# ORIGINAL



IN THE SUPREME COURT OF FLORIDA

CHARLES WILLIAM FLOYD, :

Petitioner, :

v. : Case No. 92,602

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

## INITIAL BRIEF OF PETITIONER

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# INITIAL BRIEF OF PETITIONER

## STATEMENT OF THE CASE AND FACTS

This case involves the constitutionality and interpretation of § 921.001(5), Florida Statutes (1995), which requires the trial court to impose "the sentence under the guidelines" if the "recommended sentence" exceeds the statutory maximum penalty for the offense.

Floyd faced sentencing for a third-degree felony. His guidelines point total corresponded to a sentence of 5.09 years in prison, and range 25 percent higher and lower of 3.81 to 6.36 years. The trial court imposed a sentence of 6 years in prison. Defense counsel objected that the sentence was illegal because it exceeded the 5-year maximum in § 775.082 for a third-degree felony. Floyd v. State, 23 Fla. L. Weekly D651 (1st DCA Feb. 26,

1998).

On appeal, Floyd argued that § 921.001(5) gives constitutionally insufficient notice of the authorized penalty for an offense and that. He further argued that if the statute is valid, it must be construed to require imposition of a sentence within the maximum term authorized by § 775.082 if any part of the guidelines range falls within the statutory maximum. The district court ruled that the provision gives constitutionally sufficient notice, and that it authorizes any sentence within the guidelines range if any part of that range exceeds the statutory maximum in § 775.082, Florida Statutes. On the latter point, the court certified conflict with Myers v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), rev. pending, Fla.S.Ct. No. 91,251. Floyd, 23 Fla. L. Weekly at D651.

Petitioner now seeks discretionary review in this court.

## SUMMARY OF THE ARGUMENT

I. The district court erred in concluding that § 921.001(5), Florida Statutes, satisfies the notice requirements of due process of law. Publication of § 775,082, Florida Statutes, a clear and simple penalties statute setting out the maximum duration of punishments for different degrees of offenses, meets the requirement of sufficient notice. Section 921.001(5), which suspends the penalties statute when the punishments prescribed therein fall below the applicable guidelines range, replaces clarity with the confusion of what the First DCA has termed a "wandering maxium." The new provision requires persons seeking to learn the maximum punishment to calculate a scoresheet, a task beyond the ken of ordinary persons. This renders inadequate the notice provided by § 921.001(5). District courts attempting to interpret the statute can't even agree on when and how it should be applied. To determine his potential sentence, Mr. Floyd would have needed access to Florida Statutes Annotated, Southern Reporter, plus a subscription to the Florida Law Weekly and, not least, a crystal ball to divine how this Court will come down on the issue of his sentence exposure. If this is constitutionally sufficient notice, one might just as well read tea leaves.

Section 921.001(5) must be struck down as a violation of the Due Process clauses of the state and federal constitutions.

II. Inasmuch as district courts have read § 921.001(5) to authorize three different sentences under the same circumstances, the provision is obviously susceptible of differing constructions. It must therefore be construed most favorably to the accused. The formulation in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), the most carefully considered of the three perspectives, is also the one most favorable to the accused. It permits a sentence outside the § 775.082 maximum only when the recommended sentence (the precise number of prison months calculated in the guidelines scoresheet) exceeds that maximum. Moreover, in those circumstances it authorizes only the recommended sentence, not a sentence up to 25 percent longer. The Myers construction also leaves § 775.082, which remains a valid law, a reasonable field of operation, serving an important principle of statutory construction. Application of Myers requires that Floyd's 6-year sentence be vacated and the case remanded with directions to resentence him to 5.09 years in prison.

## ARGUMENT

### I. SECTION 921.001(5), FLORIDA STATUTES, FAILS THE DUE PROCESS REQUIREMENTS OF NOTICE AND DEFINITENESS BECAUSE IT REQUIRES MORE THAN PERSONS OF ORDINARY INTELLIGENCE CAN MANAGE IN ATTEMPTING TO ASCERTAIN THE POTENTIAL SENTENCE FOR A CRIMINAL ACT.

Section 921.001(5), Florida Statutes (1995), 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.

(emphasis added).

This provision, added in a substantial revision of the guidelines statutes and rules in 1994, has withstood claims in the district courts that it violates constitutional due process clauses by suspending the notice of possible penalties for criminal acts contained in §775.082, Florida Statutes. The Fifth

DCA was the first to reject a constitutional attack to the provision, in Gardner v. State, 661 so. 2d 1274 (Fla. 5th DCA 1995). The Gardner court stated:

> We reject Gardner's claim that section 921.001(5) deprives him of due process of law by failing to provide adequate notice of the authorized punishment, because we conclude that the wording of the statute is clear. In this regard, an accused can assess a potential sentence by preparing a guidelines scoresheet in accordance with the provisions of sections 921.0012 and 921.0014, Florida Statutes (Supp.1994). As noted by the state, the fact that an accused must perform arithmetical calculations in order to ascertain a sentence does not deprive him of adequate notice as to potential penalties.

Similarly, in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), the court spurned the claim of constitutionally insufficient notice:

> 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.

Id. at 898. Though it acknowledged that the scheme reduces the certainty of the potential penalty and creates an illusory statutory maximum, the district court in this case rejected petitioner's argument, citing to Gardner and Myers. 23 Fla. L.

Weekly at D651.

These courts have stopped one step short in their constitutional analyses. The Due Process Clause of the Fourteenth Amendment requires a penal statute to provide adequate notice of the conduct proscribed and the consequences of engaging in the proscribed conduct. See generally, Kolendar v. Lawson, 461 U.S. 352 (1983); Gravned v. Citv of Rockford, 408 U.S. 104 (1972). In Florida, publication of criminal statutes, including the penalty provisions, in the Laws of Florida and Florida Statutes satisfies this requirement of due process. State v. Hart, 668 So. 2d 589, 593-93 (Fla. 1996); State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991). Another requirement of due process of law is that laws proscribing criminal conduct be sufficiently clear for persons of ordinary intelligence to understand them and gauge their conduct accordingly. Kolendar, 461 U.S. at 357; Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995). This is where § 921.001(5) founders.

It is not enough that the language of a statute is clear. If that language requires persons to perform a task to ascertain the penalty for engaging in proscribed conduct, the task must be one that persons of ordinary intelligence can perform. From this perspective, the notice provided by § 921.001(5) is constitution-

ally defective. Calculating a guidelines scoresheet is not a task persons of ordinary intelligence can perform. Even attorneys and judges of extraordinary intelligence misinterpret, misapply and miscalculate the guidelines statutes and rules, as ample caselaw in the volumes of Southern Reporter, Second Series demonstrates. The many annotations of opinions under Florida Rule of Criminal Procedure 3.701 in Florida Statutes Annotated and the growing number of opinions on application and interpretation of Rules 3,702 and 3.703 demonstrate that correctly predicting a sentencing range for a criminal offense is no easy matter. To conclude that a potential offender can correctly calculate a scoresheet range, when the task escapes so many trained professionals, requires an insupportable assumption.

Section 921.001(5) is particularly susceptible of varying interpretations. Three district courts attempting to interpret and apply the provision have reached three different conclusions. One would permit a sentence 25 percent higher or lower than the recommended sentence (a precise number reached through guidelines calculations) whenever the recommended sentence exceeds the statutory maximum. Green v. State, 691 so. 2d 502 (Fla. 5th DCA), rev. granted, 699 So. 2d 1373 (Fla. 1997). Another would require imposition of the recommended sentence when that sentence

exceeds the statutory maximum. Myers, 696 So. 2d at 899-900. The district court in this case would permit any sentence within 25 percent up or down of the recommended sentence, when any sentence within that range exceeds the statutory maximum. Floyd, 23 Fla. L. Weekly at D548. See Point II, supra.

From the perspective of the potential offender, the provision will gain any constitutionally significant clarity when it is interpreted by this Court. For the diversity of perspectives in the district courts demonstrates its potential for confusion. Using the same statute and rule books, the Myers and Floyd courts would come up with different maximum sentences for Mr. Floyd, 5.09 and 6.36 years. Publication of the applicable statutes, rules and forms in the Laws of Florida and Florida Statutes is patently insufficient to create sufficient notice of potential penalties. To accurately determine his potential sentence, Mr. Floyd would also have needed access to Florida Statutes Annotated and Southern Reporter, plus a subscription to the Florida Law Weekly and, not least, a crystal ball to divine how this Court will come down on the issue. To say the least, this casts a curious light on the notion of adequate notice.

Consequently, § 921.001(5), Florida Statutes, fails to provide adequate notice, via a procedure within the grasp of

persons of ordinary intelligence, to withstand scrutiny under the Due Process clauses of the state and federal constitutions. The sentence imposed pursuant to this unconstitutional provision must be vacated and the case remanded for imposition of sentences on each of the three third-degree felonies within the five-year statutory maximum of § 775.082(3)(d), Florida Statutes.

## II. THE VARIETY OF APPELLATE INTERPRETATIONS OF § 921.001(5), FLORIDA STATUTES (1995), DEMONSTRATES ITS AMBIGUITY AND COMPELS A CONSTRUCTION MOST FAVORABLE TO THE ACCUSED.

Section 921.001(5), Florida Statutes (1995), 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.

Though the term "recommended sentence" may have had a definite meaning in the early years of the guidelines, waves of legislative accretions and revisions have obscured it. The use of the term in the 1994 revision has led to divergent perspectives in the district court on just how to interpret and apply the quoted language. At least three different formulations are discernible.

In Green v, State, 691 so. 2d 502 (Fla. 5th DCA 1997), rev. granted, 699 So. 2d 1373 (Fla. 1997), the Fifth DCA defined "recommended sentence" as the specific number, corresponding to prison months, calculated via the scoresheet promulgated in the 1994 revision, before computing a 25 percent variation greater or lesser. The court held that, if this "recommended sentence" exceeds the penalty authorized by § 775.082, the trial court may impose any sentence within the 25 percent variation. Restated as

an algebraic equation[1] in which R is the "recommended sentence," M is the § 775.082 maximum, and S is the sentence authorized by § 921.001(5), Green holds:

$$\text{If } R > M, \quad S = \{.75(R) < 1.25(R)\}$$

In Mvers v. State, 696 So. 2d 893, (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), the court construed the term "recommended sentence" as did the court in Green, but after performing painstaking legislative analysis concluded that if the recommended sentence exceeds the § 775,082 maximum, the sentencing court must impose the recommended sentence without a 25 percent variation up or down. Restated algebraically, the rule of Myers is attractive in its simplicity:

$$\text{If } R > M, \quad S = R.$$

In Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA), rev. ismissed, 697 So, 2d 1217 (Fla. 1997), and in the First DCA opinion in this case (Floyd), the courts construed "recommended sentence" to be the range 25 percent up and down from the specific number of prison months deduced from the scoresheet. These courts hold that if any part of this range exceeds the §

[1]With apologies for any errors in nomenclature. An appellate public defender who does his own algebra may well have a fool for a mathematician.

775.082 maximum, the sentencing court may impose any sentence within the range "unencumbered" by § 775.082. Martinez, 692 So. 2d at 199; Floyd, 23 Fla. L. Weekly at D652. In algebraic terms, these courts have held:

$$\text{If } 1.25(R) > M, \; S = \{.75(R) < 1.25(R)\}$$

In Floyd's case, the specific number of prison months (R) corresponded to 5.09 years, and the sentencing range extended from 3.81 years (.75(R)) to 6.36 years (1.25(R)). The statutory maximum (M) was five years. Because R, the specific number of prison months, exceeded the statutory maximum, his lawful sentence under Green, Martinez and Floyd was 3.81 to 6.36 years, under Myers 5.09 years. Had R, the specific number of months on the scoresheet, fallen just within the statutory maximum, e.g., at 56 months, both Myers and Green would limit the sentence to the 60-month statutory maximum, while Floyd and Martinez would authorize a sentence of up to 70 months. Thus, both when the specific number of months exceeds the statutory maximum and when it falls within the maximum but a 25 percent increase exceeds the maximum, the Myers construction is most favorable to the defendant. Though, unlike the other cases, it requires a sentence both beyond the statutory maximum and greater than the bottom of the guidelines range in the first instance, it also

precludes any increase beyond the recommended sentence. In the second instance, it precludes a sentence beyond the statutory maximum altogether.

Thus, inasmuch as § 921.001(5) is obviously susceptible to differing constructions, under § 775.021(1), Florida Statutes, the Myers construction must be adopted as the one most favorable to the accused. The Myers construction[2] also boasts the virtue of giving § 775.082 a greater field of operation, for it leaves the statute (which on its face contains no exceptions to the limits it imposes) viable in a wider range of circumstances. Under Myers, when a court can impose a sentence which comports with both § 921.001(5) and § 775.082, it must. In contrast, under Martinez and Floyd, § 775.082 is suspended whenever any part of the 25 percent increase from the recommended sentence exceeds the maximum penalties in the statute. It is deprived of a reasonable field of operation. See Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2d DCA 1986) (courts should reconcile statutes to give reasonable field of operation to each).

Applying these conclusions to the instant case, Floyd's sentence of 6 years exceeds the 5.09-year recommended range, and

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[2]and that of Green.

is therefore illegal. See O'Neal v. State, 23 Fla. L. Weekly D861 (4th DCA April 1, 1998) (sentence contrary to Myers is illegal, hence fundamental error). The decision of the district court must be quashed and the case remanded with directions to vacate Floyd's sentence and remand to the trial court for imposition of a 5.09-year sentence in accord with Myers, supra.

## CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court quash the decision of the First District Court of Appeal and remand with appropriate directions, as explained herein.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charmaine M. Millsaps, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 16th day of April, 1998.

Respectfully submitted
& Served,

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