IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 24 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HINDENACH,

Respondent.

CASE NO. 92,880

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and the Appellee in the Fourth District Court of Appeal. Respondent was the Defendant and the Appellant below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the Record on Appeal documents.

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The symbol "PB" will denote Petitioner's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Respondent, John Hindenach, was charged by Information filed in the Nineteenth Judicial Circuit with DUI-impairment and/or UBAL with serious bodily injury (R 1-2). This offense is classified under Florida law as a third-degree felony punishable by up to five (5) years in prison. § 775.082(3)(d), Fla. Stat. (1995). This offense was alleged to have occurred on May 5, 1996 (R 1-2).

Since Respondent's criminal offense occurred in 1996, Florida Rule of Criminal Procedure 3.703 (revised sentencing guidelines) applies to his offense. See Fla. R. Crim. P. 3.703(a)[1]; § 921.001(4)(b)1, Fla. Stat. (1995).

Respondent was scored pursuant to the sentencing guidelines provided for in Florida Rule of Criminal Procedure 3.703 to 99 "total sentence points" which resulted in a recommended sentence under the guidelines of 71 months in prison (R 19-21). See § 921.0014(2), Fla. Stat. (1995); Fla. R. Crim. P. 3.703(d)(27),(d)(28),(d)(31). Respondent's 99 "total sentence points" results in a "presumptive sentence" of 88.7 maximum and 53.2 minimum state prison months (R 19-21). See Fla. R. Crim. P.

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[1] Rule 3.703(a)(1) provides: "This rule applies to offenses committed on or after October 1, 1995." See Amendments to Florida Rules of Criminal Procedure Re: Sentencing Guidelines, 685 So. 2d 1213 (Fla. 1996).

3.703 (d)(26)[2]. Even though the statutory maximum for a third-degree felony is five (5) years or sixty (60) months in prison, Respondent was sentenced to eighty (80) months in the Department of Corrections with credit for 250 days time served (T 39; R 33-38).

Respondent filed a timely Notice of Appeal to the Fourth District Court of Appeal (R 40, 41).

In a written opinion, the Fourth District reversed Respondent's eighty (80) month sentence in reliance upon its decision in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), quashed, State v. Myers, 1998 Fla. LEXIS 1323, No. 91,251 (Fla. July 16, 1998), and certified conflict with four decisions of its sister courts. Hindenach v. State, 708 So. 2d 336 (Fla. 4th DCA 1998). Judge Farmer, writing for the court, explained the basis for reversing Respondent's sentence of eighty (80) months:

> The penalty statute provides a maximum sentence for this conviction of 5 years. His sentencing scoresheet, however, showed a recommended sentence of 71 months. The trial judge enhanced the recommended sentence within the guidelines range of 25% and sentenced him to 80 months in prison. This appeal follows.
>
> We decided the issue raised in this appeal in our previous decision in Myers v. State, 696

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[2] Renumbered 3.703(d)(27), effective October 1, 1997. Amendments to Florida Rules of Criminal Procedure, Re Sentencing Guidelines, 696 So. 2d 1171 (1997).

> So. 2d 893 (Fla. 4th DCA), rev. granted, 703 So. 2d 477 (Fla. 1997). There we held that the court nay 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.

Id.

Petitioner, the State of Florida, filed a notice of discretionary review with this Honorable Court.

SUMMARY OF THE ARGUMENT

POINT I

The initial issue before this Honorable Court is the constitutionality of Section 921.001(5), Florida Statutes (1995). The trial judge originally imposed a sentence of eighty (80) months in prison upon Respondent for a third-degree felony, DUI-impairment and/or UBAL with serious bodily injury. This exceeded the statutory maximum by twenty (20) months in prison.

Section 921.001(5) provides that "if a recommended sentence under the guidelines" exceeds the otherwise applicable statutory maximum period of imprisonment the sentencing "court must impose sentence under the guidelines, unless valid departure reasons are given."

Although rejected by the Fourth District Court of Appeal in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), quashed, State v. Myers, 1998 Fla. LEXIS 1323, No. 91,251 (Fla. July 16, 1998), Respondent contends that Section 921.001(5) is unconstitutional on its face. Said statute fails to provide persons of common intelligence adequate notice of the actual penalty for the crime charged. There is no notice given to a citizen of the application of any sentencing statute other than the standard penalties provided in Chapter 775 for this third-degree felony. Accordingly,

the use of a different statute which is not noticed in either the applicable criminal statute or charging document violates the notice requirement of the Due Process Clause of the Fourteenth Amendment and renders said statute unconstitutional. Section 921.001(5) cannot be applied by a lay person to the extent necessary to pass the notice requirement mandated by the Fourteenth Amendment.

Further, this penal statute runs afoul of the constitutional requirement that the legislature pass the laws setting penalties and not delegate this substantive authority to a commission.

POINT II

Assuming arguendo that this Honorable Court finds that the statutory maximum for the crime charged can be constitutionally exceeded, the imposition of eighty (80) months in prison which exceeds Respondent's "recommended sentence" of seventy-one (71) months in prison is still illegal and excessive by nine (9) months in contravention of Sections 921.001(5) and 921.0014(2), Florida Statutes (1995). The Fourth District so held in the instant cause.

On remand, Respondent should be resentenced by the trial judge to no more than 71 months in prison which is Respondent's "recommended sentence" under the applicable guidelines rules and statutes.

ARGUMENT

POINT I

SECTION 921.001(5), FLORIDA STATUTES (1995), IS UNCONSTITUTIONAL ON ITS FACE [POINT RESTATED].

Respondent, Mr. Hindenach, was charged with and convicted of DUI-impairment and/or UBAL with serious bodily injury which is classified under Florida law as a third-degree felony punishable by up to five (5) years in prison. §§ 316.193(1), 316.193(3)(c)(2), 775.082(3)(d), Fla. Stat. (1995).

However, Respondent was sentenced by the trial judge in excess of the statutory maximum expressly provided for in Section 775.082(3)(d). Respondent was scored pursuant to the sentencing guidelines set forth in Florida Rule of Criminal Procedure 3.703 to 99 "total sentence points" which results in a recommended sentence under the guidelines of 71 months in prison (R 19-21). § 921.0014(2), Fla. Stat. (1995); Myers v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), quashed, State v. Myers, 1998 Fla. LEXIS 1323, No. 91,251 (Fla. July 16, 1998); Hindenach v. State, 708 So. 2d 336 (Fla. 4th DCA 1998). However, a defendant's recommended sentence "may be increased or decreased by up to and including 25% at the discretion of the sentencing court." Fla. R. Crim. P. 3.703(d)(26). Therefore, Respondent's presumptive sentence range

was 88.7 maximum and 53.2 minimum state prison months (R 19-21). See Fla. R. Crim. P. 3.703(d)(26). However, as noted, Respondent was sentenced to eighty (80) months in prison by the trial judge which is in excess of the five (5) year (60 months) statutory maximum authorized for a third-degree felony pursuant to Section 775.082(3)(d). To reach this result the trial court relied on a statutory provision that permits a prison sentence to exceed the statutory maximum.

Section 921.001(5), provides:

> (5) 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.

The 1995 revision to the Florida sentencing guidelines added a rule of criminal procedure counterpart to Section 921.001(5),

Florida Rule of Criminal Procedure 3.703(d)(26)[3], which provides:

> (26) If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felon offenses, the guideline sentence must be imposed, absent a departure. Such downward departure must be equal to or less than the maximum sentence authorized by section 775.082.

(Emphasis supplied).

A. DUE PROCESS VIOLATION.

Respondent was charged with and convicted of DUI-impairment and/or UBAL with serious bodily injury, pursuant to Sections 316.193(1) and 316.193(3)(c)(2), Florida Statutes (1995). This statute expressly provides that this offense constitutes a third-degree felony that is punishable "as provided in s. 775.082, s. 775.083 or s. 775.084." See §§ 316.193(1), 316.193(3)(c)(2).

Reference to the expressly cited statutory sections in Chapter 775 reveals no mention of imposition of any sentence other than the maximum sentence of five (5) years imprisonment or an habitual offender sentence if that section were otherwise applicable. There is absolutely no notice given of the possible imposition of a penalty in excess of five years in prison by operation of any

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[3] This Court adopted this rule on September 21, 1995, effective October 1, 1995. See Amendments to Florida Rules of Criminal Procedures re Sentencing Guidelines, 660 So. 2d 1374 (Fla. 1995).

sentencing guidelines' rules or laws. Also, no mention or reference is made to Section 921.001(5) in Sections 316.193(1) and 316.193(3)(c)(2) that would put any member of the public on reasonable notice that some additional or greater penalty could be imposed for this third-degree felony.

Further, the charging document in this cause merely recites to Sections 316.193(1) and 316.193(3)(c)(2)(R 1-2). There is absolutely no reference in Respondent's charging document to Section 921.001(5).

It is a fundamental tenet of the due process clause of the Fourteenth Amendment that "[no] person is required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." United States v. Harriss, 347 U.S. 612, 617 (1954). See Connally v. General Construction Co., 269 U.S. 385, 391-393 (1926); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972). The United States Supreme Court in United States v. Batchelder, 442 U.S. 114, 123, 99 S. Ct. 2198 (1979), also made clear that "too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of

violating a given criminal statute."

The lack of notice to the general public in the statutory sections is a due process flaw that condemns use of the provisions of Section 921.001(5) to exceed the specified statutory penalty for this offense.[4] See cf. State v. Ginn, 660 So. 2d 1118 (Fla. 4th DCA 1995)(due process does not require separate written notice of possibility of impoundment when notice is given by statute, thus no failure to notify defendant of potential penalty).

In Gardiner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995), the Fifth District rejected the defendant's claim that Section 921.001(5) deprived him of due process of law under the Fourteenth Amendment by failing to provide adequate notice of the authorized punishment. See also Myers v. State, 696 So. 2d 893. The Fifth District stated 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

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[4] Although not raised in the trial court, the constitutionality of a statute on its face can be raised for the first time on appeal. See Trushin v. State, 425 So. 2d 1126 (Fla. 1982). However, the constitutionally of Section 921.001(5), Florida Statutes (1995), was raised in the Fourth District Court of Appeal in the instant cause.

calculations in order to ascertain a sentence does not deprive him of adequate notice as to potential penalties." Gardiner, 661 So. 2d at 1276.

This argument is totally specious and rather glib. The proper calculation of a Rule 3.703 sentencing guidelines scoresheet involves a sophisticated interpretation of Florida Statutes and rules of criminal procedure coupled with the ability to make intricate factual determinations.

The steps involved in calculating a citizen's recommended guidelines sentence would totally elude the general public and thereby do not provide "notice" to the general public. To obtain a person's "recommended sentence" under the Florida sentencing guidelines, this lay person will embark on a arduous journey fraught with snares, traps and blind-alleys.

First, the individual must look at their own criminal conduct prior to its commission and determine which offense is their "primary offense," and which offenses represent "additional offenses." See Fla. R. Crim. P. 3.703(c)(1), (d)(7), (d)(8). This lay person must know the extent of punishment prior to engaging in any conduct and thereby receive the requisite "notice" of the nature of the offense to be charged.

The scoring of a person's "prior record" entails five (5)

separate provisions. See Fla. R. Crim. P. 3.703(d)(15). And under the sentencing guidelines any uncertainty in the scoring of the offender's prior record "shall be resolved by the sentencing judge." Fla. R. Crim. P. 3.703 (d)(15)(D) (emphasis supplied]. A lay person would then have to determine whether "legal status violations" and/or "community sanction points" were applicable. Fla. R. Crim. P. 3.703(d)(16), (d)(17). Further, this same lay person would have to decide whether he or she should be assessed 6 community sanction points for each successive violation or the 12 points because "the violation results from a new felony conviction." Fla. R. Crim. P. 3.703(d)(17).

Then this lay person will need to determine if any victim injury occurred due to their own criminal conduct. If "victim injury" is involved, the lay person would need to decide whether their offense caused slight, moderate or severe injury to their victim. See Fla. R. Crim. P. 3.703(d)(9). Hopefully, this lay person will remember that under the guidelines this "victim injury" shall "be scored for each victim physically injured and for each offense resulting in physical injury whether there are one or more victims." Fla. R. Crim. P. 3.703(d)(9).

Then this lay person will need to carefully assess whether they should receive "firearm points" [Rule 3.703(d)(12)] or

"serious prior felony points" [Rule 3.703 (d)(19)]. And hopefully, the lay person calculating their scoresheet will not have a substantive offense or pending violations of probation from before 1993, or after January 1, 1994, 1995, 1996 and 1997 where different rules apply. See Fla. R. Crim. P. 3.703(d)(3)("If an offender is before the court for sentencing for more then one version or revision of the guidelines, separate scoresheets must be prepared and used at sentencing.")

Respondent's recommended sentence of 71 months in prison or the vacated sentence of 80 months in prison for this third-degree felony should be vacated because the application of Section 921.001(5) and the rule of procedure counterpart, Rule 3.703(d)(26), violates the notice provision of the due process clause of the Fourteenth Amendment to the United States Constitution. "What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite." Screws v. United State, 325 U.S. 91, 95, 65 S. Ct. 1031 (1944). To enforce such a statute would be like sanctioning the practice of Caligula who "published the law, but it was written in a very small hand,

and posted up in a corner, so that no one could make a copy of it." Suetonius, Lives of the Twelve Caesars, p. 278. Hence this cause should be remanded to the sentencing court for imposition of a sentence not to exceed the statutory maximum of sixty (60) months in prison for this third-degree felony as provided in Section 775.082(3)(d).

B. UNLAWFUL DELEGATION AND VIOLATION OF SEPARATION OF POWERS.

The Florida Legislature, through enactment of Section 921.001(5), has unconstitutionally delegated to the Sentencing Guidelines Commission the authority to set the maximum penalties for offenses for persons who are sentenced for offenses committed after October 1, 1994. However, no guidance is given limiting the commission in the exercise of this traditionally legislative power to set the maximum penalties for crimes. The commission could, if the guidelines it adopts so provide, award life sentences for third-degree felonies. The fact that the present guidelines require a lengthy prior record for such to occur does not change the fact that such power exists and could be exercised for persons who have no prior record.

This unlawful delegation to the Sentencing Guidelines Commission of the power to set the maximum penalties for offenses violates the provisions of Article II, Section 3 of the Florida

Constitution that mandates three branches of government and prohibits one branch from exercising the powers appertaining to either of the other branches unless expressly provided for in the Constitution.

The statute's provision for a commission to set maximum penalties runs afoul of this limitation and the provisions of Section 921.001(5) must be disapproved to the extent that new maximum penalties can be set by the commission to prevail over the statutory maximum penalties provided by general law. On this alternative basis, Respondent's illegal and excessive sentence should be vacated and on remand, Respondent should be resentenced to a prison sentence up sixty (60) months in prison, the five (5) year statutory maximum for the criminal offense charged.

POINT II

THE FOURTH DISTRICT'S OPINION IN THE INSTANT CAUSE SHOULD BE AFFIRMED BECAUSE THE SENTENCING JUDGE REVERSIBLY ERRED IN IMPOSING AN ILLEGAL PRISON SENTENCE THAT EXCEEDED RESPONDENT'S RECOMMENDED GUIDELINES SENTENCE UNDER THE FLORIDA SENTENCING GUIDELINES.

Respondent was scored pursuant to the sentencing guidelines set forth in Florida Rule of Criminal Procedure 3.703 to 99 "total sentence points" which results in a recommended sentence under the guidelines of 71 months in prison. Respondent's sentencing range was 88.7 maximum and 53.2 minimum state prison months (R 19-21). Although the statutory maximum for the offense was sixty (60) months in prison, Respondent was sentenced to eighty (80) months in prison by the trial judge.

Assuming arguendo, that this Honorable Court declines to hold Section 921.001(5), Florida Statues (1995), unconstitutional on its face (See Point I, supra), Respondent respectfully submits that the original 80-month sentence imposed upon him by the sentencing judge was still illegal and excessive because it exceeds his "recommended sentence" of 71 months in prison in contravention of the express provisions of both Section 921.0014(2), Florida Statutes (1995), and Section 921.001(5), Florida Statutes (1995).

Respondent acknowledges that this Honorable Court has just

decided this issue adversely to his position herein in split decisions. Mays v. State, 23 Fla. L. Weekly S387 (Fla. July 16, 1998); State v. Myers, 1998 Fla. LEXIS 1323, No. 91,251 (Fla. July 16, 1998); Green v. State, 1998 Fla. LEXIS 1318, No. 90,696 (Fla. July 16, 1998); Wilkins v. State, 1998 Fla. LEXIS 1320, No. 90,864 (Fla. July 16, 1998). However, as the time for filing rehearings has not yet expired, Respondent respectfully suggests that this Court erred in deciding the issue presented herein and that this Court should affirm this cause for the reasons set forth in Justice Pariente's opinion concurring in part and dissenting in part in Mays v. State, 23 Fla. L. Weekly at S387-389.

Section 921.0014(2) provides in pertinent part: "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." (Emphasis supplied). Obviously, the recommended sentence is the "state prison months" for which a trial judge could increase or decrease 25% to obtain a defendant's "presumptive guideline sentence" range. Petitioner's suggestion to the contrary is without merit.

Section 921.001(5), only authorizes the imposition of "a recommended sentence" "if" it exceeds the statutory maximum. Said statute provides:

> 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.

(Emphasis supplied).

Under the applicable Rule 3.703 sentencing guidelines, a "recommended sentence" is determined by the total sentence points minus 28 points. See § 921.0014(2), Fla. Stat. (1995); Fla. R. Crim. P. 3.703(d)(26). A departure sentence is "[a] state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent..." See § 921.0016(1)(c), Fla. Stat. (1995)(emphasis supplied); see also Fla. R. Crim. P. 3.703(d)(28) ("A state prison sentence that deviates from the recommended prison sentence by more than 25 percent...")(emphasis supplied); Fla. R. Crim. P. 3.703(d)(29)("If a split sentence is imposed, the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence.")(emphasis supplied).

Therefore, Respondent's "recommended guidelines sentence" was 71 months in prison. See § 921.0014(2).

Respondent recognizes that this Court has developed new

terminology for a "recommended guidelines sentence" -- a "median recommended sentence." See Mays v. State, 23 Fla. L. Weekly S387; State v. Myers, 1998 Fla. LEXIS 1323; Green v. State, 1998 Fla. LEXIS 1318; Wilkins v. State, 1998 Fla. LEXIS 1320. Respondent respectfully disagrees with that result and contends that the "recommended guidelines sentence" is as defined in the decisions of the following four district courts of appeal. Mays v. State, 693 So. 2d 52 (Fla. 5th DCA 1997) ("Mays was convicted of a third degree felony and under the sentencing guidelines, his recommended sentencing range was 50.85 months to 84.74 months incarceration, with a recommended sentence of 67.8 months.") (emphasis supplied); Green v. State, 691 So. 2d 502 (Fla. 5th DCA 1997) ("Green's 'total sentence points,' as defined by Florida Rule of Criminal Procedure 3.702(d)(15), aggregated 93.8 points, which total represents, after deducting 28 points pursuant to Rule 3.702(d)(16), a recommended state prison term of 65.8 months.") (emphasis supplied)[5]; Roberts v. State, 677 So. 2d 309, n.2 (Fla. 1st DCA 1996)[6]; Garcia v. State,

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[5] After reaching the initial correct result that a defendant's recommended sentence is based on the total sentence points, the Fifth District in Green unfortunately went on to affirm the 72-month sentence imposed upon the defendant because it was not a guidelines departure sentence. However this is a totally separate issue (See discussion, infra.).

[6] "Under the 1994 Guidelines, a departure sentence is '[a] state prison sentence which varies upward or downward from the recommended

666 So. 2d 231, n.1 (Fla. 2d DCA 1995); Jenkins v. State, 696 So. 2d 893 (Fla. 4th DCA 1997); Myers v. State, 696 So. 2d 893.

Section 921.0014(2), Florida Statutes (1995), specifies that recommended guidelines sentences are obtained as follows:

> (2) Recommended sentences:
>
> If the total sentence points are less than or equal to 40, the recommended sentence shall not be a state prison sentence; however, the court, in its discretion, may increase the total sentence points by up to, and including, 15 percent.
>
> If the total sentence points are greater than 40 and less than or equal to 52, the decision to incarcerate in a state prison is left to the discretion of the court.
>
> If the total sentence points are greater than 52, the sentence must be a state prison sentence calculated by total sentence points. A state prison sentence is calculated as follows:
>
> State prison months = total sentence points minus 28.
>
> 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

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guidelines prison sentence by more than 25 percent....' § 921.0016(1)(c), Fla. Stat. (1993); Fla. R. Crim. P. 3.702(d)(18). Here the 'recommended guidelines prison sentence' was 46 months." Roberts, 677 So. 2d at 309, n.2.

> 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.
>
> If the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment. An offender sentenced to life imprisonment under this section is not eligible for any form of discretionary early release, except pardon, executive clemency, or conditional medical release under s. 947.149.

(Emphasis supplied).

First and foremost, penal statutes must be strictly construed and any doubt as to its language should be resolved in favor of the accused and against the state. See § 775.021(1), Fla. Stat. (1997); State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977); Gilbert v. State, 680 So. 2d 1132 (Fla. 3d DCA 1996). This principle of strict construction is not merely a maximum of statutory construction it is firmly rooted in the fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 102 S. Ct. 2190 (1979). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990).

Second, in interpreting a penal statute the familiar rule of lenity controls. Lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." Logan v. State, 666 So. 2d 260, 261 (Fla. 4th DCA 1996). The rule of lenity applies to an interpretation of the Florida sentencing guidelines. See Lewis v. State, 574 So. 2d 245, 246 (Fla. 2d DCA 1991).

Third, as noted, the First District in Roberts v. State, 677 So. 2d at 309, n. 2, the Second District in Garcia v. State, 666 So. 2d at 231, n. 1, the Fourth District in both Jenkins v. State and Myers v. State, and the Fifth District in both Mays v. State and Green v. State all expressly stated in these opinions that a criminal defendant's recommended sentence was the state prison months obtained after subtracting the 28 points.

In Myers v. State, 696 So. 2d 893, the Fourth District articulated the basis for this definition of "a recommended sentence":

> Under section 921.0014(2), the nature of the recommended sentence depends on the total points assessed: if the points are under 40, the court may not sentence to state prison but may increase the point total by up to 15%; if the points are between 40 and 52, the court may in its discretion imprison; if the points are greater than 52 the court must imprison; and if the points

> are greater than 362 the court may imprison for life. Here the points were 229, so the recommended sentence is therefore 201 months, or 16.75 years.
>
> The highlighted text of section 921.0014(2), above, also demonstrates the error in defendant's argument "that the term 'recommended sentence' is used to mean the sentencing range that the trial court must utilize absent a departure." [e.s.] In reality, under this statute the recommended sentence is the precise number of months, expressed in this case (where the total exceeds 52) as minus 28. The "recommended sentence" of 201 months is thus a specific sentence of a precise, fixed number of months, and not a range.

Id. at 896 (emphasis supplied).

Fourth, Section 921.001(5) expressly states "a" recommended sentence, not the recommended guideline sentence. The use of the article "a" by the Florida Legislature indicates that it is referring to a single item, not a group or multiple items. Grapin v. State, 450 So. 2d 480, 482 (Fla. 1981).

Fifth, the Florida Legislature did not use the word "range" or the phrase "recommended range." If the Florida Legislature wanted a trial judge to have the discretion to exceed the statutory maximum sentence by imposing any sentence within the defendant's presumptive guidelines sentence "range" or "recommended range" it could have clearly done so. See § 921.001(6) (referring to "the

range recommended by the guidelines").

In light of the above decisions coupled with the doctrines of strict construction and lenity, the application of Section 921.001(5) is straight forward and uncomplicated.

(1) First, the parties obtain the defendant's recommended sentence by subtracting 28 points from the defendant's "total sentence points." See § 921.0014(2).

(2) Then if this recommended sentence is more than the statutory maximum then the trial court in his or her discretion can impose this specific sentence upon the defendant. See Myers v. State, 696 So. 2d at 896-897.

(3) If the specific recommended sentence is less than the statutory maximum then the statutory maximum controls.

There is no indication in this penal statute that the trial judge could first apply the 25 per cent upward multiplier found in Rule 3.703(d)(26) and then sentence a defendant to the very top of this guidelines range consistent with Sections 921.001(5), 921.0014(2), and the rule counterpart, Rule 3.703(d)(26).

It must be noted that the Third District has looked at the identical language of this statute and proclaimed that the phrase "a recommended sentence" is really the range provided for on the sentencing guidelines. See Martinez v. State, 692 So. 2d 199

(Fla. 3d DCA 1997), rev. dismissed, 697 So. 2d 1217 (Fla. 1997). In essence, the Third District rewrote this penal statute and utterly failed to apply lenity and the doctrine of strict construction that any doubt must be resolved in favor of the accused. See § 775.021, Fla. Stat. (1995) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is suspectable of differing constructions, it shall be construed most favorably to the accused.")

The Martinez court construed ("rewrote") the pertinent statute as follows:

> The recommended guidelines range in this case was 4.6 years to 7.7 years. The trial court imposed a sentence of six and one-half years incarceration followed by one year of probation. This is a legal sentence under the 1994 guidelines. Delancy v. State, 673 So. 2d 541 (Fla. 3d DCA 1996).
>
> The statute begins by stating, "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082...." § 921.001(5), Fla. Stat. In this case the top end of the recommended range is 7.7 years, and thus the recommended sentence exceeds the ordinary legal maximum. Further, in our view the legislative intent is to allow the trial court the full use of the recommended range unencumbered by the ordinary legal maximum.

Id. at 210- 202 (emphasis supplied).

Regrettably, the Fifth District in Mays v. State, 693 So. 2d at 53, relied on the illogical, erroneous and cursory opinion of the Third District in Martinez v. State to affirm Mr. Mays' 63.2 months in prison sentence.

Judge Farmer writing for the Fourth District in Myers clearly and cogently articulated the basis for rejecting the misguided and textually unsupported notion that "a recommended sentence" is the 25 percent range:

> Applying this clear statutory text, we specifically reject the state's argument that the guidelines authorize a trial court to enhance a recommended sentence by a period of up to 25% when the recommended sentence is greater than the section 775.082 maximum. Both section 921.001(5) and section 921.0016(1)(e) are very clear that a departure sentence may not exceed the section 775.082 maximum. See § 921.001(5) ("If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082."); and § 921.0016(1)(e) ("A departure sentence must be within any relevant maximum sentence limitations provided by s. 775.082."). Moreover, both sections 921.001(5) and 921.0014(2) expressly require the imposition of a recommended sentence greater than the section 775.082 maximum. See § 921.001(5) ("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." [e.s.], and § 921.0014(2) ("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."). While the 25% range from the recommended sentence is discretionary, there is nothing in the text clearly specifying that the 25% range may be used to increase the recommended sentence further beyond the section 775.082 maximum. In contrast, as we have just seen, there is specific authority--in fact, a mandatory direction--to impose a recommended sentence greater than the section 775.082 maximum, but that authorization is limited to a recommended sentence and does not include the discretionary authority to enhance a recommended sentence within the 25% range. The absence of express textual authority to impose a discretionary range enhancement up to 25% greater than a recommended sentence that is itself greater than the section 775.082 maximum leads us to the conclusion that there is no such authority.
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> * * *
>
> Because in neither formulation did the legislature add any words that convey that precise meaning, it follows it that the recommended sentence that must be imposed when it exceeds section 775.082 is the unenhanced version without the additional 25%.

Id. at 897 (emphasis supplied).

Finally, the Fourth District in Myers expressly rejected the Third District's decision in Martinez and the Fifth District's decision in Mays:

> The state calls our attention to the recent decisions in Martinez v. State, 692 So.2d 199

(Fla. 3d DCA 1997); and Mays v. State, 693 So.2d 52 (Fla. 5th DCA 1997), and suggests thereby that the sentence in this case was proper. In Martinez the court considered on motion for rehearing virtually the same issue we confront in this case. There is an important difference in that the recommended sentence in Martinez was within the section 775.082 maximum, while here it exceeds it. But the trial judge in Martinez elected to enhance the recommended sentence within the 25% permitted variance, and the enhanced sentence then exceeded the section 775.082 maximum. In approving this variation, the third district reasoned:

"In our view, the defendant argues a distinction without a legal difference. Under subsection 921.0014(1), Florida Statutes (1993), '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 is, therefore, the full range from minus 25 percent to plus 25 percent. It is accurate to describe this as a recommended range, and the term 'range' continues to be used elsewhere in the guidelines statute. See id. § 921.001(6) (referring to 'the range recommended by the guidelines').

"After defining the 'recommended sentence,' id. § 921.0014(1), to include the 25 percent increase and 25 percent decrease, the statute goes on to say, '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.' Id. § 921.0014(1). When increased by 25 percent, the defendant's recommended sentence was 7.7 years, which exceeds the 5-year legal maximum.

The trial court was entitled to impose the sentence that it did." 692 So.2d at 204. See also Mays v. State, 693 So.2d 52 (Fla. 5th DCA 1997) (recommended sentence less than section 775.082 maximum; sentence imposed greater than maximum but within 25% variance range; sentence affirmed on basis of Martinez).

We do not agree that section 921.0014(2) defines recommended sentence to include the 25% variance range. Section 921.0016(1)(a) provides that: "The recommended guidelines sentence provided by the total sentence points is assumed to be appropriate for the offender." [e.s.] Hence the recommended sentence is the one "provided by the total sentence points." A sentence that varies from the recommended sentence by plus or minus 25% is a variation sentence, or a sentence within the guidelines range, but it is not "the recommended sentence provided by the total sentence points." As we have previously explained, we construe the quotation in Martinez taken from section 921.0014(1)--"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"--to allow only a mitigating departure but not an aggravating departure further beyond the section 775.082 maximum. And while section 921.001(6) does indeed refer to the "range recommended by the guidelines, "Sections 921.001(5) and 921.0014(2) both state that "the sentence recommended by the guidelines must be imposed absent a departure." [e.s.] To repeat ourselves, we view the "must be imposed" language of this provision, and the discretionary 25% variance provision of the same statute, to create an ambiguity which we must resolve in favor of the defendant. Thus

> while this provision authorizes the imposition of a recommended sentence greater than the section 775.082 maximum, it does not allow the imposition of sentence enhanced by a 25% variation above the recommended sentence. We disagree with the analysis of both Martinez and Mays to the extent that it applies to the case we face today, in which the recommended sentence itself exceeds the section 775.082 maximum without any variation.

Id. at 899-900 (emphasis supplied)(footnote omitted).

Petitioner relies on the Fifth District's decision in Green v. State, which allowed the sentencing judge to exceed the statutory maximum beyond the defendant's recommended sentence of 65.8 months in prison to reach the very top of his presumptive guideline sentence range or 72 months in prison "because this sentence does not represent a "departure sentence." Green, 691 So. 2d at 504.

The Fifth District's decision in Green is clearly wrong because it veered off on a tangent.[7] The departure concept is irrelevant. The applicable statute states that the trial court can only exceed the statutory maximum if "a recommended sentence under the guidelines exceeds the maximum sentence." As noted supra, the reference in Section 921.001(5) to a departure must be solely to a downward departure. See Myers v. State, 696 So. 2d at 899. This

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[7] The Fourth District in Myers expressly rejected the holding of the Fifth District in Green. See Myers, 696 So. 2d at 899.

is made abundantly clear by this Court's adoption of the rule counterpart to Section 921.001(5), Florida Statutes (1995), Rule 3.703(d)(27)("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. Such downward departure must be equal to or less than the maximum sentence authorized by Section 775.082."). Not surprisingly, the Fifth District in Green acknowledged that to reach its own conclusion this penal statute had to redrafted because "the articles in the foregoing sentence are misplaced in the printed statute." Green, 691 So. 2d at 504.

The Fifth District in Green utterly failed to strictly construe this penal statute or apply the rule of lenity to its application to the accused. And further, the Fifth District engaged in the legislative function of writing the law instead of interpreting or construing the statute. Under our constitutional system, courts cannot legislate. Art. II, § 3, Florida Constitution; State v. Wershow, 343 So. 2d at 607; State v. Egan, 287 So. 2d 1 (Fla. 1973).

Petitioner's claim that this issue has not been preserved for appellate review is without merit (PB 7-9). If Respondent is correct in his claim, then he received an illegal sentence. This

Court has held that an illegal sentence may be raised on appeal without preservation below. State v. Mancino, 23 Fla. L. Weekly S301 (Fla. June 11, 1998); Davis v. State, 661 So. 2d 1193, 1196-97 (Fla. 1995).

Finally, Respondent also notes an error in Petitioner's brief wherein Petitioner states that the trial court properly sentenced Respondent to eighteen years in prison (PB 9). Respondent was sentenced to 80 months in prison by the trial court (R 35-38).

Therefore, this Honorable Court, if it declines to hold Section 921.001(5) unconstitutional, should affirm the decision of the Fourth District Court of Appeal and remand this cause to the sentencing court for imposition of a sentence not to exceed Respondent's "recommended guideline sentence" of 71 months in state prison.

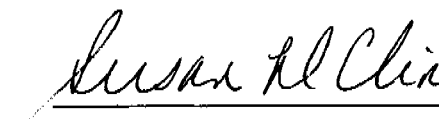
CONCLUSION

Based on the arguments and authorities contained herein, Respondent urges this Honorable Court to declare Section 921.001(5), Florida Statutes (1995), unconstitutional on its face and remand the instant cause to the trial court for the resentencing of Respondent to a term in prison not to exceed the statutory maximum for the offense charged of five (5) years in prison.

In the alternative, Respondent requests this Honorable Court to affirm the opinion of the Fourth District Court of Appeal in the instant cause.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to James J. Carney, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 21st day of July, 1998.

Susan K. Clive

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