IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 92,770

JAMES THOMPSON,

Respondent.

****
ON PETITION FOR CERTIORARI REVIEW
****

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Other Authority

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution and Respondent, JAMES THOMPSON, was the defendant in the criminal trial conducted in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the appellant and Petitioner the appellee in the appeal heard by the Fourth District Court of Appeal for the State of Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as "the State."

Reference to the record on appeal will be by the symbol "R," reference to the transcripts will be by the symbol "T," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.]", and reference to the appendix will be by the symbol "A," all followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Respondent, JAMES THOMPSON, was charged by information with the third degree felony of possession of cocaine. (R 1-2). He was found guilty of this offense. (R 12). Preparation of the sentencing scoresheet showed that Respondent had earned 91.2 "TOTAL SENTENCE POINTS." (R 15). The next step on the scoresheet was to subtract 28 from the "TOTAL SENTENCE POINTS" which resulted in an initial calculation of 63.2 "State Prison Months." (R 15). As the scoresheet noted, the trial court could increase or decrease these state prison months by up to an additional twenty-five percent. (R 15). Thus, performing the last calculation on the scoresheet resulted in a guidelines recommended range with a minimum of 47.4 months and a maximum of 79 months. (R 15). The trial court accordingly chose to upwardly increase the state prison months by sentencing Respondent to the maximum sentence of 79 months in state prison. (R 15, 19).

Respondent appealed his sentence to the Fourth District Court of Appeal for the State of Florida (hereinafter "the Fourth District"). The Fourth District reversed the sentence of 79 months and remanded to the trial court with instructions to resentence Respondent to the "sentence recommended by the guidelines scoresheet." In deciding this case, the Fourth District referenced its previous holding in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477, where

the court found that the trial court could not increase, by up to twenty-five percent, a recommended sentence that already exceeded the statutory maximum. In both Myers and in the instant case, the district court certified conflict with a number of other district courts.

SUMMARY OF THE ARGUMENT

As used in Florida Statutes Sections 921.001(5) and 921.0014(2), the term "recommended sentence" is not limited to a single fixed number; rather, it includes any sentence within the recommended range of plus or minus twenty five percent. Therefore, contrary to the Fourth District's position, the guidelines do authorize a trial court to increase the initial calculation of "State Prison Months" by up to twenty five percent even when this initial calculation of "State Prison Months" is greater than the statutory maximum. This Honorable Court should quash the Fourth District's opinion insofar as it addresses this ground, and should reimpose Respondent's original sentence.

ARGUMENT

WHETHER THE TRIAL COURT IMPOSED A LEGAL SENTENCE UNDER THE SENTENCING GUIDELINES.

Respondent was sentenced to a guidelines sentence of 79 prison months for a third degree felony with a statutory maximum sentence of five years or 60 prison months. § 775.082, Fla. Stat. The initial calculation of "State Prison Months" on Respondent's scoresheet was 63.2 months. In the opinion now under scrutiny,[1] the Fourth District Court of Appeal (hereinafter "the Fourth District") essentially found that the trial court erred in sentencing Respondent to the upper limit of the recommended sentence range, here, 79 prison months, when the trial court should have sentenced Respondent to what the district court termed as the "recommended sentence" of 63.2 prison months. The State respectfully disagrees.

Florida Statutes Section 921.001(5) reads:

> 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.

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[1] Thompson v. State, 707 So. 2d 1191 (Fla. 4th DCA 1998).

This statute does not define the term "recommended sentence." However, Florida Statutes Section 921.0014(2), regarding "Recommended sentences," explains that:

> The recommended sentence length in state prison months may be increased by up to and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court. The recommended sentence length may not be increased if the total sentence points have been increased for that offense by up to, and including, 15 percent. If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence recommended under the guidelines must be imposed absent a departure.

In their opinion in this case, the Fourth District referred to Myers v. State, 696 So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997), for an explanation of their reasoning. The Fourth District's position, as explained in Myers, was that the initial calculation of "State Prison Months" on the guidelines scoresheet constituted the "recommended sentence" as that term was used in Florida Statutes Sections 921.001(5) and 921.0014(2). The Fourth District claimed that, when this "recommended sentence" exceeded the statutory maximum, a trial court was limited to imposing this and only this "recommended sentence."

Thus, as in Myers, the Fourth here held that the guidelines did not authorize a trial court to increase the initial calculation of "State Prison Months" by up to twenty five percent

when the initial calculation of "State Prison Months" was greater than the statutory maximum. In reaching this conclusion, the Fourth District necessarily determined that the term "recommended sentence" meant only the initial calculation of "state prison months." The district court denied that it could encompass a recommended range of sentences varying by as much as twenty-five percent.

The State respectfully contends that the legislature, in using the term "recommended sentence" in Florida Statutes Section 921.001(5) and Florida Statutes Section 921.0014(2), did not intend to limit the term's meaning to the initial calculation of "State Prison Months;" rather the legislature intended that the meaning should encompass the twenty-five percent range of sentences above and below that initial calculation. Therefore, although the sentence of 79 months imposed here was greater than the initial calculation of "State Prison Months," 63.2 months, this sentence of 79 months fell within the twenty five percent recommended range allowed by the guidelines, 47.4 to 79 months. (R 15). Thus, it was a proper sentence which should not have been reversed by the Fourth District.

In reviewing Respondent's scoresheet, the district court calculated the State Prison Months by subtracting 28 from the total sentence points. The court thus arrived at a initial fixed number of 63.2 months. (R 15). The district court defined this

initial fixed number as the "recommended sentence." Although the sentencing guidelines scoresheet, as well as Section 921.0014(2), showed that there was a subsequent step allowing a trial court to increase or decrease this single fixed number by up to twenty five percent, the district court refused to take this next step.

The key to how the Fourth District reached their opinion is in how the court defined the phrase "recommended sentence." The State respectfully contends that the Fourth District's interpretation of this phrase is contrary to the spirit and the letter of the guidelines which intentionally provide a trial judge with a certain discretion in imposing sentence depending on the circumstances of each case.

In Florida Statutes Section 921.0014(2), it is clear that the legislature intended to provide the trial courts with a discretionary "window" for sentencing of a twenty-five percent variation on the initial scoresheet calculation of "State Prison Months." After all, each trial court requires a discretionary window because each case carries with it unique nuances and each defendant brings his or her own special circumstances for consideration during the sentencing process. The trial court is in the best position to consider the inherently illusive variables of each individual case which can not be predetermined and which, therefore, require some amount of latitude in the final sentencing determination.

Clearly, the "63.2" figure for "State Prison Months" calculated on the Respondent's sentencing guideline scoresheet, (R 15), was only a part of the overall calculations needed to be made in order to arrive at a final sentence. It was not intended to be considered a finite restriction upon the trial court when sentencing a defendant under the guidelines. If the Fourth's interpretation of the relevant statutes were upheld, a trial court would have no discretion whatsoever, but would have to sentence a defendant to the initial calculation of "State Prison Months."

This is contrary to the spirit of the guidelines which were promulgated to provide for flexibility in sentencing. After all, the thrust of Section 921.001(5) is that the guidelines now take precedence over the statutory maximum. In Martinez v. State, 692 So. 2d 199, 201 (Fla. 3d DCA), rev. dismissed, 697 So. 2d 1217 (Fla. 1997), the Third District rightly noted that the legislative intent of the statute was to allow the trial court the full use of the recommended range unencumbered by the ordinary legal maximum.

Furthermore, the Fourth District's interpretation is incorrect because it does not complete the calculations required by the scoresheet. There is a subsequent step wherein a trial court may increase or decrease the initial calculation of "State Prison Months" by up to, and including, twenty-five percent.

> The recommended sentence length in state prison months may be increased by up to, and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court. The recommended sentence length may not be increased if the total sentence points have been increased for that offense by up to, and including, 15 percent. 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. The recommended sentence is increased or decreased by up to twenty five percent *before* any determination as to whether the sentence exceeds the statutory maximum.

§ 921.0014(2), Fla. Stat.

Although Florida Statutes Section 921.0014(2) initially begins calculating a defendant's sentence with a finding of "State Prison Months, it then **immediately** proceeds to provide that the trial court may increase or decrease the recommended sentence by up to twenty five percent. When the scoresheet is fully completed it becomes clear that the "recommended sentence" is not a single fixed number but rather, a range, as arrived at by arithmetical calculation in accordance with the formulas embodied in the Sentencing Guidelines Scoresheet at Florida Rule of Criminal Procedure 3.991(a). The order of sentences in the statute shows that the legislature intended the courts to calculate the twenty five percent variation and arrive at a "recommended sentence" **before** they determined if this recommended sentence exceeded the statutory maximum. Clearly, the legislature intended the "recommended sentence" to include the recommended

range.

The Fourth District contended in Myers, 696 So. 2d at 893, that to allow a variation when the statutory maximum is exceeded creates "an intolerable ambiguity" because the twenty-five percent variation is discretionary but the language in Florida Statutes Section 921.001(5) is mandatory. The State respectfully maintains that no such ambiguity is be created because any sentence falling within the guidelines recommended range is, as the statute phrases it, "**a** recommended sentence" would satisfy the mandatory language which requires that "**the** recommended sentence" under the guidelines must be imposed.

Notably, the legislature in Section 921.0014(2) directed that "the sentence under the guidelines must be imposed if it exceeds the statutory maximum," but then went on to say that a departure sentence must be within the maximum. Clearly, a sentence within the guidelines is not a departure sentence as it can exceed the statutory maximum.

In addition, the legislature states that a trial judge could impose, without written reasons, a state prison sentence which varied by up to twenty five percent from the state prison sentence. § 921.0016(b), Fla. Stat. In contrast, any sentence which deviates from the initial calculation of "State Prison Months" by more than, or less than, twenty-five percent (25%) was a departure sentence which requires a written order of departure

to be completed by the trial court at the time of sentencing. § 921.0016(c), Fla. Stat.; Fla. R. Crim. P. 3.702(d)(16). A sentence which does not vary from the initial calculation of "State Prison Months" by *more* than twenty-five percent is not a departure sentence.

It is telling that a departure sentence is one that deviates from the range, not from the initial calculation of state prison months. This shows that any sentence within the range under the guidelines is not a departure sentence; rather, it is a "recommended sentence." If the legislature did not intend to include the recommended range in its definition of recommended sentence, it would have defined a departure sentence as anything other than the initial calculation of "State Prison Months." The Fourth District's reasoning leads to the absurd result that a trial court could impose the initial calculation of "State Prison Months" or a downward departure sentence that did not exceed the statutory maximum, but could not impose any sentence in between.

The Fourth District suggested in Myers, that if the legislature wished the twenty five percent variation to be included under Section 921.001(5), it would have so specified. The State responds to this suggestion by stating that if the legislature did not wish the variation to be included, it would have used terminology referencing the initial determination of "State Prison Months" instead of terminology referencing "a

recommended sentence."

The wording of the statute bears out the State's position. That is, both Section 921.0014(2) and Section 921.001(5) stated that "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." The use of "a" instead of "the" suggests that the legislature was referencing any recommended sentence under the guidelines, which in turn suggests that the legislature was referring to the recommended range of sentences rather than to a single fixed sentence. The subsequent use of "the" suggests that having established "a" sentence under the guidelines, the trial court could then proceed to determine whether it exceeded the statutory maximum, and if it did, then this was "the" sentence that must be imposed.

Every district court in Florida except the Fourth District has found, when confronted with guidelines sentences which exceeded the statutory maximum, that the phrase "recommended sentence" included the recommended range. For example, in Delancy v. State, 673 So. 2d 541 (Fla. 3d DCA 1996), the Third District, citing to Section 921.001(5), held that the defendant's six year sentence was permissible although it exceeding the five year statutory maximum because the **guidelines range** was 4.3 to 7.1 years.

Subsequently, in Martinez, 692 So. 2d at 199, the statutory maximum was five years, the "recommended sentence" was 4.6 years, and the upper limit of the guidelines range was 7.7 years. The Third District stated that the recommended sentence could accurately be described as a recommended range. They accordingly affirmed the trial court's imposition of six and one-half years incarceration followed by one year of probation.

The First District, in State v. Eaves, 674 So. 2d 908 (Fla 1st DCA 1996), required the trial court on remand to impose sentences within what the court termed the "presumptive **range**" under the guidelines. More recently, in Floyd v. State, 23 Fla. L. Weekly D651 (Fla. 1st DCA Feb. 26, 1998), the defendant committed several third degree felonies with a statutory maximum of five years. The guidelines range was 3.81 to 6.36 years and the "presumptive sentence" was 5.09 years, but the defendant was sentenced to several six year terms. The First District affirmed the sentences, because it found that the term recommended sentence could encompass the recommended range, and certified conflict with the Fourth District in Myers.

The Second District, in Nantz v. State, 687 So. 2d 845 (Fla. 2d DCA 1996), calculated the recomended **range**, not the recommended sentence, to determine if the appealed sentence was correct, then ordered that on remand the trial court should impose a sentence no greater than the upper limit of the

guidelines recommended range. Subsequently, in West v. State, 1998 WL 171386 (Fla. 2d DCA April 15, 1998), the Second District specifically affirmed the trial court's authority to exercise the twenty-five percent prerogative in cases where the guidelines score exceeded the statutory maximum.

In Mays v. State, 693 So. 2d 52 (Fla. 5th DCA), rev. granted, 700 So. 2d 686 (Fla. 1997), and more recently, in Green v. State, 691 So. 2d 502 (Fla. 5th DCA), rev. granted, 699 So. 2d 1373 (Fla. 1997), the Fifth District concurred with the Third District in Martinez. In both Mays and Green, the Fifth District affirmed a sentence greater than the initial "State Prison Months" calculation. Although it called the initial "State Prison Months" calculation of 65.8 months "the recommended sentence," the Green court found that the sentence of 72 months actually imposed was not only not an improper departure without written reasons, it was a permissible variation.

The Green court stated:

> The emphasized line from section 921.001(5) ... should read, for purposes of clarity, as follows: "If *the* recommended sentence under the guidelines exceeds the maximum otherwise authorized by s. 775.082, *a* sentence under the guidelines must be imposed absent a departure." It would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute.

Id.

The First, Second, Third, and Fifth Districts have all

affirmed the interpretation of "recommended sentence" in Section 921.001(5) as meaning the "recommended range." These courts recognized that the legislature clearly intended for the recommended guidelines sentence to include the recommended range and for a recommended sentence to be imposed regardless of any statutory maximum. As the cases cited above skillfully argue, the Fourth District's opinion is inconsistent with the wording of the statute and with its intent.

Here the trial court was required to sentence Respondent beyond the statutory maximum because the recommended sentence exceeded the statutory maximum of five years or 60 months for a third degree felony. See § 921.001(5), Fla. Stat.; § 775.082, Fla. Stat. The "recommended sentence" was properly construed to be any sentence within the recommended range of 47.4 months to 79 months. Thus, the trial court could properly sentence Respondent to any sentence within that range. Respondent's sentence of 79 months was a proper nondeparture sentence in accordance with Florida Statutes Section 921.001(5). The district court's opinion insofar as it finds this sentence to be improper should be quashed and Respondent's original sentence should be reinstated.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, the State of Florida respectfully submits that the decision of the district court, insofar as it found that a sentence that was in excess of the guidelines recommended median sentence but within the guidelines recommended range was improper, should be QUASHED, and that the sentence originally imposed by the trial court should be REINSTATED.

Respectfully submitted,
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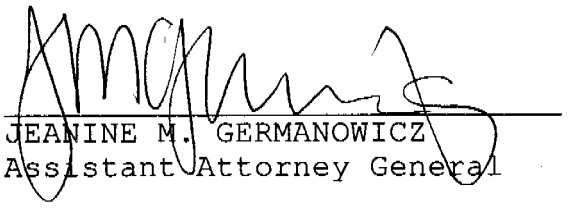
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the

foregoing "Petitioner's Brief on the Merits" has been furnished by courier to: ANTHONY CALVELLO, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on May 28, 1998.



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STATE OF FLORIDA,

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1998

JAMES THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96–2862

Opinion filed April 1, 1998.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; James I. Cohn, Judge; L.T. Case No. 96–7104 CF10.

Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Diana K. Bock, Assistant Attorney General, West Palm Beach, for appellee.

FARMER, J.

A jury convicted defendant of possession of cocaine, a third degree felony. The penalty statute provides a maximum sentence for this conviction of 5 years.[1] His sentencing scoresheet, however, showed a recommended sentence of 63.2 months. The trial judge enhanced the recommended sentence within the guidelines range of 25% and sentenced him to 79 months in prison. This appeal follows.

We decided the issue raised in this appeal in our previous decision in *Myers v. State*, 696 So. 2d 893 (Fla. 4th DCA), *rev. granted*, 703 So. 2d 477 (Fla. 1997). There we held that the court may not enhance a recommended sentence that already exceeds the maximum set by the penalty statute by a further extension within the guidelines range. *Myers* requires that we reverse the sentence in this case and remand with instructions to resentence defendant to the sentence recommended by the guidelines scoresheet. As we did in *Myers*, we certify conflict with *Mays v. State*, 693 So. 2d 52 (Fla. 5th DCA), *rev. granted*, 700 So. 2d 686 (Fla. 1997); *Martinez v. State*, 692 So. 2d 199 (Fla. 3d DCA), *rev. dismissed*, 697 So. 2d 1217 (Fla. 1997); and *Green v. State*, 691 So. 2d 502 (Fla. 5th DCA), *rev. granted* 699 So. 2d 1373 (Fla. 1997); and with the subsequently issued decision in *Floyd v. State*, 23 Fla. L. Weekly D651(Fla. 1st DCA Feb. 26, 1998).

REVERSED AND REMANDED FOR RESENTENCING TO SENTENCE RECOMMENDED UNDER GUIDELINES.

DELL and SHAHOOD, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

[1] § 775.082(3)(d), Fla. Stat. (1995).

A