In The Supreme Court of Florida

CASE NO. SC 95,949

BRIAN McLEAN,

***Petitioner/Appellant*,**

v.

THE STATE OF FLORIDA,

***Respondent/Appellee*.**

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

SUPPLEMENTAL MERIT BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 95,949

BRIAN McLEAN,

Petitioner/Appellant,

v.

THE STATE OF FLORIDA,

Respondent/Appellee.
_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. __" — Record on Appeal (documents), Vol. I, including transcript of sentencing (R. 178-192);

"T. __" — Transcript of trial proceedings, Vols. II through IV.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Appellee, State of Florida, was the plaintiff below, and will be referred to as "appellee" or the "state." Appellant was the defendant below, and will be referred to as "appellant" or as the "defendant" or by name.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in 14 point Times Roman, a proportionately-spaced, computer-generated font.

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JURISDICTIONAL STATEMENT

Discretionary jurisdiction of this Court is based upon a certified question of the district court regarding fundamental error in the failure to orally pronounce costs (in this case, restitution). However, thus having jurisdiction, this Court also has discretion to address additional issues that affect the outcome of the case, and this is particularly so where the additional or ancillary issue is a claim of fundamental error. *See*, *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983) (Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case); *Angrand v. Key*, 657 So. 2d 1146 (Fla. 1995)(same); *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). *See also*, *Heggs v. State*, 25 Fla. L. Weekly S137 (Fla. February 17, 2000)(fundamental error).

SUMMARY OF SUPPLEMENTAL ARGUMENTS

ISSUE II — Petitioner was sentenced under the 1995 sentencing guidelines using a 1995 scoresheet (Rule 3.991(a)), for offenses committed on April 16, 1997. Had he been sentenced under the 1994 sentencing guidelines law, the maximum discretionary sentence under the scoresheet would have been less than the sentence imposed under the 1995 guidelines. He contends that he has standing to challenge the 1995 sentencing guidelines enactment, Ch. 95-184, and his sentence because those guidelines were invalid under *Heggs v. State*. He further contends the guidelines were invalid until May 24, 1997, and invalid when his offenses were committed on April 16, 1997.

SUPPLEMENTAL STATEMENT OF THE CASE AND THE FACTS

In addition to the facts set forth in the Petitioner's Initial Merit Brief, the record shows that Mr. McLean was sentenced to a guidelines sentence of 10 years on each of two counts of sexual battery (second degree felonies), imposed consecutively, based upon a Sentencing Guidelines Scoresheet effective for offenses committed on or after October 1, 1995 (Rule 3.991(a)) [R. 85-86; 79-84].

This 1995 scoresheet scored one sexual battery, a second degree felony, as the primary offense at level 8 with 74 points. A second sexual battery, also at level 8, was scored as an additional offense with 37 additional points. Victim injury was scored for sex penetration, two counts, for 160 points plus as severe for 40 points, a total of 200 victim injury points. Also scored as prior record were two misdemeanor convictions at 0.2 points each plus a third degree felony under Ch. 893 at 1.6 points, a total of 2.0 points. This resulted in 313 total sentence points, with a resultant presumptive sentence of 285 months [23.75 years], and a discretionary sentencing range of 213.75 months [17.8 years] to 356.25 months [29.6 years]. [R. 85-86].

The Information charging the sexual battery offenses alleged that the offenses were both committed on April 16, 1997 [R. 8]. At sentencing, no objection was made to the Sentencing Guidelines Scoresheet, nor was any challenge made to the sentencing guidelines statute under which the scoresheet had been prepared in the trial court.

Before the First District Court of Appeal, undersigned counsel filed a merit brief that, *inter alia*, raised error in the imposition of restitution without announcing the intent

to impose restitution or the amount thereof at sentencing, and without giving the defendant notice that restitution would be imposed, the matter which is the subject of the question in this case certified by the First District Court of Appeal. Undersigned counsel, however, did not raise in his brief or in any other way challenge in the district court the sentencing on the ground that Ch. 95-184 that enacted the guidelines sentencing law under which Petitioner was sentenced was violative of the single subject rule and resulted in a sentence that exceeded that permitted under the valid 1994 sentencing guidelines.

SUPPLEMENTAL ARGUMENTS

ISSUE II

CHAPTER 95-184, WHICH ENACTED THE 1995 SENTENCING GUIDELINES UNDER WHICH PETITIONER WAS SENTENCED, HAS BEEN HELD CONSTITUTIONALLY INVALID IN ITS ENTIRETY; APPELLANT'S OFFENSE WAS COMMITTED WITHIN THE WINDOW OF INVALIDITY; AND THE INVALID LAW UNDER WHICH HE WAS SENTENCED INCREASED HIS SENTENCE AND RESULTED IN IMPOSITION OF A SENTENCE GREATER THAN THE MAXIMUM PERMITTED UNDER THE VALID 1994 SENTENCING GUIDELINES, THUS BEING FUNDAMENTAL ERROR.

Petitioner was sentenced under the 1995 sentencing guidelines using a 1995 scoresheet (Rule 3.991(a)), for offenses committed on April 16, 1997.

The 1995 scoresheet (Rule 3.991(a)) used in his case scored one sexual battery, a second degree felony, as the primary offense at level 8 with 74 points. A second sexual battery, also level 8, was scored as an additional offense with 37 additional points. Victim injury was scored for sex penetration, two counts, at 80 points each for 160 points, plus additional injury (cutting the victim) scored as severe for 40 points, a total of 200 victim injury points. Also scored as prior record were two misdemeanor convictions at 0.2 points each plus a third degree felony under Ch. 893 at 1.6 points, a total of 2.0 points. This totaled 313 total sentence points, with a resultant presumptive sentence of 285 months [23.75 years], and a discretionary sentencing range of 213.75 months [17.8 years] to 356.25 months [29.6 years]. [R. 85-86]. Petitioner was thus sentenced to two consecutive 10 years sentences, or a total of 20 years imprisonment, slightly below the calculated presumptive sentence of 23.75 years.

Recently, this court held Ch. 95-184, Laws of Florida, which enacted the 1995

sentencing guidelines under which petitioner was sentenced, constitutionally invalid in its entirety due to violation of the single subject requirement of the Florida Constitution. *See, Heggs v. State,* 25 Fla. L. Weekly S137 (Fla. February 17, 2000). The First District Court addressed the same claim in *Trapp v. State,* 24 Fla. L. Weekly D1431 (Fla. 1st DCA June 17, 1999), and had concluded that Ch. 95-184 did not violate the single subject rule and that the sentencing guidelines enacted thereby were valid, and certifying the question. *See also*, *Valentine v. State*, 737 So. 2d 654 (Fla. 1st DCA 1999), *rev. granted*, Case No. SC96,502 (Fla. February 24, 2000). These decisions are now in direct conflict with and contrary to the recent decision of this Court in *Heggs*. *Heggs v. State,* 718 263 (Fla. 2d DCA 1998), the case under review, was itself decided on September 4, 1998, after the instant case had been briefed on its merits in the district court on August 7, 1998. Appellate counsel failed to recognize then that Petitioner had a claim that the sentencing guidelines under which he was sentenced, enacted by Ch. 95-184, were invalid, and did not brief that issue in his merit brief to the district court. For the reasons and authorities set forth in the jurisdictional statement, and because the issue is one of fundamental error, this Court should exercise its discretion and determine the issue because Petitioner's liberty interests were violated.

Had Mr. McLean been sentenced under the valid 1994 sentencing laws (Rule 3.990(a) scoresheet), the offenses of sexual battery (794.011(5)) would have both been scored at level 8, § 921.0012, Fla. Stat. (1994), 74 and 9.6 points respectively as primary and additional offenses, a total of 83.6 points. Victim injury, scored in the same manner as before, however, would have resulted in 40 points each (2) for a total of 80 points for

sex penetration, plus 40 points for severe, or a total of 120 points for victim injury. The two misdemeanors scored as prior record would have resulted in a total of 0.2 points, plus 0.8 for the prior third degree felony drug offense (level 3), or a total of 1.0 point. Thus, the sum would have been 204.6 Total Sentence Points. Deducting 28, the presumptive sentence would have been 176.6 months [14.7 years], and the calculated discretionary range would have been 132.45 months [11.03 years] to220.75 months [18.39 years]. The overall sentence of 20 years (two consecutive ten year sentences) actually imposed exceeds the maximum that would have been permitted under the 1994 scoresheet calculations and constitutes a departure sentence without written reasons. Thus, Petitioner's liberty interests were effected by sentencing him under the invalid 1995 sentencing law, and this claim constitutes fundamental error, *Heggs*. Thus this claim is one of fundamental error, it can be raised at any time.

Petitioner contends that he falls within the window of invalidity of the sentencing statute under which he was sentenced — from October 1, 1995, when Ch. 95-184 became effective, to May 24, 1997, when the statute was reenacted biannually — and has standing to challenge the validity of the sentencing guidelines and his resultant sentence. As reasoned in *Diaz v. State*, 25 Fla. L. Weekly D518 (Fla. 3d DCA March 1, 2000):

> Furthermore, we find that the date of the defendant's offenses, November 1, 1996, falls within the window period to challenge Chapter 95-184 on the basis that it violates the single subject provision of the Florida Constitution. In Heggs, the Florida Supreme Court noted that "depending on which Section of Chapter 95-184 impacts the person challenging that Chapter law on single subject rule grounds, the applicable window period could open on June 8, 1995 or on October 1, 1995." *Heggs v. State*, 25 Fla. L. Weekly S137, S140 n. 3 (Fla. Feb. 18, 2000). The Heggs Court declined, however, to further rule on when the window period would close. We find that, for the purpose of challenging the constitutionality of Chapter 95-184,

the window closed on May 24, 1997, the date on which Chapter 97-97, Laws of Florida, reenacted the provisions contained in Chapter 95-184 as part of the Legislature's biennial adoption of the Florida Statutes. "Once reenacted as a portion of the Florida Statutes, a Chapter law is no longer subject to challenge on the grounds that it violates the single subject requirement of article III, Section 6, of the Florida Constitution." *State v. Johnson*, 616 So.2d 1, 2 (Fla.1993).

Conceivably, one might argue that the window period for challenging the constitutionality of Chapter 95-184 closed on October 1, 1996, the date on which the amendments to the 1995 sentencing guidelines became effective pursuant to Chapter 96-388. The basis for this argument would be that Section 3 of Chapter 97-97, Laws of Florida, which declares that laws enacted during the 1996 and 1997 regular sessions "are not repealed by the adoption and enactment of the Florida Statutes 1997" and "shall have full effect as if enacted after its said adoption and enactment ", operated to reenact all 1996 and 1997 regular session laws as of their effective date. Such a contention would not persuade us for two reasons. First, we find that the quoted language from Section 3 of Chapter 97-97 does not operate to reenact all laws enacted during the 1996 and 1997 regular sessions. Instead, we give the language its plain meaning and find that it merely functions to ensure that all laws enacted during the 1996 and 1997 regular sessions are not repealed by the 1997 biennial adoption of the Florida Statutes and that said laws will remain in effect after said biennial adoption. Second, we find that such an interpretation operates to deprive persons of standing to challenge the constitutionality of Chapter 95-184 after that standing has already been established. As noted above, the Heggs court found that persons have standing to challenge the constitutionality of the 1995 sentencing guidelines beginning on either June 8, 1995 or October 1, 1995, depending on which Section of Chapter 95-184 that person is challenging. *Heggs v. State*, 25 Fla. L. Weekly S137, S140 n. 3 (Fla. Feb. 18, 2000). When the amendments to the 1995 sentencing guidelines became effective on October 1, 1996, under Chapter 96- 388, those persons who committed a crime after October 1, 1996, still retained standing to challenge the constitutionality of the 1995 sentencing guidelines. It would be inequitable and absurd for us to now find that, based upon the above quoted language of Section 3 of Chapter 97-97, which was enacted by the legislature almost eight months after the effective date of the amendment in question, the legislature eliminated those persons' standing to challenge the constitutionality of Chapter 95-184. Moreover, it would be equally absurd for us to deny standing to similarly situated persons, who are alleged to have committed a crime after October 1, 1996, but before May 24, 1997, but who chose to challenge the constitutionality of Chapter 95-184 after the enactment of Chapter 97-97 on May 24, 1997.

> Therefore, we hold that, for the purpose of challenging the constitutionality of Chapter 95-184, the window closed on May 24, 1997. In so holding, we acknowledge conflict with the Fourth District's opinion in Bortel v. *State*, 743 So.2d 595 (Fla. 4th DCA 1999), wherein the court held that the window period for challenging Chapter 95-184 closed on October 1, 1996.

Petitioner adopts fully the reasoning and analysis of *Diaz* in support of his claim to standing.

For the foregoing reasons, Petitioner's guideline sentences must be reversed and remanded accordingly.

CONCLUSION

Appellant, BRIAN McLEAN, based on all of the foregoing, respectfully urges the Court to vacate his conviction and sentence, to remand the case for resentencing, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: James W. Rogers, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on August 28, 2000.

Fred P. Bingham II

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 95,949

BRIAN McLEAN,

Petitioner/Appellant,

v.

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_____/

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

COMES NOW the Petitioner, BRIAN McLEAN, by and through appellate counsel, and respectfully moves this Court for an order granting him leave to file the attached supplemental brief raising an issue regarding his sentencing under this Court's recent decision in *Heggs v. State*, 25 Fla. L. Weekly S137 (Fla. Feb. 18, 2000), and would respectfully show:

1. Petitioner was sentenced under the 1995 sentencing guidelines using a 1995 scoresheet (Rule 3.991(a)), for offenses committed on April 16, 1997.

2. The 1995 scoresheet (Rule 3.991(a)) used in his case scored one sexual battery, a second degree felony, as the primary offense at level 8 with 74 points. A second sexual battery, also level 8, was scored as an additional offense with 37 additional points. Victim injury was scored for sex penetration, two counts, at 80 points each for 160 points, plus additional injury (cutting the victim) scored as severe for 40 points, a total of 200 victim injury points. Also scored as prior record were two misdemeanor convictions at

0.2 points each plus a third degree felony under Ch. 893 at 1.6 points, a total of 2.0 points. This totaled 313 total sentence points, with a resultant presumptive sentence of 285 months [23.75 years], and a discretionary sentencing range of 213.75 months [17.8 years] to 356.25 months [29.6 years]. [R. 85-86]. Petitioner was sentenced to two consecutive 10 years sentences, or a total of 20 years imprisonment, slightly below the presumptive sentence of 23.75 years.

3. Recently, this court held Ch. 95-184, Laws of Florida, which enacted the 1995 sentencing guidelines under which petitioner was sentenced, constitutionally invalid in its entirety due to violation of the single subject requirement of the Florida Constitution. *See, Heggs v. State,* 25 Fla. L. Weekly S137 (Fla. February 17, 2000). The First District Court had addressed the same claim in *Trapp v. State*, 24 Fla. L. Weekly D1431 (Fla. 1st DCA June 17, 1999), and concluded that Ch. 95-184 did not violate the single subject rule and that the sentencing guidelines enacted thereby were valid, and certifying the question. *See also*, *Valentine v. State*, 737 So. 2d 654 (Fla. 1st DCA 1999), *rev. granted*, Case No. SC96,502 (Fla. February 24, 2000). These decisions are now in direct conflict with and contrary to the recent decision of this Court in *Heggs*. *Heggs v. State*, 718 263 (Fla. 2d DCA 1998), the case under review, was itself decided on September 4, 1998, after the instant case had been briefed on its merits in the district court on August 7, 1998. Appellate counsel failed to recognize and failed to raise the issue of the invalidity of Ch. 95-184 before the district court.

4. Had Mr. McLean been sentenced under the valid 1994 sentencing laws (Rule 3.990(a) scoresheet), the offenses of sexual battery (794.011(5)) would have both been

scored at level 8, § 921.0012, Fla. Stat. (1994), 74 and 9.6 points respectively as primary and additional offenses, a total of 83.6 points. Victim injury, scored in the same manner as before, however, would have resulted in 40 points each (2) for a total of 80 points for sex penetration, plus 40 points for severe, or a total of 120 points for victim injury. The two misdemeanors scored as prior record would have resulted in a total of 0.2 points, plus 0.8 for the prior third degree felony drug offense (level 3), or a total of 1.0 point. Thus, the sum would have been 204.6 Total Sentence Points. Deducting 28, the presumptive sentence would have been 176.6 months [14.7 years], and the calculated discretionary range would have been 132.45 months [11.03 years] to220.75 months [18.39 years]. The overall sentence of 20 years (two consecutive ten year sentences) actually imposed exceeds the maximum that would have been permitted under the valid 1994 scoresheet calculations and constitutes a departure sentence without written reasons. Thus, Petitioner's liberty interests were effected by sentencing him under the invalid 1995 sentencing law, and this claim constitutes one of fundamental error, *Heggs*. Thus this claim can be raised at any time.

5. Discretionary jurisdiction of this Court is based upon a certified question of the district court regarding fundamental error in the failure to orally pronounce costs (in this case, restitution) at sentencing. However, this Court also has discretion to address additional issues that affect the outcome of the case, particularly where the additional or ancillary issue is a claim of fundamental error even if raised for the first time. *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983) (Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case); *Angrand v. Key*,

657 So. 2d 1146 (Fla. 1995)(same); *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

6. Although when briefing the issues before the district court, appellate counsel did not recognize and did not raise that Mr. McLean had a meritorious claim of constitutional invalidity of Ch. 95-184 which enacted the guidelines under which he was sentenced, the recent invalidation of that enactment by this Court brought this issue to appellate counsel's attention, and upon further review of the case, it appears that Petitioner has standing to assert a claim under *Heggs*, which is fundamental error if Petitioner falls within the window during which these sentencing guidelines were invalid — October 1, 1995, to May 24, 1997 — contending that the guidelines were invalid on the date he committed the offenses. The issue of the date of closing of the period of invalidity, present in this case, is also pending, counsel believes, before this Court in other cases accepted for review, and thus should be addressed in this case. *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

WHEREFORE, Petitioner requests that this Court enter an order granting him to leave to file the attached Supplemental Brief, and that the Court accept the attached Supplemental Brief.

Respectfully submitted,

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(850) 386-1775

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: James W. Rogers, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on August 28, 2000.

Fred P. Bingham II