads as follows: *"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."* According to Petitioner, this provision should be construed to mean that a guidelines sentence could exceed the statutory maximum specified in section 775.082, only "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." (Petitioner's brief, p. 9) (emphasis in original) This strained construction entirely disregards the next sentence in section 921.001(5) which states: *"If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s.* 775.082."

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 stated that any guidelines 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 Neuroloai cal Injury Compensation Ass'n .Florida Div. of Administrative Hearings, 686 So.2d 1349, 1354 (Fla. 1997) The 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." Byrd 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)

The plain meaning of section 921.001(5), as it is written, coupled with the legislative intent behind its amendment, as evidenced by chapter 93-406, Laws of Florida, defeat Petitioner's

contention that the statute is ambiguous.[2] Petitioner claims, however, that "the very fact that the Fifth District Court chose to rewrite 'for purposes of clarity' Section 921.001(5) in Green. . .indicates that the language of Section 921.001(5) is susceptible of differing constructions..." (Petitioner's brief, p. 9) Far from rewriting the section, the district court simply reversed the articles "the" and "a" within a sentence, stating that "[i]t would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute." Green v. State, 691 So.2d 502, 504 (Fla. 5th DCA 1997)[3]

It is ironic that Petitioner would make this argument, where he was required to indisputably rewrite section 921.001(5) in his brief, by changing the language and adding new language, in order to convey the meaning he argues should be applied to the statute. (See Petitioner's brief, p. 9) It has long been established that

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[2]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 also 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. flyers. v. State, 696 So.2d 893 (Fla. 4th DCA 1997) Myers is currently pending review before this Court in State v. Myers, Case No. 91,251.

[3]Green is currently pending review before this Court in Green v. State, Case No. 90,696.

courts may transpose words or phrases in accord with legislative intent. State ex rel Givens v, Holland, 147 Fla. 396, 2 So.2d 735 (1941) Where the text of a statute is clear, a court may properly effectuate that intent by supplying words or correcting clerical errors. City of Opa Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So.2d 29 (Fla. 3rd DCA 1966) (substituting 'on" for "or" and inserting the word "of") Courts, however, may not add new requirements by inserting additional language in a statute. Sarasota Herald-Tribune v. Sarasota County, 632 So.2d 606, 607 (Fla. 2d DCA 1993)

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 interpreted section 921.001(5).

CONCLUSION

Based on the foregoing argument and authority, Respondent respectfully requests this Honorable Court affirm the judgment and sentence in all respects.

Respectfully submitted,

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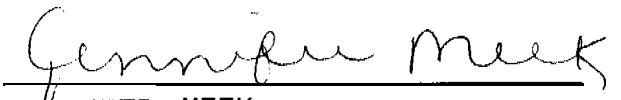

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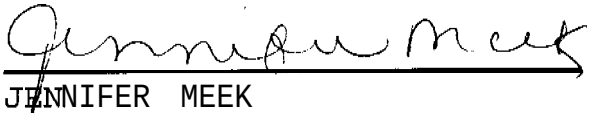
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above merits brief has been delivered to Susan A. Fagan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 3rd day of November, 1997.



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