

Ad 7

IN THE FLORIDA SUPREME COURT

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CLERK, SUPREME COURT
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Chief Deputy Clerk

STATE OF FLORIDA,)
)
Petitioner,)
)
vs.)
)
DONALD SOLOMON,)
)
Respondent.)
_____)

CASE NO. 93,188

ANSWER BRIEF ON BEHALF OF
RESPONDENT DONALD SOLOMON

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ARGUMENT

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the Prosecution in the Criminal Division of the Nineteenth Judicial Circuit, In and For Indian River County, Florida and Respondent, Mr. Donald Solomon, was the Defendant in the trial court and the Appellant on appeal to the Fourth District Court of Appeal.

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

The symbol "R" will denote Record on Appeal.

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

STATEMENT OF THE CASE AND FACTS

Respondent, Mr. Solomon, accepts petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

Notwithstanding this honorable court's recent decision in Mays v. State, No. 90,826 (Fla. July 16, 1998), respondent argues that the imposition of 265 months in prison which exceeds his "recommended sentence" of 212 months in prison is illegal and excessive in contravention of Section 921.001(5), Florida Statutes (1995) and Section 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 212 months in prison which is Respondent's "recommended sentence" under the applicable guidelines rules and statutes, not the top of Respondent's presumptive and guidelines sentence "range" or 265 months in prison as suggested by Petitioner-State of Florida in its Brief on the Merits.

ARGUMENT

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

Notwithstanding this Honorable Court's recent decision in Mays v. State, No. 90,826 (Fla. July 16, 1998), respondent respectfully submits that this court should affirm the decision of the Fourth District Court of Appeal on the grounds stated herein.

Respondent, Mr. Solomon, was scored pursuant to the Fla. R. Crim. P. 3.703 sentencing guidelines to a "total sentence points" of 240 which results in "a recommended guideline" sentence of 212 state prison months. R 78. In turn, Respondent's "presumptive guidelines sentence" is 265 maximum state prison months and 159 minimum state prison months due to the 25% multiplier. R 78. However, the statutory maximum for the offense charge was sixty (60) months in prison.

Respondent respectfully submits that the 265 month sentence imposed upon him by the sentencing judge was illegal and excessive because it exceeds his "recommended sentence" (212 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).

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." [e.s]. 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.

Section 921.001(5), Florida Statutes(1997) 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 Added].

Under the applicable 3.703 sentencing guidelines rules, a "recommended sentence" is determined by the total sentence points minus 28 points. See Section 921.0014(2), Florida Statutes (1995); Rule 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 Section 921.0016(1)(c), Florida Statutes (1995) [Emphasis Added]; See also Rule 3.703(d)(28) ("A state prison sentence that deviates from the recommended prison sentence by more than 25 percent...") [Emphasis Added]; Rule 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 Added].

Therefore, Respondent's "recommended guidelines sentence" was 212 months in prison. See Section 921.0014(2); Myers v. State, *supra*. The Fifth District in Mays v. State, 693 So. 2d 52 (Fla. 5th DCA 1997), expressly stated that: "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." Mays, 693 So. 2d at 52. [Emphasis Added]. The Fifth District in Mays correctly stated that Mr. Mays' recommended guideline sentence was 67.8 months in prison. Likewise, in Green v. State, 691 So. 2d 502 (Fla. 5th DCA), rev. granted, 699 So. 2d 1373 (Fla. 1997), the Fifth District expressly noted in its opinion that: "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].¹

The First District in Roberts v. State, 677 So. 2d 309 n.2 (Fla. 1st DCA 1996)², the Second District in Garcia v. State, 666 So. 2d 231 n.1 (Fla. 2d DCA 1995), the Fourth District in both Jenkins v. State, 696 So. 2d 893 (Fla.4th DCA 1997), and Myers v. State, supra, and the Fifth District in both Mays v. State, supra, and Green v. State, supra, all expressly stated in their opinions that a criminal defendant's recommended sentence was the precise state prison months obtained after subtracting the 28 points. If Petitioner-State is looking for a consensus this is the finding that four of five district courts of appeal have agreed upon in written opinions.

¹ 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.]

². "Under the 1994 Guidelines, a departure sentence is "[a] state prison sentence which varies upward or downward from the recommended 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. (R. at 14, 57.)" Roberts, 677 So. 2d at 309 n.2.

Section 921.0014(2), Florida Statutes (1997), specifies that recommended guideline 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 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 against the state. See Section 775.021(1), Florida Statutes (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 State, 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.2³, the Second District in Garcia v. State, 666 So. 2d at 231 n.1, the Fourth District in both Jenkins v. State, supra, and Myers v. State, supra, and the Fifth District in both Mays v. State, supra, and Green v. State, supra, all expressly stated in their opinions that a criminal defendant's recommended sentence was the state prison months obtained after subtracting the 28 points.

The Fourth District in Jenkins, supra, explained that the defendant's "recommended sentence" was determined by subtracting 28 from the "total sentence points":

We affirm appellant's conviction but reverse appellant's sentence. The state concedes that a mathematical error was made in the scoresheet calculation. Using the correct total sentencing points would result in a recommended state prison sentence of 37 months, rather than the 40 months which was

³. "Under the 1994 Guidelines, a departure sentence is "[a] state prison sentence which varies upward or downward from the recommended 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. (R. at 14, 57.)" Roberts , 677 So. 2d at 309 n.2.

imposed. The state urges, however, that the error is harmless, because the sentence falls within the variation permitted by Florida Rule of Criminal Procedure 3.703(25). See also Sec. 921.0014, 921.0016, Fla. Stat. (1995). As we stated in Shabazz v. State, 674 So. 2d 920 (Fla. 4th DCA 1996), we are unable to conclude that appellant's sentence would have been the same had the trial court utilized a correctly calculated scoresheet. This case involves the new procedure for calculating sentences where an exact amount of state prison months is calculated. Then a range is calculated from that figure. In the instant case, the court sentenced appellant to the recommended state prison months and did not increase his sentence within the range allowed.

Id. at 390-391. [e.s].

In Myers v. State, supra, 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 iscretion 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 Added].

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 they are referring to a single item, Gravin v. State, 450 So. 2d 480, 482 (Fla. 1981), not a group or multiple items.

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" they could have clearly done so. See Section 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 Section 921.0014(2); Myers; Jenkins; Roberts; Mays; Green.

(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.

Thus, this statute is very straight forward and easy to apply.

There is no indication in this penal statute that the trial judge could first apply the 25% upward multiplier found in Rule 3.703(d)(26) and then sentence a defendant to the very top of this presumptive 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 Section 775.021, Florida Statutes (1997) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible 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. [e.s]

Regrettably , the Fifth District in Mays v. State, 693 So. 2d 52 (Fla. 5th DCA 1997), relied on the illogical, erroneous, and cursory opinion of the Third District in Martinez v. State, supra,

to affirm Mr. Mays 63.2 months in prison sentence.⁴

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,

⁴"Clearly the sentencing range, or at least a portion of it that is available to the sentencing judge, exceeds the statutory maximum and takes the sentencing outside the limitation imposed by the general sentencing statute. This issue has been ably decided by the Third District in Martinez v. State, 692 So.2d 199 (Fla. 3d DCA 1997), and we concur with that court's reasoning." Mays, 693 So. 2d at 53.

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.

Because in neither formulation did the legislature add any words that convey that precise meaning, it follows 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 Added].

Finally, the Myers court expressly rejected the Third District's decision in Martinez and the Fifth District's 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 Added] (Footnote omitted).

Petitioner-State in its Brief on the Merits (PB 6), relies on the Fifth District's decision in Green v. State, supra, 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.⁵ 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 note supra, the

⁵ The Fourth District in Myers expressly rejected the holding of the Fifth District in Green. See Myers, 696 So. 2d at 899.

reference in Section 921.001(5) to a departure must be solely to a downward departure. See Myers v. State, supra. This is made abundantly clear by this Court adoption of the rule counterpart to Section 921.001(5), Florida Statutes (1997), Rule 3.703(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. Article II, Section 3, Florida Constitution; State v. Wershow, 343 So. 2d 605, 607 (Fla. 1977); State v. Egan, 287 So. 2d 1 (Fla. 1973).

Therefore, this Honorable Court, notwithstanding its decision

in Mays v. State, No. 90,826 (Fla. July 16, 1998), 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 212 months in state prison.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof the Answer Brief on Behalf of Respondent Donald Solomon has been furnished to Carol Cobourn Asbury, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 17th day of July, 1998.



Counsel for Respondent Donald Solomon